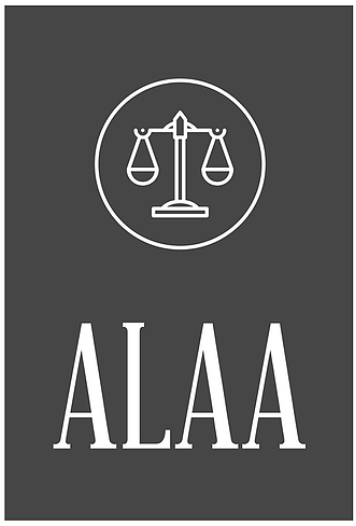
JOURNAL OF THE AUSTRALASIAN LAW ACADEMICS ASSOCIATION

VOLUME 13/14

ALAA



JOURNAL OF THE AUSTRALASIAN LAW ACADEMICS ASSOCIATION

(2020–21) Volume 13/14

Terms of Use

This volume was copy-edited and typeset by Barbara Graham.

CONTENTS

Foreword

Jonathan Barrett ..... *v*

A Final Four Outstanding Law Academics in Australian Legal Education

Emeritus Professor David Barker *1*

The Application of Syllogism as a Pedagogical Tool in Teaching Duty of Care

Martin Allcock and Ken Yin *12*

Reviewing Honours and Distinction in 21st Century Australian Law Schools: Is the Diversity of Approaches Corroding Its Market Relevance?

Kelley Burton, Julian Laurens and Judith Marychurch *29*

Follow Me: Using Social Media to Encourage Student Engagement at a Regional Law School

Julia Day and Mary McMillan *46*

The Mainstreaming of Climate Change and the Impact on Directors' Duties

Trish Keeper *62*

New Zealand Secondary School Principals' Understanding of Laws Relating to Student Discipline

Nicola Leete *76*

The Open Access Law Book in Aotearoa New Zealand: Radicalising the Funding of Future Publishing

James Mehigan *93*

Innovative Teaching and Assessment Methods to Enhance Student Belonging in Online Teaching

Elizabeth Shi and Jessica Helmi *104*

Democratic Deficit: The Electoral System under Fiji's 2013 Constitution

Gaurav Shukla *119*

Why Legal Scholarship Matters: Julius Stone, A Legal Scholar We Admire

Steven Stern *132*

Teaching Technology into the Law Curriculum

Aaron Timoshanko and Caroline Lydia Hart *146*

Legal Scholarship: A Role in Reconciling Differing Views about a Bankruptcy Trustee's Conduct?

Mary Wyburn *161*

FOREWORD

Jonathan Barrett

Budyeri kamaru

Tēnā koutou

It is fitting to greet readers of this volume of the *Journal of the Australasian Law Academics Association* ('*JALAA*') in the Gadigal language and te reo Māori. Most articles in this volume were first presented as papers at either the 2021 ALAA Conference, hosted by the University of Sydney and the University of Technology Sydney, both of which are situated on Gadigal land, or at the 2021 ALAA-Aotearoa New Zealand Symposium, hosted by the University of Canterbury. Kāi Tahu Whānui are the traditional kaitiaki (guardians) of Te Waipounamu (the South Island).

Due to the Covid-induced cancellation of the annual conference in 2020, we reluctantly decided to cancel the 2020 volume of *JALAA* and publish a double volume for 2020–21. It is unsurprising that several articles consider teaching law on a restricted contact basis, by distance or in a dual mode. Other articles, however, present a snapshot of the diverse research and teaching interests of ALAA members, from Professor Emeritus David Barker's final reflections on leading Australian law educators to peer reviewed articles by experienced subject specialists and early career researchers. In my interactions with authors and reviewers, it became clear that Covid had presented even greater challenges to academic practice than the usual problems of balancing teaching, research and being citizens of our universities. I would particularly like to recognise the resilience and stamina of (solo) parents, who, for extended lockdown periods, had to attend to the education needs of their children, as well as those of their students.

I would like to acknowledge some of the key people who have contributed to this volume of *JALAA*. Recognising, of course, the contribution of my co-editors (Dr Sean Goltz and Dr Jackie Mapulanga-Hulston), I would also like to thank the authors for considering publication in *JALAA*, and the peer reviewers, who gave up their time to engage constructively with submissions. In addition to the members of the ALAA Executive, I would like to thank Leylani Taylor for coordination and administrative support. My thanks are also due to Barbara Graham, copy-editor and typesetter of this volume.

Dr Jonathan Barrett
Editor in Chief
JALAA

A FINAL FOUR OUTSTANDING LAW ACADEMICS IN AUSTRALIAN LEGAL EDUCATION

*Emeritus Professor David Barker AM**

ABSTRACT

Over the past three ALTA/ALAA conferences, the author has endeavoured to highlight the achievements of leading Australian law academics and their influence on the development of Australian legal education. The intention has been to reflect on the accomplishments of these individuals, reviewing their contribution to what has been described as a 'great and noble occupation'.[†] The selection is limited to law academics who are deceased, retired or have moved on from their original career of law teaching.

A third paper, presented at the 2019 ALAA Conference at Southern Cross University, was meant to be the final reflection.[‡] However, a view was expressed that there should be the opportunity for a final four academics to be considered under this unique heading. This would also afford the opportunity to consider whether the idea of focusing on outstanding academics had reached its climax and that such disruptive and innovative forms of team teaching, online teaching and other technological forms of legal education had made the concept of law teaching icons redundant.

These final four names of eminent law academics include Sir Zelman Cowen (former Australian Governor-General), the Hon Emeritus Professor Ralph Simmonds (former Justice of the Supreme Court of Western Australia), Emerita Professor Margaret Thornton (highly regarded commentator on the development of modern legal education) and the Hon Justice Sarah Derrington (currently Justice of the Australian Federal Court and President of the Australian Law Reform Commission).

* Senior Researcher, AustLII/Law Faculty, University of Technology Sydney.

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

‡ David Barker, 'Reflections on the Lives and Achievements of Michael Coper, David Weisbrot, Rosalind Croucher and Christopher Roper, Four Outstanding Legal Educators of the Modern Era of Australian Legal Education' (2019) 12 *Journal of the Australasian Law Academics Association* 1.

I INTRODUCTION

During the past three ALTA/ALAA conferences, this author has endeavoured to highlight the achievements of those who, in his view, have been the leading Australian law academics, and to illustrate their influence on the development of Australian legal education. The topic for this long-standing presentation arose because, unlike the United Kingdom and the United States where the names of Sir Frederic Maitland, Sir Frederick Pollock and Professor William Twining, or Professor Benjamin Cardozo, Professor Christopher Langdell and Professor Karl Llewellyn, respectively, are well regarded and revered as outstanding law academics, the same regard is not reserved for equivalent long-standing or high-profile Australian law academics.

Of course, any such exercise is highly subjective, and the choices are always open to criticism, but the intention has been that a selection of names spanning the period of Australian legal education from the time of European settlement in 1788 to the present day could give rise to a debate as to whether that selection was acceptable or needed further scrutiny. To avoid controversy over any comparison of the qualities of active legal educators, it was always intended to limit the selection to those law academics who are deceased, are retired or have moved on from their original career of law teaching, so that there has been sufficient time to properly analyse their accomplishments. To give a sense of perspective, Professors John Peden, William Moore, Dugald Gordon McDougall and Frank Beasley were selected for the 2017 Conference held at the University of South Australia Law School; Sir David Derham, and Professors Hal Wootten, Dennis Pearce and Tom Cain were selected for the 2018 Conference held at Curtin University Law School; and Professors Michael Coper, David Weisbrot, Rosalind Croucher and Christopher Roper were selected for the 2019 Conference at Southern Cross University.

II A FINAL FOUR OUTSTANDING LAW ACADEMICS

The final four law academics might be regarded as somewhat eclectic choices. The first is an outstanding law academic of international standing, former Dean of the University of Melbourne Law School and also Governor-General of Australia, Sir Zelman Cowen. The second is former Foundation Dean and Professor of Law at Murdoch University, subsequently Justice of the Supreme Court of Western Australia, the Hon Ralph Simmonds. The third is former Professor of Law at both La Trobe and the Australian National University College of Law, Margaret Thornton — a socio-legal scholar, self-claimed as 'committed to a critical approach to legal scholarship'.[1] The final selection is the previous Head of School and Dean of Law at the University of Queensland, the Hon Professor Sarah Derrington, currently the President of the Australian Law Commission and a Justice of the Federal Court of Australia.

In making this assessment and, in fact, in nominating any outstanding law academics, one could rightly question the criteria on which these candidates are being measured in their selection as Australia's finest law academics? In comparing their life and achievements it is helpful to

[1] Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012) xiv.

consider the standard adopted by R Gwynedd Parry, a Welsh legal author, who, when engaged in a similar exercise, answered this question by basing such a judgement on 'legal scholarship', stating that 'by legal scholarship I mean the teaching of law, research and publication on the law and the provision of academic leadership through administrative roles and other offices that contribute to the maintenance and promotion of law as a subject of scholarly pursuit'.[2] In my view, these are admirable criteria for judging these current four selected law academics. Nevertheless, this is not a concern when reviewing the achievements of our first outstanding law academic, Sir Zelman Cowen.

III SIR ZELMAN COWEN

I have used for my starting point when considering the life and influence of Sir Zelman Cowen an article by Mark Finnane published in the *Melbourne University Law Review* of 2015, entitled 'Law as an Intellectual Vocation'.[3] In the abstract to his article, which reviews the lives of three law academics, including Cowen, Finnane expresses an extremely helpful overview of the social environment that was the background for Cowen's life at the University of Melbourne Law School:

> Academic law at the mid-20th century was a fledgling, uncertain of its place in relation to the profession and still finding its research legs. The institutional and political milieu of post-war Melbourne provided a fertile seedbed for those willing and able to shape the future of legal education and promote a vision of its relevance to a changing society. Exploring these propositions through a consideration of the lives of three leading figures in the Melbourne Law School in the 1950s, Sir Zelman Cowen, Norval Morris and Sir John Vincent Barry, this paper considers their academic, political and writing lives as the practice of a strong sense of vocation, of intellectual vocation, noteworthy for its intense engagement with the world beyond the university.[4]

To justify the use of the word 'vocation' in his article's title, Finnane then continues by stating that he is attempting to 'recapture the sense of obligation these three felt in reconstructing legal education and legal research as practices that intersected powerfully with the political and social world of which they were, very self-consciously, a part'.[5]

In this respect, he explains Cowen's connection with the Law School by drawing on John Waugh's history of the school, *First Principles*, in which Waugh selected the title of his chapter on this period by using 'Cowen's own laconic description of the endeavour that preoccupied him during these years: "building the new Jerusalem"'.[6]

Waugh provides an account of Cowen's time in the Melbourne Law School and describes his profound influence on legal education in Australia and internationally, stating that 'the

---

[2] R Gwynedd Parry, *David Hughes Parry: A Jurist in Society* (University of Wales Press, 2010) xiii.
[3] Mark Finnane, 'Law as an Intellectual Vocation' (2015) 38(3) *Melbourne University Law Review* 1060.
[4] Ibid.
[5] Ibid 1061.
[6] Ibid. See also John Waugh, *First Principles*: *The Melbourne Law School 1857–2017* (Miegunyah Press, 2007) 152.

university found another star, but one that was home grown'.[7] Waugh acknowledges that when Cowen graduated from the Law School in 1941 it was 'with first-class honours and the final-year exhibition, one of his thirteen prizes in arts and law'.[8]

In 1945, after completing service in the Australian Navy during World War II, Cowen returned to the Law School as an acting law lecturer but also unofficial sub-Dean to the Dean at the time, Professor George Paton. This spell in Melbourne was short-lived, as he was awarded a Rhodes Scholarship to attend Oxford University. There, on completion of his Bachelor of Civil Law examination, he was awarded one of only two Vinerian Scholarships, and became a Fellow of Oriel College and a university lecturer in law. This was followed by a visiting lectureship at the University of Chicago in 1949, and on his return to Australia in 1950 he was offered the Chair in Public Law at the University of Melbourne Law School at the age of 31. Very soon after, Professor Paton became University Vice-Chancellor and Cowen replaced him as Dean of the Law School.[9] In acknowledging his work at the Law School, Waugh has described his influence:

> The law school rather than the wider university absorbed him. He was a fluent writer of books and articles on an extraordinary range of topics, not only his legal specialities of private international law, family law and constitutional law but also international relations, public affairs, police, urban design and biography. He appeared frequently on radio and television.[10]

It is also important to place alongside this observation a further comment by Waugh:

> The usually friendly relations among the staff owed much to Cowen's influence. When disagreement threatened over who should be dean in his absence overseas during 1964 he was dismayed. 'We have a very happy faculty and it is absolutely disastrous if bitterness breaks out in this way.' A round of reassuring letters from him dispelled the misunderstanding that started the trouble.[11]

He finally left the Law School in 1966 to become Vice-Chancellor of the University of New England (1966–70), and then moved as Vice-Chancellor to the University of Queensland (1970–77), after which he became Governor-General of Australia (1977–82), returning to academia as Provost of Oriel College, Oxford University (1982–90).

IV THE HON EMERITUS PROFESSOR RALPH SIMMONDS

Having previously been an Associate Professor and Associate Dean of McGill University in Montreal, Canada, Professor Ralph Simmonds was appointed Foundation Professor at the newly established Murdoch Law School in Western Australia in 1990 and Dean in 1991. Originally the law program at Murdoch had been in the School of Economics and Commerce,

[7] Waugh (n 6) 150.
[8] Ibid.
[9] Ibid 152.
[10] Ibid.
[11] Ibid 158.

but in 1992 the Law School separated. Simmonds stated that one of the major aims of the new Murdoch Law School was

> [t]o formulate a program of study that meets the requirements of the governing bodies of the West Australian legal profession for recognition for admission to articles of clerkship. But we will also offer the scope of earning two degrees through a carefully structured program of joint study of law and another major discipline.[12]

In his recollections of his time at Murdoch Law School, Simmonds commented on the advantage that Murdoch had in its early days in that its small initial number of 50 students afforded him the opportunity to get to know all the members of the first Law School cohort. This advantage was gradually eroded as subsequent intakes grew in number. However, early ambience of friendly relationships between staff and students has remained a feature of the school. As another Foundation Professor Michael Pendleton has remarked:

> The first intake of Murdoch law students was an eclectic mix — far from typical law students but all enthusiastic for the new law school … A significant cohort of mature age students marked these students aside from law students at UWA which at that time required a year of study in another course before transferring to law.[13]

Murdoch was given its early stability because Simmonds remained as Dean until 2003, except for a break from July 1995 to November 1996. His period as Dean marked the significant development of two lasting features of the Murdoch Law School. These were the establishment in April 1992 of an electronic law journal, and the formal opening of Murdoch's Student Legal Advisory Office by Sir Ronald Wilson, a Justice of the High Court. This then became the foundation for Western Australia's first legal clinic, the Southern Communities Advocacy, Legal and Education Service Inc (SCALES), which was opened in 1997 by the Hon Daryl Williams, the federal Attorney-General.

In Simmonds' view, the most important initiative of Murdoch Law School was the fundraising campaign for a new university law library. This campaign resulted in non-government sources committing AUD1.8 million by the middle of the first year of teaching of the law program in 1990. The total cost of the library was AUD6.5 million, which was raised from a variety of government and non-government sources. However, Simmonds believed that other advantages eventuated from the library fundraising campaign, particularly in establishing links with the legal profession:

> The law library campaign was enormously helpful. Not only did it bring us to the attention of those who might otherwise only have been able to take a passing interest in our operation, it also helped our relations with firms and individuals with particular talents and interest to contribute to our teaching. Our first year

[12] Philip Evans and Gabriel Moens (eds), *Murdoch Law School: The Search for Excellence* (Murdoch University, 2010) 8.
[13] Ibid 120.

> tutorial staff and some of our more innovative teaching in our first years were in large part products of the campaign.[14]

While he continued as Dean of Murdoch Law School, Simmonds was appointed as a Commissioner of the Western Australian Law Reform Commission from 1996 to 2004, becoming its Chair in 2001. In 2004 he was appointed as a Justice of the Supreme Court of Western Australia, one of the select group of law academics in Australia to achieve promotion to the judiciary.

V EMERITA PROFESSOR MARGARET THORNTON

Professor Margaret Thornton commenced her career as a law academic at Macquarie Law School, subsequently moving to La Trobe University Law School where she occupied the Richard McGarvie Chair of Socio-Legal Studies. She also served as Head of School, Director of Research, and Professorial Member of University Council. She was appointed as a Professor of Law at the Australian National University in 2006, where she remained until she retired in 2019, and was then appointed as Emerita Professor. She has held visiting fellowships at Oxford, London, Leeds, Columbia and Osgoode Hall (Canada).

Thornton is recognised as a socio-legal scholar whose work on the legal academy and the legal profession is internationally recognised. She has published extensively in the area of discrimination and the law. Her book *The Liberal Promise* remains the only critical study of discrimination law in Australia, whilst her book *Dissonance and Distrust* is the only study of women in the legal profession in Australia.[15] It is understandable that Thornton's association with the early foundation of La Trobe Law School would be reflected in the description given by Craig McInnis and Simon Marginson in their successor report to the 1987 Pearce Report:

> La Trobe developed a reputation for critical approaches, particularly in the social science curriculum. The structure of schools rather than faculties symbolised the self-conscious effort of La Trobe to distinguish itself from the traditional model of university organisations. This was partly aimed at encouraging inter-disciplinary studies across the schools. Legal Studies offered its first course in 1972 in the School of Social Sciences with emphasis on its inter-disciplinary qualities.[16]

The outcome from a restructuring of the university in 1992 was the establishment of a Law and Legal Studies School as part of a Faculty of Education, Economics and Social Science. The original intention was that, with the introduction of the LLB into the new Law School's curriculum, 'La Trobe has maintained its emphasis on teaching law in a socio-legal framework

---

[14] Ralph Simmonds, 'From Foundation to Ordinary Politics: Staffing, Financing and Promoting the School of Law at Murdoch University' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish, 1998) 161.

[15] 'Emerita Professor Margaret Thornton FASSA, FAAL', *Australian National University College of Law* (Web Page) <https//law.anu.edu.au/people/margaret-thornton>.

[16] Craig McInnis, Simon Marginson and Alison Morris, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Publishing Service, 1994) 133.

and argues that much of the law curriculum is indistinguishable from the legal studies curriculum'.[17]

However, Thornton has commented on how this socio-legal approach, which she had influenced and supported at the La Trobe Law School, was gradually eroded:

> When an LLB was first mooted for La Trobe University, the intention was to draw on its socio-legal orientation, as legal studies had been taught to BA Students for 20 years. A critical stance was facilitated by the fact that the Department of Legal Studies was located within an interdisciplinary School of Social Sciences. However, it was not very long before socio-legal scholarship was traded in for commercial law and practical skills in order to offer what was perceived to be a more vocationally oriented LLB, as well as commercially oriented coursework masters degrees, short courses attractive to the professions and consultancies.[18]

This comment is taken from Thornton's book *Privatising the Public University*, in which she also states:

> Because of the upheavals in governance, there is considerable tension, if not an overt power struggle between management and academics everywhere which is exacerbated by declining resources. It is paradoxical that the extent of government control has been ratcheted up as government funding has declined.[19]

The subject matter of this book had been foreshadowed in a 2007 article by Thornton, 'The Law School, the Market and the New Knowledge Economy':

> Until recently, Australia was firmly committed to the idea of higher education as a public good. The swing from social liberalism to neo-liberalism has seen a rejection of this basic principle in favour of values associated with the market. Knowledge, education and credentialism have become highly desirable in the information age, but treating them as tradable commodities has profound repercussions for what is and how it is taught. Most significantly, we have moved to a mass education system where the focus is on applied and vocational knowledge. Within this new paradigm, law, business, information technology, hospitality and tourism courses have proliferated.[20]

In the 2007 article, Thornton considered how changes in higher education were impacting on the discipline of law, causing the critical scholarly space to contract in favour of that which is market-based and applied. In her view, '[t]he charging of high fees has transformed the delicate relationship between student and teacher into one of "customer" and "service provider"'. This has been added to by '[c]hanges in pedagogy, modes of delivery and assessment [that] have all contributed to a narrowing of the curriculum over the last two decades in a way that supports the market'.[21]

---

[17] Ibid 134.
[18] Thornton (n 1) 16.
[19] Ibid 18.
[20] Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2008) 17(1/2) *Legal Education Review* 1.
[21] Ibid 1.

It must be acknowledged that Thornton has attributed much of this decline to the reforms introduced in 1988 by John Dawkins, Federal Minister for Employment, Education and Training. As has been observed, 'Professor Margaret Thornton … has been extremely forthright in her view that the Dawkins reforms have had an adverse effect on the development of universities',[22] which in her view, 'brought an end to the binary system in Australia in 1988, signalled the beginning of the end of the idea of the university as envisaged by Newman, and its replacement with the idea of the university as a business'.

With respect to law schools, Thornton was even more scathing about the effect of the Dawkins reforms:

> Law Schools that have been able to retain at least a vestige of autonomous faculty status through the recent upheavals are better able to withstand the depredations than those schools which form merely a constituent element of a mega-faculty, commonly dominated by business or management.[23]

Whilst Thornton's theories about the general failure of the quality and governance of some of the newer law schools would not necessarily be accepted by all law academics, there would be an agreement that she is an internationally recognised law academic and has had a major influence on how legal education has developed within the past four decades in Australia.

VI PROFESSOR SARAH DERRINGTON

Professor Derrington was educated at the University of Queensland, where she graduated in 1990 with a BA/LLB (Hons), subsequently being awarded an LLM in 1996 and a PhD in Marine Insurance Law in 1999. Having been admitted to the Bar in Queensland in 1990 and as a Barrister and Solicitor of the Supreme Court of the ACT, she practised in the litigation section of Freehill Hollingdale & Page in Canberra before transferring to MinterEllison in Brisbane. Here she commenced part-time practice at the Bar whilst taking up an academic post at the University of Queensland ('UQ') in 1994, where she was Director of the Centre for Maritime Law and the Marine and Shipping Law Unit, Academic Advisor, Deputy Director of Studies (Law), Professor of Admiralty Law, and Associate Dean (Academic) of the Faculty of Business, Economics and Law.[24] She returned to full-time practice as a barrister, arbitrator and mediator in 2011, whilst maintaining an active role in the UQ Law School as an Adjunct Professor and as a mooting coach. It was in this role that she steered a UQ team to victory in the annual International Maritime Law Arbitration Moot in 2012.[25]

---

[22] David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 101.
[23] Ibid.
[24] 'The Hon Sarah Catherine Derrington', *Federal Court of Australia* (Web Page) <https://www.fedcourt.gov.au/about/judges/current-judges-appointment/current-judges/sc-derrington-j>.
[25] TC Beirne School of Law, 'New Law Dean to Harness Industry Links' (Media Release, 2 July 2013) <https://www.uq.edu.au/news/article/2013/07/new-law-dean-harness-industry-links>.

On 1 July 2013 she returned to the UQ Law School as Professor and Dean, declaring that she looked forward to returning to the Law School and tackling challenges faced by the higher education sector:

> My priorities will be to encourage professional involvement with the School; to lift our research profile; and to make our student experience the very best that we make it. UQ has focus on educating and supporting the leaders of the future so we aim to ensure that each generation of law graduates is prepared for international practice and to successfully transition into a profession that has already experienced significant change over the past decade and will continue to evolve in the future.[26]

Regarding future research opportunities for the UQ Law School, she emphasised that

> [t]he School's diverse community of scholars enables it to offer opportunities for multi- disciplinary and international collaboration on research that has a positive society in the areas of private law, international and comparative law, marine and shipping law and energy law, among others.[27]

As part of this spin-off, Derrington created a partnership between the UQ TC Beirne School of Law and the Indonesian Universitas Gadjah Mada (UGM) Faculty of Law, which enabled UGM Master of Law students to have the chance to complete two Master's degrees in two years from both UGM and UQ in the time it would normally take to complete one.[28]

During her time as Dean, Derrington led a number of major transitions for the Law School, including the reimagination and refurbishment of the Forgan Smith Building West Wing, and the introduction of a revised curriculum to ensure students received what was claimed to be a more relevant legal education experience. She also focused on increasing opportunities for students to access university significant funding for scholarships, culminating in a generous donation of AUD2 million for the LEAD scholarships, which were offered annually to deserving students from disadvantaged backgrounds who intended to study an undergraduate law program at UQ.[29]

In a major presentation to the Academy of Law in 2017, Derrington reviewed the current trends in legal education, offering an insight as to how legal education might be or had already been required to innovate and change as a result of legal consequences. In her conclusion, she stated:

> What I hope has become obvious after this survey of what I see as the current and emerging trends in legal education is that those at the frontline of legal education, namely law schools, have decreasing autonomy over the way in which law is taught. We are increasingly dictated to by our universities' bureaucracies, by multiple regulators whose impact is felt at various stages along the educational

[26] Ibid.
[27] Ibid.
[28] 'UQ Law Partnership Creates Links with Indonesia', *The University of Queensland Faculty of Business, Economics & Law* (Web Page, 4 December 2015) <https://bel.uq.edu.au/article/2016/04/uq-law-partnership-creates-links-indonesia>.
[29] TC Beirne School of Law, 'Head of Law School Looks Forward to New Challenges' (Media Release, 6 December 2017) <https://law.uq.edu.au/article/2017/12/head-law-school-looks-forward-new-challenges>.

> pathway, and we are coming increasingly hostage to consumerism, be that from the perspective of the student or from that of the end user of legal services.[30]

With these comments she echoed the concerns that Professor Thornton had been expressing as to the direction that legal education in Australia was being led.

In December 2017, Derrington was appointed as President of the Australian Law Reform Commission and as a Judge of the Federal Court of Australia. It was at this time that the UQ School of Law was ranked 48th in the world in the QS World University Rankings, and its offerings were ranked 54th in the world by the Times Higher Education World University Rankings by subject. At her time of leaving, the Law School comprised 50 members of staff and approximately 2,000 students.[31] Its high world ranking in research was reflected in the fact that its expertise was based in four research centres comprising Australian Private Law, Centre for International Minerals and Energy Law, Centre for Public International and Comparative Law and a Marine and Shipping Unit.[32]

These outcomes from the UQ Law School were evidence of the all-round influence that Derrington as Dean was able to exercise on the school, in the areas of both teaching and research.

VII THE FINAL CONCLUSION

Over the past five years the presentation of these reflections has been an excellent opportunity to identify those who have had a leading influence on the development of legal education in Australia. In conducting such a review, the nature of the influence exercised by the 16 nominees has varied greatly. Most of the original four, Professors John Peden, William Moore, Dugald Gordon McDougall and Frank Beasley, occupied their role as Dean in excess of 34 years and, in fact, for most of their tenure were the only full-time law academics in their particular law schools.

The influence of the second group of selected law academics — Professors Sir David Derham, Hal Wootten, Dennis Pearce and Tom Cain — has stemmed from their reputation as innovators. For Derham it was his influence on the Martin Report, and for Pearce on the report named after him, the Pearce Report. Wootten would be judged as the creator of the modern law school at the University of New South Wales, whilst Tom Cain would have similarly earned his reputation in establishing the QUT Law School.

By the third group, the review had moved forward to four legal academics who were termed as 'outstanding legal educators of the modern era of Australian legal education'. Professors Michael Coper, David Weisbrot, Rosalind Croucher and Christopher Roper were

---

[30] Sarah Derrington, 'Trends in Legal Education' (Australian Academy of Law Lecture, Sydney, 26 October 2017).
[31] 'School of Law', *The University of Queensland* (Web Page) <www.law.uq.edu.au>.
[32] 'Research Groups and Partnerships', *The University of Queensland School of Law* (Web Page) <https://law.uq.edu.au/research/groups>.

acknowledged for their participation in one of the most challenging times for legal education, when it had to retain and enhance its status as a major university discipline.

It now comes to the final four academics, whose professional lives have been considered in this concluding reflection. There should be no doubt as to the reputation of Sir Zelman Cowen, who would have had a tremendous influence at any stage of Australian legal education — someone who was not just an outstanding legal educator but occupied a major role in national and international life as Australian Governor-General.

The Hon Emeritus Professor Ralph Simmonds was another law academic who established his reputation as a Foundation Dean with Murdoch University Law School, serving as Chair of the Council of Australian Law Deans and becoming a long-serving member of the Western Australia judiciary.

There should be no questioning Professor Margaret Thornton's reputation as a leading socio-legal scholar, with particular influence on feminist legal theory, but it will always be her text *Privatising the Public University* for which she will be remembered, especially as to its challenge to the introduction of the market-based influence on modern legal education.

Our concluding law academic, Professor Sarah Derrington, illustrates the current influence of the modern law educator, in her major effect on the development of the University of Queensland Law School, in her appointment as a Judge of the Australian Federal Court, and, following in the footsteps of Professors David Weisbrot and Rosalind Croucher, in her appointment as President of the Australian Law Reform Commission.

In the first reflection, the author recognised that there would always be difficulties in undertaking a review of the careers of outstanding legal educators and considering the legacy that their respective approaches had left for legal education in Australia. The complex nature of the characters and variety of the influence of the final 16 law academics, spanning a period of approximately 170 years since the establishment of the first law school in Australia, was unexpected. The challenges that they have all faced in a drastically changing legal education setting have transformed law schools from their early role as small entities within universities to institutions with vastly more complex present-day functions. Nevertheless, accepting the fact that such a list could be added to or amended, it would be hoped that these final choices would be generally accepted by the legal community as appropriate candidates for having had a major influence on Australian legal education and acknowledged for their contributions towards this worthy objective.

THE APPLICATION OF SYLLOGISM AS A PEDAGOGICAL TOOL IN TEACHING DUTY OF CARE*

Martin Allcock and Ken Yin†

ABSTRACT

IRAC is an acronym for issue-law-application-conclusion, and is the conventional problem-solving format presented to students in first-year legal studies. In first-year legal studies, IRAC is usually taught as a formalistic series of steps with the headings of the acronym. There is much conceptual uncertainty in many of the milestone approaches to the duty of care in negligence, particularly in novel situations, leading to difficulties in students' understanding. This article explores the advantages of teaching legal principles relating to the duty of care in novel situations by a syllogism-based model of IRAC rather than the conventional, formalistic model currently in use, and argues that the use of syllogism as a tool to teach duty of care will greatly assist students to understand and express answers to problems involving the topic.

* This article was presented as a paper at the Australasian Law Academics Association Conference hosted by the University of Sydney Law School and University of Technology Sydney Law Faculty on 4–6 July 2021. Thank you to conference convenors Professor Penny Crofts (University of Technology Sydney Law Faculty) and Professor Jason Harris (University of Sydney Law School) for arranging such a rewarding conference at a difficult time. Thanks also to conference attendees for their helpful comments in relation to the subject of this article. Further thanks go to Dr Anna Bunn (Curtin Law School) for her helpful comments on a draft of this article. Any errors are our own.

† Dr Martin Allcock is a law lecturer at Curtin University. Ken Yin is a law lecturer at Edith Cowan University.

I INTRODUCTION

Presenting law students with the conventional, formalistic model of IRAC (issue-law-application-conclusion) can be a useful and effective method of teaching, especially in the students' introductory years. In first-year law studies, IRAC is conventionally taught as a 'formalistic series of steps labelled with an acronym'.[1] There are numerous variants of IRAC, each known by a bespoke acronym.[2] This method can be effective in assisting students to gain a rudimentary understanding of both the method of legal problem-solving and relevant legal doctrines.

The use of problems is commonplace in the legal studies curriculum.[3] Foundation legal studies texts all contain statements that legal problem-solving requires an ability to apply the results of legal research to the facts of the problem, and to apply the law to the facts in a way that demonstrates the true extent of the students' understanding of the law.[4] One commentator laments that educators tell students they must learn to 'think like lawyers', not merely memorise discrete rules of law, but that students are then left largely to their own devices to decipher the meaning of this admonition.[5]

However, the method of IRAC introduced in most Australian foundation legal studies texts is a superficial form of IRAC and is arguably not an accurate reflection of real-world legal problem-solving.[6] Furthermore, we are familiar with the following instruction to law students: 'I want your answer to be in IRAC form'. This instruction does nothing to enhance the quality of a student's answer, because without a more nuanced understanding of the syllogistic underpinnings of IRAC, the student's answer might still comprise a series of disembodied headings, legal principles and facts, and a failure to appreciate the role of policy in the evolution of doctrine. A frequent criticism of the model of 'IRAC and its progeny'[7] conventionally introduced to first-year law students is that it is superficial, masking 'the series of complex, interrelated steps that students need to learn to analyse and write about legal problems in a

---

[1] 'Legal reasoning' is conventionally delivered to first-year law students 'as a formalistic series of steps labelled with an acronym such as IRAC, HIRAC, MIRAT or CREAC': Nick James, *Good Practice Guide (Bachelor of Laws): Thinking Skills (Threshold Learning Outcome 3)* (Australian Learning and Teaching Council, 2011) 11–12.

[2] Eg, HIRAC, MIRAT, CREAC: see ibid.

[3] One commentator explicitly stated: 'Why are so many questions on a law course problem based? That's what lawyers and judges do. They problem solve … It is vital that you start to develop the special skills required in problem solving as early as possible': Chris Turner and Jo Boylan-Kemp, *Unlocking Legal Learning* (Unlocking the Law Series, Routledge, 3rd ed, 2012) 133.

[4] Eg, Nickolas James, Rachael Field and Jackson Walkden-Brown, *The New Lawyer: Foundations of Law* (Wiley, 1st ed, 2018) 272.

[5] Kurt Saunders and Linda Levine, 'Learning to Think Like a Lawyer' (1994) 29(1) *University of San Francisco Law Review* 121.

[6] This superficial treatment is evident in the brief entry in most texts, taking up just a page or so. See, eg, Robin Creyke et al, *Laying Down the Law* (LexisNexis Butterworths, 10th ed, 2018) 462.

[7] Law lecturers will likely be familiar with these 'progeny', eg, FILAC (facts-issue-law-application-conclusion) and MIRAT (material facts-issue-rule-application-tentative conclusion).

sophisticated manner'.[8] Professor James Boland argues that 'the IRAC model, while helpful in providing a superficial template for legal analysis, is simply not enough'.[9] He goes on to say:

> Legal analysis and argument must be grounded in the legal syllogism, and IRAC placed within the syllogistic context. If students understand the syllogism, then all possible forms of IRAC can be placed within that context, so that the syllogism becomes a roadmap to guide the students through the analytical process.[10]

This is acknowledged by the authors of the Threshold Learning Outcome 3,[11] who argue that the strict formal technique of IRAC does not produce a correct or even a realistic answer as it takes into account only the relevant legal rules but not the various policies underlying those rules.[12] In a critique of the perceived deficiencies of the superficial IRAC model, Boland argues that legal reasoning should be grounded in an understanding of the syllogism in order to guide analysis.[13] Schnee likewise envisages a model of IRAC that 'unpack[s] … and explain[s] … to students the deductive process on which IRAC is based instead of merely labelling it', an approach that has the advantage of emphasising 'the active, evolving nature of the enquiry'.[14]

This paper presents a syllogistic model of IRAC that, we argue, represents a more accurate model of legal reasoning. The model adopted as our proposed vehicle will be a bespoke variant of the IRAC model envisaged by Boland and Schnee, one grounded in the legal syllogism, customised to illustrate the application of the principles of duty of care. There is much academic authority supporting the contention that every good legal argument is in the form of syllogism.[15] In turn, IRAC is regarded as the legal variant of the syllogism.[16] Syllogistic logic accordingly should underpin legal reasoning, the corollary being that it is inadequate to direct a student to 'use IRAC' and that the formalistic model of IRAC is inadequate to teach tort doctrine. We will argue that there are two potential benefits of using this model: first, this model has the potential to improve the ability of students to express answers to legal problems in their correct doctrinal and syllogistic form; and second, the use of this model may also assist students in the mastery of doctrine itself.

---

[8] See Laura P Graham, 'Why-Rac? Revisiting the Traditional Paradigm for Writing about Legal Analysis' (2015) 63 *Kansas Law Review* 681, 682.
[9] James Boland, 'Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club' (2006) 18(3) *St Thomas Law Review* 711, 719.
[10] Ibid.
[11] James (n 1) 11.
[12] Ibid 11–12.
[13] Ibid.
[14] Anita Schnee, 'Logical Reasoning "Obviously"' (1997) 3 *Legal Writing: The Journal of the Legal Writing Institute* 105, 121.
[15] Explicitly: 'Every good legal argument is cast in the form of a syllogism': James A Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* (LexisNexis, 2nd ed, 2007) 8. Very similarly: Boland (n 9).
[16] It suffices to note that IRAC is considered to be the legal variant of syllogism in which the syllogistic major premise corresponds to the 'rule', the minor premise to the 'application', and the 'conclusion' as being the logical consequence of applying the law (or rule) to the circumstances of the particular case: see, eg, Bradley G Clary and Pamela Lysaght, *Successful Legal Analysis and Writing: The Fundamentals* (West Academic Publishing, 3rd ed, 2010) 84; Nadia E Nedzel, *Legal Reasoning, Research, and Writing for International Graduate Students* (Wolters Kluwer, 3rd ed, 2012) 70.

The critics of the superficial form of IRAC do not distinguish between discipline areas. As such, this paper makes an original contribution to the relevant scholarly literature in specifically considering application of this bespoke syllogistic model of IRAC to the teaching of the legal principles associated with establishing a duty of care in negligence in novel duty situations. This is an apposite area of law to consider for the purposes of demonstrating the potential benefits of this model. This is because the instability and unpredictability of the rule (or the syllogistic major premise) is almost a *sine qua non* of negligence. As such, the law of negligence arguably attracts an even more acute need to overcome the deficiencies of the formalistic IRAC model.

At a general level, the concept of a 'meta-syllogism', comprising discrete syllogisms, is particularly apt for the presentation of the law of negligence since its doctrinal content, presented as a series of elements, coheres well with the concept of a meta-syllogism — and of IRAC.[17] In turn, the doctrinal content of each mini-syllogism or mini-IRAC, of which 'duty of care' is one, is particularly well understood when presented within that syllogistic framework.

At a more specific level, this paper also argues that the shades of instability and vagueness evident in the various milestone approaches to duty of care in novel situations, including shifts in policy and how these are then expressed within the doctrine, can be best explained to first-year law students when presented as a syllogistic major premise.[18] It is argued, likewise, that the syllogistic minor premise provides a readily understood vehicle for students to understand how these various milestone approaches are applied to the facts at hand.[19]

The discussion takes place in two parts: Part II presents a syllogistic model of IRAC — a bespoke variant of the IRAC model envisaged by Boland and Schnee — that more accurately reflects real-world legal problem-solving than the superficial model of IRAC. Part III considers use of this model in relation to the teaching of the legal principles relating to establishing a duty of care in negligence in novel duty situations. It will be argued that use of the syllogistic model of IRAC presented in Part II has the potential to improve the ability of students to express answers to legal problems in their correct doctrinal and syllogistic form. It will further be argued that use of this model may also assist students in the mastery of doctrine itself, which is of particular importance in relation to the area of law considered, due to the conceptual uncertainty inherent in many of the relevant legal principles.[20]

---

[17] Boland (n 9) 724.

[18] Professor James Boland, an apologist for the use of syllogism-based IRAC, argues, and we concur, that 'teaching inductive reasoning is most easily presented when placed in the context of the major premise of the syllogism': ibid 723.

[19] Boland, again, states that 'the minor premise is the best context for teaching application of the law to facts': ibid 724.

[20] We suggest that if students recognise the syllogistic form of the various milestone approaches to duty of care, they will better understand the doctrine itself and vice versa. The path towards understanding the syllogistic form of doctrine is parallel to understanding the doctrine itself.

II A SYLLOGISTIC MODEL OF IRAC

The role of syllogism in legal reasoning has long been debated. John Dewey, for example, denounced syllogism as emblematic of inflexible legal thought and argued that law is not a closed system but must respond to social change.[21] Professor Julius Stone lamented that the theory of syllogism failed to recognise that the real problem of appellate judgement lies with judicial performance in the leeways of choice and that the problem should not be 'forestalled by postulates about formal justice'.[22] Oliver Wendell Holmes famously stated that 'the life of the law has not been logic: it has been experience'.[23]

Professor Sir Neil McCormick acknowledges that syllogism would not 'wholly dispose of recourse to personal feelings' but argues that the merit of such an approach is that it would both 'postpone and narrow down appeals to intuition'.[24] American judge and commentator Ruggero Aldisert, also an apologist for syllogism, acknowledges that 'we cannot expect judicial minds to be untainted by their first impressions of a case' but nevertheless propounds that 'what we can demand is that judges employ logically sound techniques of intellectual inquiry when making value judgments and then explain both their premises and their conclusions to us in clear language evidencing impeccable logical form'.[25] In a direct riposte to Holmes, Justice Brennan of the US Supreme Court states in the foreword to Aldisert's *Logic for Lawyers* that the author does not challenge Oliver Wendell Holmes's 'classic statement that "the life of the law has not been logic"' but in the same passage states that Aldisert offers 'telling arguments that that legal reasoning or legal logic may play an equal or even more significant role in the life of the law'.[26]

Aldisert furnishes a particularly cogent explanation of the role of 'logic' in legal reasoning: he suggests that the heart of the common law tradition is the adjudication of specific cases and 'case by case evaluation', testing the ground each step so one needs to re-evaluate each rule in subsequent cases to determine if the rule produces a 'fair result' and if the rule operates unfairly to modify it.[27] Aldisert explains further that logical reasoning lies at the heart of the common law tradition, and, driven by the reasoning process, the common law is thereby able to maintain unity, yet flexibility to develop legal precepts.[28]

Aldisert describes common law reasoning as having an 'ebb and flow' like a tide, being inductive and deductive;[29] Schnee stated that '[i]nduction creates and evolves rules; deduction

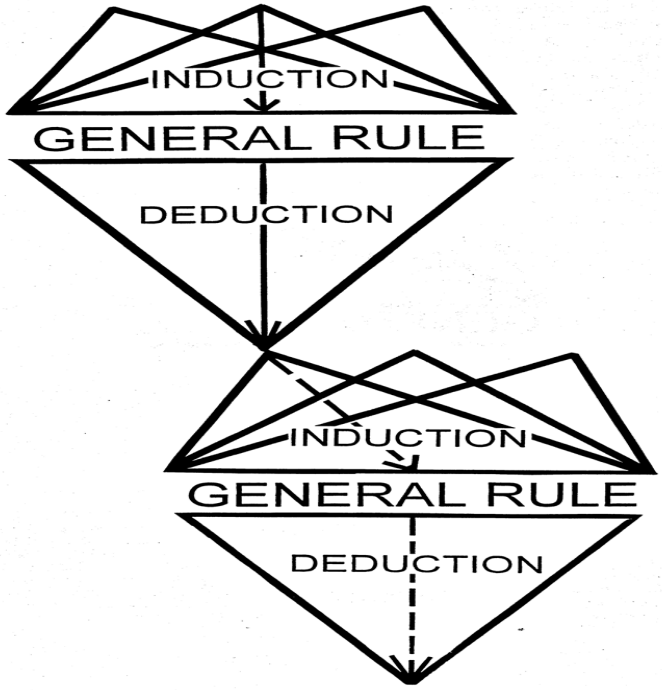
---

[21] John Dewey, 'Logical Method and Law' (1924) 10 *Cornell Law Review* 17, 21.
[22] Julius Stone, *Precedent and Law* (Butterworths, 1985) 4–5.
[23] Oliver Wendell Holmes (ed Mark DeWolfe Howe), *The Common Law* (Belknap Press, 1963) 5.
[24] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005).
[25] Ruggero J Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* (National Institute for Trial Advocacy, 3rd ed, 1997) 21.
[26] Ibid xix.
[27] Ibid 21.
[28] Ibid 8.
[29] Ibid 10.

applies them'.[30] The rule (major premise) must contain a sufficient explanation of the premises so the reader would know why the premises are true.[31] This should include reference to the holdings, the material or operative facts of the case law[32] and the court's reasoning or rationale.[33] Nedzel further explains: 'This reference to the factual context [in the major premise, or rule] is later developed into the analogical thinking that underlines the application portion of common law reasoning.'[34]

With duty of care concepts so strongly nuanced towards the role of policy in the evolution of doctrine, Aldisert's observations are particularly appropriate. A particularly eloquent explanation of the application and evolution of case law within common law jurisprudence, apt to show the alignment of the role of policy in the development of tort doctrine, is provided by Schnee, who observes that 'in the ever-shifting process that is judicial jurisprudence, both induction and deduction work together'.[35] In the common law process, the means by which this occurs, 'with due regard for stability, predictability and the avoidance of arbitrariness', is that 'deduction works until it doesn't anymore … [i]nduction's expansiveness is then called in to remedy rigidity'. This process she lucidly diagrammatises, illustrating the movement between induction and deduction in common law reasoning (see Diagram 1).[36]

Diagram 1: Schnee's depiction of induction and deduction in legal reasoning[37]



[30] Schnee (n 14).
[31] Gardner (n 15) 28.
[32] Nedzel (n 16) 76.
[33] Ibid 72.
[34] Ibid.
[35] Schnee (n 14) 117.
[36] Ibid 118.
[37] Ibid.

In accordance with Schnee's model of the process of legal reasoning, the 'end point' of each inductive–deductive process is the creation of 'one more case for future induction'.[38]

Within Schnee's model, the question of whether a principle in a previous case should apply to the present case becomes part of the process of argument producing the relevant law. Her diagram, showing the evolution and application of principle in the judicial process, lucidly gives visual expression to Cardozo's theory of *stare decisis*, in which he propounds that where there is a gap in the law, 'the preferred gap filler' in addressing novel questions of law is 'public policy, the good of the collective body', 'the social gain that is wrought by adherence to the standards of right conduct'.[39] The determination in that case then becomes the end point in that cycle of induction and deduction.

The reasoning in *Grant v Australian Knitting Mills* ('*Grant*')[40] and its subsequent treatment illustrate this process clearly. *Grant* actually has no particular jurisprudential significance but is selected as a case study in foundation legal texts for the lucidity of demonstrating how the court reasons if a particular principle in a previous case should apply.[41] Furthermore, *Grant* is a convenient vehicle for discussion because the case on which it focuses is none other than *Donoghue v Stevenson* ('*Donoghue*').[42]

The plaintiff in *Grant* contracted dermatitis from coming into contact with a garment contaminated with sulphides. The relevant issue, problematised, would have been: *Would the application of the principles in* Donoghue v Stevenson *apply such that the defendant would owe a duty of care to the plaintiff?* The question was answered 'yes', thereby extending the scope of the *Donoghue* duty of care to a manufacturer of a contaminated garment. Following *Grant*, the conclusion that the principles in *Donoghue* apply to a manufacturer of a garment essentially became the end point in *that* process of induction and deduction, to be applied subsequently.[43]

In a passage that will doubtless strike a chord with tort lecturers who regard policy as the driver of doctrinal change, Schnee further states: 'Induction is needed when there is no rule, or when there is a choice between rules, or when the neat categories on which deduction relies have become eroded, or when social circumstances change.'[44] The proposition that the process of the application and evolution of principle, two discrete processes, find expression in tort law is not difficult to illustrate. The following section of this article explores the various rule

[38] Ibid 118.
[39] Aldisert (n 25) 67, in which the author paraphrases and adopts those propositions advanced in Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921).
[40] [1936] AC 85.
[41] Eg, James Holland and Julian Webb, *Learning Legal Rules: A Student's Guide to Legal Method and Reasoning* (Oxford University Press, 7th ed, 2010) 183.
[42] [1932] AC 562 ('*Donoghue*').
[43] Eg, *Suosaari v Steinhardt* [1989] 2 Qd R 477.
[44] Schnee (n 14) 117.

structures adopted in syllogistic reasoning, with a dedicated treatment of their harmony with the approaches to the duty of care in novel duty situations.

III USE OF THE SYLLOGISTIC MODEL OF IRAC IN TEACHING THE LEGAL PRINCIPLES ASSOCIATED WITH ESTABLISHING A DUTY OF CARE IN NOVEL DUTY SITUATIONS

This section considers use of this model in relation to the teaching of the legal principles relating to establishing a duty of care in negligence in novel duty situations. It will be argued that use of the syllogistic model of IRAC presented in Part II has the potential to improve the ability of students to express answers to legal problems in their correct doctrinal and syllogistic form. It will further be argued that use of this model may also assist students in the mastery of doctrine itself, which is of particular importance in relation to the area of law considered, due to the conceptual uncertainty inherent in many of the relevant legal principles.[45]

Of all the doctrinal modules taught in first year, the law of negligence is arguably the most appropriate to demonstrate the analytical deficiencies of the conventional, formalistic model of IRAC presented to first-year law students. Boland argues that negligence can be expressed as a 'meta-syllogism' and each 'element' of negligence[46] can be set out as a mini-syllogism within the negligence meta-syllogism.[47] These are the relevant 'tests' in negligence, tests being rule structures that comprise conditions and identified elements that each need to be satisfied.[48] Similarly, a 'test' may be described as a 'formulation of the law expressed as a set of discrete conditions'.[49] Importantly, this coheres well with the manner in which the various 'elements' in the law of negligence are taught in Australian law schools.

Within this general meta-syllogistic framework, students are taught to apply a process of factor-analysis in relation to each element as it is considered in the curriculum. 'Factor-analysis' has been described as a 'flexible rule structure' that emerges from the analysis of the factors considered important by the court in a particular case.[50] Gardner, explaining factor-analysis, states:

> One can almost always extract a factor-analysis from judicial opinion … the things a court discusses in its opinion, whatever they might be, are by definition the aspects of the case that the court thinks are

[45] As we suggested in n 20, if students recognise the syllogistic form of the various milestone approaches to duty of care, they will better understand the doctrine itself and vice versa. The path towards understanding the syllogistic form of doctrine is parallel to understanding the doctrine itself. This suggestion is borne steadily in mind.
[46] Namely, duty of care, breach of duty, causation, remoteness and damage.
[47] Boland (n 9) 724. These are the relevant 'tests' in negligence, tests being rule structures that comprise conditions and identified elements that each need to be satisfied: see, eg, Linda H Edwards, *Legal Writing: Process, Analysis, and Organization* (Wolters Kluwer, 6th ed, 2014) 17. Similarly, a 'test' may be described as a 'formulation of the law expressed as a set of discrete conditions': see Gardner (n 15) 43.
[48] See, eg, Edwards (n 47).
[49] See Gardner (n 15) 43.
[50] Ibid 47.

> important. It follows that you can always generate some sort of factor-analysis simply by listing the things that the court chose to discuss.[51]

In factor-analysis, 'the decision maker has the discretion to gauge the relative importance of each factor'.[52] It is in considering the factors that influence judicial decision-making in relation to each element that law students are presented with the various reasons of the court, with these reasons ideally providing rational justification for the decision ultimately reached. It is this process by which law students are exposed to the various factors considered by the courts in novel duty of care situations.

A *Teaching the Duty of Care in Novel Duty Situations: The Current Jurisprudence*

Deane J in *Jaensch v Coffey* ('*Jaensch*')[53] explained that the 'elements' of negligence are a duty of care, breach of that duty, and the suffering of injury that is reasonably foreseeable. Numerous Australian commentators have adopted Deane J's treatment in *Jaensch*.[54] Deane J's deconstruction of negligence into 'elements' thus is explicitly at harmony with the idea of a syllogistic 'test' with discrete conditions or, in other words, of a meta-syllogism comprising discrete mini-syllogisms.[55]

Gardner cautions that there is 'far more play in the joints of the law than the fiction of legal determinacy would have us believe'.[56] His view is fundamentally consistent with tort commentators who, notwithstanding the explicit attempts to deconstruct negligence into elements, describe duty of care and remoteness of damage as 'artificial concepts'.[57] Even if the statement is accurate, it is of little assistance to a neophyte tort student for whom the jurisprudential indeterminacy of the elements of negligence is not a useful consideration in a conventional problem exercise.

The presentation of negligence as a meta-syllogism comprising three mini-syllogisms, or mini-IRACs, is doctrinally aligned with the *Jaensch* framework. Furthermore, and just as relevantly from a pedagogical viewpoint, this ensures that the examiner can follow the analytic path that culminates in a meta-syllogistic 'conclusion'. Also, by performing the analysis within the parameters of its strict 'elements', the risk of conflating the content of one element with

---

[51] Ibid.
[52] Edwards (n 47) 22.
[53] *Jaensch v Coffey* (1984) 155 CLR 549 ('*Jaensch*').
[54] See Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 8th ed, 2017) 99. This is a familiar framework for negligence presented in Australian torts texts: see, eg, Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts* (Lawbook, 10th ed, 2011) 121.
[55] Boland (n 9) 725.
[56] Gardner (n 15) 25. Sappideen and Vines similarly describe duty of care and remoteness of damage as being 'artificial' concepts: see Sappideen and Vines (n 54). Likewise, Covell, Lupton and Forder have stated that '"elements" in negligence are better described as "*guidelines*" but the choice to describe them as "*elements*" is based on the notion that a failure to satisfy any one of them will be fatal to the plaintiff's case': Wayne Covell, Keith Lupton and Jay Forder, *Principles of Remedies* (LexisNexis Butterworths, 5th ed, 2012) 15 (emphasis added).
[57] Sappideen and Vines (n 54) 222.

another, or omitting an element altogether, is minimised. Using the important concept of 'foreseeability' to illustrate the point, Sappideen and Vines note:

> Foreseeability is said to be something that operates at a different level of abstraction in each state of the elements of the tort of negligence. We see it again at the breach stage and at the stage of causation of damage in the remoteness element.[58]

Thus, a tort student in addressing a relevant problem question is compelled first to identify the relevant element that is in issue. By analysing, say, foreseeability within the parameters of that element and not any other, the student is able to keep their eye on the ball and not misdirect themselves by investigating the concept of foreseeability as a component of some other element.

Adopting the characterisation of negligence as a syllogistic 'test', with 'duty of care' being the first 'element' of that test, attention now turns to the treatment of duty of care as an element *of* negligence. In so doing, focus is directed on the internal organisation of the 'duty of care' element in relation to novel duty situations.[59]

In Part II, the evolution of the principles relating to the duty of care in *Donoghue* was shown to demonstrate the process of the evolution of principle within judicial jurisprudence. Fast-forwarding to the present, the current approach taught to law students in the Australian curriculum is the one outlined by the High Court in *Sullivan v Moody*.[60] When viewed in their historical context, the same process of the evolution of principle is evident, albeit on a more sophisticated tier.

The central feature of this approach is the consideration of whether there was a duty of care owed by the defendant to someone who was in a particular, identifiable relationship with them.[61] The *Sullivan v Moody* approach is multi-factored, requiring that a range of factors be considered in order to establish a duty of care in novel situations. In the case of *Caltex Refineries (Qld) Pty Ltd v Stavar*,[62] Allsop J neatly summarised the process of imputing a duty using this approach in novel situations, stating:

> [T]he proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the 'salient features' or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.[63]

---

[58] Carolyn Sappideen, Prue Vines and Penelope Watson, *Torts: Commentary and Materials* (Lawbook, 12th ed, 2016) 222.
[59] Establishing a duty of care in established duty of care situations — eg, a duty from one road user to another, the duty of occupiers to invitees, the duty of doctors to their patients, etc — is a much less analytically difficult task than establishing a duty of care in novel duty situations.
[60] (2001) 207 CLR 562 ('*Sullivan v Moody*').
[61] Sappideen, Vines and Watson (n 58) 207.
[62] 2009) 75 NSWLR 649, 675 ('*Caltex v Stavar*').
[63] Ibid.

Allsop J continued by outlining the list of non-exhaustive and non-compulsory factors to be considered when applying this approach:

> These salient features include:
>
> (a) the foreseeability of harm;
> (b) the nature of the harm alleged;
> (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
> (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
> (e) the degree of reliance by the plaintiff upon the defendant;
> (f) any assumption of responsibility by the defendant;
> (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
> (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
> (i) the nature of the activity undertaken by the defendant;
> (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
> (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
> (l) any potential indeterminacy of liability;
> (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
> (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
> (o) the existence of conflicting duties arising from other principles of law or statute;
> (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
> (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.[64]

The meaning of the terms identified by Allsop J each has a historical context. The factors (as he himself called them) are thereby given a specific contextual content. In turn, the examination of the context in which these factors arise fits well with the argument that with each relevant occasion on which the question of a 'duty of care' is substantially explored, the court has taken the opportunity to augment the previous doctrine on the adjudication of specific cases. Consistent with the doctrine of *stare decisis* and 'case by case evaluation', the subsequent court tests the ground each step to re-evaluate each rule in the earlier case(s) to determine if the earlier rule produces a 'fair result' and if the rule operates unfairly to modify it.[65] The previous factors are then modified to address the situation before the court. Ultimately the final decision in that process of induction and deduction is pronounced, comprising the court's reasoning concerning the veracity of the factors that hitherto had been considered and including its commentary on any modification of those factors, or the recognition of fresh ones.

Expanding on these concepts, the consideration of 'reasonable foreseeability' (factor (a) in the above list) incorporates the test of reasonable foreseeability from *Donoghue*;[66] the

---

[64] Ibid.
[65] Aldisert (n 25).
[66] This test was further developed in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (Wagon Mound No. 1)* [1961] AC 388; *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound No. 2)* [1967] AC 617; and *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

considerations of control, vulnerability, reliance, assumption of responsibility, whether the defendant had knowledge that their act would harm the plaintiff, the extent of the imposition on autonomy, and the existence of inconsistent duties or rights (factors (c), (d), (e), (f), (k), (n) and (o) in the above list) incorporate those factors identified above emanating from the 'salient features approach';[67] the consideration of the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant (factor (g) in the above list) incorporates Lord Atkin's concept of proximity from *Donoghue* (further considered by Deane J in the development of his 'proximity approach' advanced in *Jaensch*);[68] and the existence of a category of relationship between the plaintiff and the defendant (factor (h) in the above list) incorporates those factors from the 'incremental approach' advanced by Brennan J in a number of cases in the 1980s and 1990s.[69]

In truth, the incremental approach gives lie to Cardozo's theory of *stare decisis*[70] to which Schnee gave expression in her diagram (see Diagram 1), by which she explained that by a process of the evolution and application of principle, induction was called in to remedy rigidity by the creation of 'one more case' for future induction.[71] Finally, the remaining factors identified by Allsop J are matters not associated with any particular approach to the duty of care in novel duty situations, but have been considered relevant in previous cases in some form or another.[72]

---

[67] See *Hill v Van Erp* (1997) 188 CLR 159 (Gummow J) ('*Hill v Van Erp*'); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (Gummow and Hayne JJ) ('*Graham Barclay Oysters*'); *Perre v Apand Pty Ltd* (1999) 198 CLR 180 ('*Perre v Apand*'). This approach requires the court to focus on the relationship between the parties and to make a determination regarding whether that relationship was sufficiently close to justify finding that the defendant owed the plaintiff a duty, with a particular focus on the 'salient features' of that relationship: see *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 (Stephen J). See also Amanda Stickley, *Australian Torts Law* (LexisNexis Butterworths, 4th ed, 2016) 199. This approach requires the court to engage in 'a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle'. Some of the relevant salient features are universal, whilst others apply only to particular categories of case: see Norman Katter, '"Who Then in Law Is My Neighbour?": Reverting to First Principles in the High Court of Australia' (2004) 12(2) *Tort Law Review* 85, 86.

[68] Deane J stated that his version of proximity was 'directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act of one person and the resulting injury sustained by the other'. This involved 'both an evaluation of the closeness of the relationship and a judgment of the legal consequences of that evaluation'. Deane J's proximity approach involves asking whether in any particular case there is sufficient physical, circumstantial, or causal proximity between the parties. Whether one of these particular considerations of proximity would be relevant in a particular case, and if so, how significant it would be to the outcome of the case, would differ from case to case, involving 'value judgments on matters of policy and degree': *Jaensch* (n 53) 580, 584, 585.

[69] This approach disregards the search for a general principle at the heart of the duty of care question, instead taking the view that 'the law should develop novel categories of negligence incrementally and by analogy with established categories rather than by massive extension of a prima facie duty of care': see, eg, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

[70] Cardozo (n 39).

[71] Schnee (n 14) 118.

[72] See, eg, *Harriton v Stephens* (2006) 226 CLR 52 (considering the relevance of the nature of the harm alleged on the nature of the duty owed (a)); *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (2001) 207 CLR 562 (any potential indeterminacy of liability (l)); *Graham Barclay Oysters* (n 67) (consistency with the terms, scope and purpose of any statute relevant to the existence of a duty (p)); *Sullivan v Moody* (n 60) (the desirability of coherence in the common law (q)).

B *A Pedagogical Analysis of the Use of the Proposed Syllogism-Based Model*

The current approach to duty of care in novel duty situations from *Sullivan v Moody* reprises the methodology of fundamental factor-analysis outlined in Part II of this article. This methodology provides the decision-maker with the discretion to gauge the relative importance of each factor.[73] The coherence with fundamental syllogistic reasoning is apparent: the vessel in which 'induction' (rule creation) takes place, is the syllogistic major premise or 'rule' in the IRAC framework. 'Deduction', the process of applying the rule thus synthesised to the facts of the case, takes place in the minor premise or 'application'.[74]

We recount that the major premise is the vessel in which the applicable rule is synthesised, within which must be inserted not just the relevant holding and the 'operative facts' that ground that holding, but also the judicial reasoning that underpins the finding.[75] Eschewing the formalistic superficial model of IRAC,[76] in our syllogism-based model of IRAC the rule corresponds to the syllogistic major premise,[77] and therefore is the vessel that contains the holdings in case law, together with all the operative and material facts and reasons that ground those holdings.

Presented to law students in this way, the syllogism-based model of IRAC is arguably an effective model to use when teaching the legal principles outlined in the previous section.[78] Understanding and adhering to the High Court's directive in *Sullivan v Moody* that the basis for the imputation of liability within the salient features approach was not based on *policy* but on a search for *principle* presents implicit difficulties that render the major premise particularly suitable as the vessel for the search for that principle. Presented within the major premise of a 'concrete' syllogism, the search for principle then becomes a search within case law for the facts and underpinnings for the reasons in case law.

Having then synthesised that rule from the facts, reasons and holdings of case law, the next phase in the syllogistic reasoning cycle is the application of that principle to the facts of the case — the process of deduction. Reprising what he considers to be the benefits of presenting principle within the context of the syllogistic major premise, Boland says of the process of

---

[73] Edwards (n 47) 18.
[74] See, eg, Clary and Lysaght (n 16); Nedzel (n 16).
[75] Gardner (n 15) 28; Nedzel (n 16) 76.
[76] Recounting the criticisms of the superficial model of IRAC discussed above in Part I of this article: Graham (n 8); Boland (n 9).
[77] Clary and Lysaght (n 16); Nedzel (n 16).
[78] Boland (n 9) 723. Boland discusses his experiences in using this method to teach first-year students, stating: 'In first year legal writing classes, when we teach students to synthesize a number of cases to form a rule based on the issue presented, we are asking them to do a form of inductive generalization. Presented as a theoretical concept, it is very difficult to grasp. On the other hand, presented as a search for the major premise of a concrete syllogism, inductive generalisation has meaning. Students then understand that they are looking at prior court decisions based on a narrow set of facts, and from these decisions, inducing a rule, their major premise': at 723.

application: 'In the same way, the minor premise is the best context for teaching application of law to facts.'[79]

It is suggested that the final stage of the *Sullivan v Moody* approach, the judicial evaluation of the factors for and against the imposition of a duty of care in the particular case under consideration,[80] is most aptly performed within the minor premise of a concrete syllogism. The understanding that the process of 'evaluation' is a discrete 'stage' gives rise to the need to treat it as such within the structure of syllogism, and as a distinctly different process to the search for principle, the latter undertaken within the vessel of the major premise.[81] The conclusion thereby derived is congruent with the figurative end point in Schnee's diagram in which she depicts the evolution and application of principle (see Diagram 1).[82]

We argue that a specific potential benefit of using this approach to teaching relates to the teaching of legal doctrines that are conceptually uncertain, or in relation to which there may be a number of relevant underlying policy considerations. The principles associated with the area of law considered in this section provide a good example. It is of crucial importance that the premises used in a syllogism be of a sufficient level of conceptual clarity to be used effectively in a syllogism, and for students to be able to accurately identify and apply these principles to novel fact situations. Where, for example, one or more of the premises in a syllogism is conceptually ambiguous, the conclusion reached using such a premise or such premises will depend upon which interpretation of the ambiguous premise the reasoner takes. As more than one interpretation can be taken of the conceptually ambiguous premise, more than one conclusion can be reached using this form of reasoning, despite the use of the same syllogistic premises.

The following is an example of a syllogism in a non-legal context incorporating ambiguous premises:

> Major premise: Mark seeks meaning
> Minor premise: The seeking of meaning is a sign of intelligence
> Conclusion: Therefore, Mark is intelligent

As a matter of formal logic, the conclusion that Mark is intelligent seems to be correct. However, the concepts of 'meaning' and 'intelligence' are both ambiguous; as such, the conclusion that 'therefore, Mark is intelligent', whilst potentially being correct as a matter of

---

[79] Ibid 724.
[80] Stickley (n 67).
[81] The suitability of performing the process of judicial evaluation as a distinct 'stage' is well explained by Boland, who states: 'In the context of the minor premise, cases with facts similar to the facts of the instant case must then lead to the same conclusion (or holding). By using the syllogistic method, it becomes much less likely that students will confuse use of case law to find and articulate a major premise with use of case law analogically to support or attack the minor premise. Students then know why they are using a case and where the case fits within their syllogistic argument': Boland (n 9) 724.
[82] Given the limited length of this article, it is beyond the scope of this work to provide particular examples of the syllogisms that may be employed using this method. This will be the focus of future work.

logic, is entirely dependent upon the meanings ascribed to these concepts by the reasoned, which may differ from person to person.

With this in mind, it is important to draw to students' attention that there is conceptual uncertainty in many of the relevant legal principles concerned with establishing a duty of care in novel duty situations. For example, the concept of reasonable foreseeability at the heart of Lord Atkin's 'neighbour principle' in *Donoghue* has caused much consternation to courts in the years since this important decision, as have the concepts of 'closeness', 'directness', 'proximity' and 'policy'.[83] Incorporating such open language, Lord Atkin's approach from *Donoghue* has often been argued to provide insufficient guidance to judges, this in turn leading to the inconsistent application of principle and a reduction in certainty and predictability in the law.[84]

The concept of proximity advanced by Lord Atkin in *Donoghue* and further considered by Deane J in *Jaensch* has also caused consternation to High Court judges and lawyers alike in its application to new factual circumstances. Whilst it is arguable that Deane J's proximity approach may not necessarily be representative of Lord Atkin's conception of proximity, it is not entirely clear whether discussion of proximity in the physical, temporal or relational sense in the Australian context will be complete without reference to Deane J's discussion of these terms in *Jaensch.* This is a further potential source of conceptual uncertainty for law students to grapple with, given that Deane J's conception of proximity has been described as 'meaningless and unworkable',[85] and a concept that is not fully articulated, which operates as a vehicle to simply provide conclusions rather than a clear process of reasoning.[86] For this reason, it has been argued that Deane J's concept of proximity is 'a hollow concept providing no guidance beyond merely indicating that something more was required other than reasonable foreseeability to raise a duty of care'.[87] A similar criticism has also been levelled at Brennan

---

[83] Importantly, this model does not explicitly engage with the scholarly literature concerning standards, rules and social norms: see, eg, Eric A Posner, 'Standards, Rules, and Social Norms' (1997) 21(1) *Harvard Journal of Law & Public Policy* 101; Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 *Duke Law Journal* 557; Louis Kaplow, 'A Model of the Optimal Complexity of Legal Rules' (1995) 11(1) *Journal of Law, Economics & Organization* 150.

[84] See Jessica Randell, 'Duty of Care: Haunting Past, Uncertain Future' (2014) 2(2) *North East Law Review* 75, 77. It has been argued that this approach is 'incapable of sound analysis and possibly productive of injustice': see WW Buckland, 'The Duty to Take Care' (1935) 51(4) *Law Quarterly Review* 637, cited in Richard Kidner, 'Resiling from the Anns Principle: The Variable Nature of Proximity in Negligence' (1987) 7(3) *Legal Studies* 319, 320. Some have even argued that these factors are so conceptually wide as to be essentially meaningless: see, eg, Kidner (n 84) 319. For this reason, Smith and Burns stated in 1983 that 'the only service [*Donoghue* (n 42)] can now perform is to remain as a warning to the judges of the dangers of relying on judicial platitudes such as Lord Atkin's "neighbour principle" rather than on careful analysis and sound reasoning': JC Smith and P Burns, 'Donoghue v Stevenson: The Not So Golden Anniversary' (1983) 46(2) *Modern Law Review* 147, cited in Kidner (n 84) 322.

[85] See, eg, *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd* [1985] 1 QB 350, 395 (Robert Goff LJ); *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, 24, PC, cited in Martin Davies, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9(1) *Legal Studies* 67, 68.

[86] See Katter (n 67) 89.

[87] Ibid. It was because this approach was considered to be insufficiently fixed in meaning to allow it to be used to

J's incremental approach, namely that this approach necessitates the exercise of such a broad discretion that it provides no greater certainty or predictability in determining the duty of care in novel duty situations than any other approach.[88]

If the first-year law student is confused by this point, things unfortunately do not get much better for them. The current approach from *Sullivan v Moody* incorporates each of these conceptually ambiguous concepts, thereby drawing in a wide range of potential ambiguities. Furthermore, the *Sullivan v Moody* approach has been criticised on the basis that 'it has not provided a methodology but is simply a list of potentially relevant "legal policy" factors whose priority and significance in any given circumstance depends on a value judgment'.[89] For example, Katter argues:

> No over-arching principles guide the application and importance of these salient features. The weighing of such factors involves an ad hoc response and such an approach provides no guidance or predictability as to the likely outcome of the duty issue in novel cases. Conceptually, these salient features belong to the evaluation of considerations of policy and are not anchored to legal principle. They derive from public policy and justice concerns.[90]

As such, it has been argued that the salient features approach 'is not an approach at all but merely an unfettered discretion to prioritise factors which subjectively appeal to the court as relevant in the case at hand'.[91] Thus, the salient features approach has arguably done nothing to improve the certainty and predictability of the law.[92]

In response to this concern, we argue that a carefully applied syllogistic model offers a potential solution to students who may otherwise experience issues with application of the superficial IRAC model to consideration of the duty of care in novel duty situations.[93] What this means in practice is that it is not sufficient for law students to simply consider the current approach outlined in *Sullivan v Moody* divorced from the previous cases whose principles find expression in this approach in one form or another. That is to say, when students are considering the

---

provide clear guidance in subsequent cases that it was ultimately abandoned by the High Court in *Sullivan v Moody* (n 60): see, eg, Des Butler, 'Proximity as a Determinant of Duty: The Nervous Shock Litmus Test' (1995) 21(2) *Monash University Law Review* 159, 186–7; Des Butler, 'Managing Liability for Bystander Psychiatric Injury in a Post-Hill v Van Erp Environment' (1997) 13 *Queensland University of Technology Law Journal* 152, 171; Peter Handford, *Mullany & Handford's Tort Liability for Psychiatric Damage* (Thomson Reuters, 2nd ed, 2006) 117–18.

[88] See Stickley (n 67) 198.

[89] See Katter (n 67) 88.

[90] Ibid.

[91] Ibid.

[92] See Carl F Stychin, 'The Vulnerable Subject of Negligence Law' (2012) 8(3) *International Journal of Law in Context* 337, 344.

[93] Importantly, this proposed model also may serve lawyers in the age of artificial intelligence. In particular, whilst artificial intelligence platforms are increasingly able to perform many legal tasks not previously thought possible, such platforms currently do not yield predictable results, particularly in relation to the solving of complex legal problems utilising algorithms that process natural language: see Benjamin Alarie, Anthony Niblett and Albert H Yoon, 'How Artificial Intelligence Will Affect the Practice of Law' (2018) 68(1) *University of Toronto Law Journal* 106, 118. See also Eric Allen Engle, 'An Introduction to Artificial Intelligence and Legal Reasoning: Using xTalk to Model the Alien Tort Claims Act and Torture Victim Protection Act' (2004) 11(1) *Richmond Journal of Law and Technology* 53.

'elements' that form part of the applicable 'rule' as part of the syllogistic major premise, this 'rule' must be considered by reference to the many salient features mentioned in *Caltex Refineries (Qld) Pty Ltd v Stavar*. In turn, where each of the salient features refers to a legal rule or principle from a previous case or line of cases, these cases too must be taken into consideration when developing the syllogistic major premise. Importantly, each of these relevant rules must in turn be considered and applied using the syllogistic model presented.

As argued above, in our syllogism-based model of IRAC, the rule corresponds to the syllogistic major premise and therefore is the vessel that contains the holdings in case law, together with all the operative and material facts and reasons that ground those holdings. As such, although there is some analytical uncertainty regarding whether *Sullivan v Moody* is an approach at all or simply a list of factors to be considered without any guiding principle, our syllogistic model of IRAC requires that each of the relevant case law holdings be taken into careful consideration when generating the relevant rule or syllogistic major premise.[94] Once all of these salient features have been systematically considered in turn, the law student should then follow the approach suggested in *Sullivan v Moody*, engaging in an 'evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle'.[95]

IV CONCLUSION

This article has considered the teaching of the legal principles relating to the duty of care in novel duty situations in negligence to law students in the form of a syllogism-based model of IRAC, attempting to lay the pedagogical foundations for further work of a more practical nature that will employ this model. It has been argued that close attention to a syllogism-based model of IRAC can assist law students to express their answers to problems concerning duty of care in novel duty situations in the correct doctrinal and syllogistic form, as well as improve students' mastery of doctrine. Finally, it has been contended that a syllogism-based model of IRAC may be of particular benefit when teaching and learning the relevant legal principles concerning the duty of care in novel duty situations, particularly in light of the lack of conceptual clarity inherent in many of these legal principles.

[94] These include the consideration of reasonable foreseeability outlined by Lord Atkin in *Donoghue* (n 42), which includes consideration of the concepts of 'closeness', 'directness', 'proximity' and 'policy'; the consideration of the concept of proximity advanced by Deane J in *Jaensch* (n 53); the consideration of Brennan J's incremental approach; and the consideration of the many salient features outlined in *Hill v Van Erp* (n 67), *Graham Barclay Oysters* (n 67), *Perre v Apand* (n 67) and *Caltex v Stavar* (n 62).

[95] See *Sullivan v Moody* (n 60) 580. As stated above at n 82, the syllogism-based model of IRAC presented in this article provides the pedagogical framework for future work of a more practical nature, which will provide examples of the type of syllogisms that may be employed using this model.

REVIEWING HONOURS AND DISTINCTION IN 21ST CENTURY AUSTRALIAN LAW SCHOOLS: IS THE DIVERSITY OF APPROACHES CORRODING ITS MARKET RELEVANCE?

Kelley Burton, Julian Laurens† and Judith Marychurch‡*

ABSTRACT

In 2013 and 2020 the Legal Education Associate Deans Network ('LEAD') executive undertook member-only surveys that captured a snapshot of the Honours programs offered at just over half of Australian law schools. In 2021, in order to further augment the responses and in response to member interest, the LEAD executive reviewed the publicly available data from Australian university websites advertising their Bachelor of Laws and/or Juris Doctor degrees, and the respective Honours and/or Distinction options. The 2021 review shows the most common law program offered by an Australian law school to be a Bachelor of Laws with Honours (including combined programs). However, the eligibility requirements for Honours vary considerably by institution. This article discusses and contextualises the initial findings of the 2021 LEAD executive review, with the intention to: highlight the varied and often inconsistent approaches of Australian law schools to the award of Honours; provide some insight as to how this situation arose; and, finally, identify some concerns with the current scattered approach, and why more consistency may be desirable. It seeks to initiate an ongoing conversation on how to best support the demonstration of excellence by students. This exploratory article is preliminary to a proposed larger project examining the place of Honours and Distinction in the contemporary Australian law school.

* Associate Professor, School of Law and Society, University of the Sunshine Coast, LEAD Co-convenor.
† Senior Project Officer, Melbourne Law School, University of Melbourne, LEAD Senior Project/Executive Officer.
‡ Assistant Dean Teaching and Learning, Melbourne Law School, University of Melbourne, LEAD Co-convenor.
The authors acknowledge and thank the anonymous reviewers for their comments and insights into an earlier draft. The authors would further like to acknowledge and thank the members of LEAD for their contribution to discussion on the 2021 ALAA Conference presentation on which this article is based.

I INTRODUCTION

The primary focus of this paper is on drawing attention to the broad diversity and inconsistency of criteria by which Honours is awarded amongst Australian law schools, and highlighting some issues that this *may* (and the authors stress 'may' — more research is needed) raise for graduates. The need to critically evaluate whether the current approach to awarding Honours at Australian law schools is providing benefit to graduates as a whole is given credence by recent suggestions that there is indeed confusion amongst students and domestic employers about the myriad approaches to Honours, and that this lack of clarity may have implications for the perceptions of quality in graduates from certain institutions.[1] This is discussed further in Part V. In the context of the global market for legal education, consideration should be given to the idea that dissatisfaction by consumers or employers with the offering of one institution could lead, unfairly, to dissatisfaction with the larger national sector by association. While there is no qualitative or quantitative evidence to suggest this last point is occurring in respect of Australian law schools, the global market provides a dynamic and fickle environment in which practices adopted by an individual business or organisation can generally impact the reputational integrity of others in its immediate or relational network. It is a risk that law schools need to be cognisant of and manage.

Part II presents some background and context underpinning the themes of this article, and Part III briefly outlines the revisions to the Australian Qualifications Framework ('AQF') in more depth, and the changes in requirements for Honours in the Bachelor of Laws ('LLB') that led to the proliferation of Honours models. The AQF forced Australian universities to examine their respective approaches, adapting them or adopting different ways of recognising academic excellence in law programs. Part IV reports on specific findings of the LEAD executive review of eligibility for the awarding of Honours or Distinction for the LLB and Juris Doctor ('JD'), the review demonstrating the diversity of approaches. Part V provides opportunity for discussion and further contextualisation of issues identified through the literature and research that are germane to the contemporary Australian legal education and employment landscape, and the future direction of this project.

Consistent with previous research, the current study found a lack of robust contemporaneous research around Honours programs generally in the Australian context.[2] There is a dearth of specific literature on Honours and Distinction in law in Australia. Barron and Zeegers argue this lack of conversation is generally a reflection of the assumed place of Honours as simply being a pathway to higher study and academic positions,[3] though it has been recognised that

---

[1] Nick James, 'RIP LLB (Hons)', *The Centre for Professional Legal Education* (Blog Post, 8 May 2020) <https://thecple.wordpress.com/2020/05/08/rip-llb-hons>.

[2] Elisa Backer and Pierre Benckendorff, 'Australian Honours Degrees: The Last Bastion of Quality?' (2018) 36 *Journal of Hospitality and Tourism Management* 49.

[3] Deirdre Barron and Margaret Zeegers, 'Honours in Australia: Globally Recognised Preparation for a Career in Research (or Elsewhere)' (2012) 13(2) *Journal of the National Collegiate Honors Council* 35, 36. And see also John McGagh et al, *Review of Australia's Research Training System* (Final Report, Australian Council of Learned Academies, 2016).

this traditional view is at odds with the actual demands of the modern employment market beyond universities.[4] This current work seeks to move the discussion on this forward, with an empirical foundation. We encourage law academics to increase their awareness of how other law schools award Honours and Distinction to ensure that their students have the best possible graduate experience.

II BACKGROUND

Traditionally, Honours in an Australian LLB was awarded on the basis of marks achieved during the course of study, via a weighted average mark ('WAM') or grade point average ('GPA'). This was a common national approach and generally understood by students and by the profession seeking to employ graduates. However, the introduction of the AQF[5] gave rise to significant challenges for law schools because of the new requirements for the award of the 'Level 8 Bachelor Honours Degree'. The AQF required that students awarded a Level 8 qualification (as opposed to a standard undergraduate 'pass' degree being classified at Level 7) would be required to demonstrate more advanced knowledge and skill requirements, as well as the application of that knowledge and skill set, and that the qualification would require a volume of learning of an additional 12 months following a three-year full-time Bachelor degree. As such, the traditional approach to the award of Honours on the basis of previous marks and, in some cases, a threshold requirement of a longer research essay in a later-year subject, no longer met AQF requirements. This resulted in the re-examination of Honours programs in law across Australia.

The AQF and Honours has been a topic of discussion amongst the Council of Australian Law Deans ('CALD').[6] However, rather than adopting consistent national criteria to the awarding of Honours, Australian law schools took an individual interpretative approach as to how they would meet the new requirements. In some cases, the response was dictated by a larger institution-wide response to the AQF, as they sought to ensure compliance with a new regime of heavier regulation than previously experienced. Largely, and importantly, changes to Honours in law post-AQF were often based upon immediate pragmatic concerns, including a perceived need by some institutions to differentiate themselves in the developing national and global marketplace in a way that would be acceptable to consumers. They were not informed by empirical research per se, and there is little to suggest that law schools considered how an individualised and fragmented approach to Honours across the nation could negatively impact later students. The focus was on providing a benefit to their immediate cohorts at that juncture and satisfying regulatory pressures. However, individual institutions did take inspiration from overseas models, such as the degree classification system in England, or the model dominant

[4] Louise Horstmanshof and Bill Boyd, 'W(h)ither the Honours Degree in Australian Universities?' (2019) 61(2) *Australian Universities' Review* 14.
[5] Australian Qualifications Framework Council, *Australian Qualifications Framework* (2nd ed, 2013) <https://www.aqf.edu.au/sites/aqf/files/aqf-2nd-edition-january-2013.pdf> ('*AQF 2013*').
[6] For CALD generally, see 'Home', *Council of Australian Law Deans* (Web Page, 2021) <https://cald.asn.au>.

in the United States where Honours is largely awarded based on GPA, and adapted those to their circumstances, after review.

This is in no way to be seen as a judgement or criticism of policies and practices adopted by institutions at that time. Law schools are independent, there is nothing to suggest they cannot make decisions based on their understood 'best interests', and the general position remains that a law school is free to set its own curriculum and assessment structure, assuming the graduates meet a certain 'standard,' and other statutory regulatory requirements where relevant. What is helpful is critically revisiting the assumptions upon which decisions were made at that time in order to test their validity now.

Indeed, it is almost trite to observe that a hallmark of 'best practice' in service delivery is that assumptions and practices should be re-examined periodically to ensure consistency with vision, goals and, importantly, consumer expectations. However, reconciling an individual response with the desirability of a national collective strategy, as argued by some, is recognised as a challenge. Identifying and implementing strategies to resolve objections is not assisted by the numerous restructures and amalgamations endured by law schools since the introduction of the AQF. It is no longer clear today how many law schools are able to set their own excellence regimes independent of the wider university protocols, despite a law school delivering a program that is largely professionally focused and therefore subject to compliance with an external, statutory-based, legal profession-admitting authority.

Arguably, in the face of an increasingly competitive domestic and global marketplace, not assisted by reductions in government funding and a global pandemic, there is an imperative for a unified voice on a number of policy matters, or at least a renewed recognition of the benefit of a 'common purpose' when scoping and adopting practice and policy positions.[7] Of relevance to the current case, decisions that may have had a reasonable economic rationale at the time could potentially lead to future financial repercussions if, for example, the quality of an offering is not consistent with identified quality measurements or if markets otherwise shift so that they no longer reflect the reality of the previous paradigm. Focus should be directed at: identifying those policies that affect and inform how law schools measure and differentiate student excellence in a way that is meaningful; understanding how those measures are understood in the marketplace; and, finally, determining how such policies in practice may affect a graduate's success in the job market, both domestically and globally.

A not insurmountable problem is that the diversity in approaches to Honours highlighted and discussed below has made it difficult to identify what is 'best practice' in the Australian context. The diversity in approaches should give the legal academy pause to consider a key question that has been conspicuously absent from the research landscape: what is the purpose

[7] That law schools can all adopt the Priestley 11, even in a jurisdiction not covered by *Legal Profession Uniform Admission Rules*, provides some indication that common ground does exist, even if it is heavily contested at times, as is the case with the role and content of the Priestley 11. The point is that adhering to a general national curriculum of subjects is seen to provide benefits — eg, a consistency in knowledge — that the profession can rely upon.

of Honours in law in the 21st century? In Australia, and it appears uniquely in the world, Honours has been traditionally seen as the main pathway into higher degree-by-research programs, and to provide for a university workforce.[8] Clearly, for law, Honours is something more than this, especially given that a law program is traditionally seen as professionally orientated.[9] What that 'more' is needs to be defined in light of the contemporary student and employment market.

If it is more broadly about recognising excellence, then what is meant by 'excellence'? Which view of what demonstrates excellence in a law school graduate should prevail? Do some methods of awarding Honours better reflect excellence than others? If this last view is in fact held by some key stakeholders, this could be problematic, even if such a view can be classed as subjective. Not only is it problematic for the reputation of an impugned law school and its graduates, but it introduces confusion into the wider legal education sector and employment market. Unchecked parochialism may unintentionally hinder law graduates from achieving the best possible outcome commensurate with their ability.

III IMPACT OF THE AQF

The AQF was originally introduced in 1995 to provide an agreed national (via intergovernmental agreement)[10] level-based framework for categorisation of higher education, vocational education and training, and school qualifications.[11] A definition of the AQF is included in the dictionary to the *Higher Education Support Act 2003* (Cth):

> ***Australian Qualifications Framework*** means the framework for recognition and endorsement of qualifications:
>
> (a) that is established by the Council consisting of the Ministers for the Commonwealth and each State and Territory responsible for higher education; and
> (b) that is to give effect to agreed standards in relation to the provision of education in Australia;

---

[8] Margaret Kiley, Thea Moyes and Peter Clayton, '"To Develop Research Skills": Honours Programmes for the Changing Research Agenda in Australian Universities' (2009) 46(1) *Innovations in Education and Teaching International* 15; Margaret Kiley et al, 'Honouring the Incomparable: Honours in Australian Universities' (2011) 62(5) *Higher Education* 619, 620; Barron and Zeegers (n 3).

[9] It is important to note, however, that (a) many law graduates do not go on to practice, and (b) in recent years there has been a shift to seeing a law degree as a 'generalist' qualification, though this is not without challenge. See, eg, Pip Nicholson, 'Why Law Degrees Matter', *Pursuit* (9 February 2018) <https://pursuit.unimelb.edu.au/articles/why-law-degrees-matter>. For a slightly different perspective, see, eg, Cathy Sherry, 'A Law Degree? Only If You're Committed', *The Sydney Morning Herald* (online, 17 September 2015) <https://www.smh.com.au/opinion/a-law-degree-only-if-youre-committed-20150917-gjozxj.html>. While this has prompted discussion about the relevance of course content generally, does this also have implications for the way Honours is conceived or undertaken?

[10] The intergovernmental agreement is given effect via the following state and territory legislation: *Higher Education Act 2001* (NSW) s 7.

[11] See Australian Qualifications Framework Advisory Board, *Australian Qualifications Framework Implementation Handbook* (1st ed, 1995) <https://www.aqf.edu.au/sites/aqf/files/aqf_implementation-hb-1st-edition.cv01.pdf>.

> as in force from time to time.[12]

The system underwent significant amendment in 2011,[13] and then revision in 2013.[14] The Tertiary Education Quality and Standards Agency ('TEQSA') was created in 2011 to regulate higher education in Australia.[15] The primary impact of the revisions in 2011 was on the requirements for Honours-level qualifications.

Historically, the LLB was commonly four years' duration when studied alone, and five to six years' duration when studied concurrently with another undergraduate degree as part of a double degree offering. Whether studied as part of the more common double degree in law or as a stand-alone degree, the requirements for Honours in law were based on WAM or GPA, sometimes with additional 'threshold' requirements, like a research essay of 5,000 words or more. However, the 2011 revised AQF treated combined degrees as effectively two undergraduate degrees at Level 7, with Honours requirements at a higher level in terms of skill and duration, adding a 'typical' amount of 12 months' study. This additional 12 months of study may be embedded in a Bachelor degree, but it is still required to be a discrete additional year.[16] As noted by then University of New South Wales Dean of Law David Dixon in 2012, '[t]his ignores the reality that the combined degree is more than a sum of its parts'.[17]

Dixon expressed the frustration that many law schools critical of the AQF approach were experiencing at that time. Arguments Dixon raised against the AQF approach included that: the requirement of an additional year of study does not take into account the unique professional nature of the LLB; the LLB is commonly taken as a double degree, thus containing significant content over a significant duration; and it would make Australian law schools uncompetitive in the global market if law students are required to undertake an additional year of study.[18] Dixon notes that many competing international jurisdictions, such as England or the

---

[12] *Higher Education Support Act 2003* (Cth) sch 1.
[13] Australian Qualifications Framework Council, *Australian Qualifications Framework* (1st ed, 2011) <https://www.aqf.edu.au/sites/aqf/files/aqf-1st-edition-july-2011.pdf> ('*AQF 2011*').
[14] *AQF 2013* (n 5).
[15] *Tertiary Education Quality and Standards Agency Act 2011* (Cth).
[16] *AQF 2011* (n 13) 49. The same wording is used in *AQF 2013* (n 5) 51.
[17] David Dixon, 'TEQSA, the AQF and the Regulatory Threat to Australian Legal Education' (University of New South Wales, 2012) <https://cald.asn.au/wp-content/uploads/2012/06/TEQSA-and-the-Regulatory-Threat-to-Australian-Legal-Education-final.pdf>.
[18] Ibid. Note also that at law schools offering a straight undergraduate LLB (not combined) the duration is still usually four years, which is one year higher than most other undergraduate Bachelor (pass) programs. See, eg, 'Bachelor of Laws', *The University of Adelaide* (Web Page, 14 September 2021) <https://www.adelaide.edu.au/degree-finder/2022/blaws_llb.html>.

United States, do not require an additional year of research for their respective LLB or JD law programs to be awarded with Honours.[19]

As a result, some law schools continued with an LLB (AQF Level 7), adding on additional requirements to be awarded Honours (in which we see a considerable variety of approaches), and other law schools reclassified their entire LLB programs as being at AQF Level 8, with all students graduating with some level of Honours. Some law schools offered Honours in the LLB for the first time. It is hard to discern at this stage to what extent certain approaches were influenced by policies and procedures set at a university level. At a similar time, some law schools progressively introduced a JD, which brought its own issues.[20] The JD degree is not able to be awarded with Honours under the AQF and TEQSA standards. Being classified a 'graduate degree', it does not qualify for AQF Level 8, which is reserved for Bachelor degrees. Indeed, the AQF and TEQSA do not have a category that recognises graduate degrees at all, so as a compromise the JD is categorised as an AQF Level 9 qualification. This is the same position as a Master's degree (coursework), despite the JD sharing much of its curriculum with the LLB.[21] Individual institutional interpretation of the AQF has been a significant driver behind the adoption of diverse approaches to Honours and Distinction in the LLB and, to a lesser extent, JD programs in Australia today.

IV THE LEAD EXECUTIVE REVIEW: DIVERSE APPROACHES TO HONOURS IN AUSTRALIAN LAW PROGRAMS

The Law Associate Deans' Network (as it was then called) was established in 2010. In September 2013 it was renamed the Legal Education Associate Deans Network ('LEAD'). It comprises the Associate Deans (Teaching and Learning) (or equivalent) of Australian law schools. The purpose of LEAD is to promote collaborative approaches to teaching and learning in Australian legal education. LEAD seeks to encourage, document and lead initiatives

---

[19] In the United States, Honours is awarded overwhelmingly on the basis of GPA throughout a program without an extra year. For some approaches, see, eg, Harvard Law School, *Harvard Law School: Handbook of Academic Policies 2021–2022* (2021) 36 <https://hls.harvard.edu/content/uploads/2021/09/HLS_HAP.pdf>; 'Academic Honors & Cutoffs for 2019–2020', *Georgetown Law* (Web Page) <https://www.law.georgetown.edu/academics/academic-resources/registrar/academic-honors/academic-honors-cutoffs-for-2019-2020>; 'Grading Policy', *Northwestern Pritzker School of Law* (Web Page) <https://www.law.northwestern.edu/registrar/gradingpolicy>; 'Honors Programs', *University of Illinois Chicago* (Web Page) <https://law.uic.edu/academics/jd/honors>. It is worth noting for readers that, in Australia, the JD degree is not able to be awarded with Honours.

[20] For early discussion on the introduction of the JD in Australia, see, eg, Donna Cooper et al, 'The Emergence of JD in the Australian Legal Education Marketplace and Its Impact on Academic Standards' (2011) 21 *Legal Education Review* 23; Wendy Larcombe and Ian Malkin, 'The JD First Year Experience: Design Issues and Strategies' (2011) 21 *Legal Education Review* 1.

[21] See *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 5 <https://www.legislation.gov.au/Details/C2021C00287>, stating that a *higher education award* is: '(a) a diploma, advanced diploma, associate degree, bachelor degree, undergraduate certificate, graduate certificate, graduate diploma, masters degree or doctoral degree; or (b) a qualification covered by level 5, 6, 7, 8, 9 or 10 of the Australian Qualifications Framework; or (c) an award of a similar kind, or represented as being of a similar kind, to any of the above awards'. A 'graduate degree' is not mentioned in the *AQF 2013* (n 5). See also *Higher Education Standards Framework (Threshold Standards) 2021* (Cth) Definitions <https://www.legislation.gov.au/Details/F2021L00488>.

promoting good practice in learning and teaching in the discipline of law, and to create processes and strategies to sustain the network for the benefit of members. It previously received funding from the Office for Learning and Teaching, and now receives financial assistance from CALD. The views of LEAD are independent of those of CALD and its agenda is set by members.

In July 2021, the LEAD executive explored the publicly available information about Honours and Distinction in law programs on the websites of 38 Australian universities (for a full list of Australian universities reviewed, see Appendix 1). The research was intended to supplement previous findings and encapsulate a broader view of the LLB and JD offerings of Australian law schools, particularly exploring whether or how Honours and Distinction is awarded to law students. While LEAD had actively conducted online surveys of its members in 2013 and 2020 regarding Honours practices, the response rate was just over half of Australian law schools. The current comprehensive review was warranted because of continued interest on the topic of Honours by LEAD members, and the desire to capture more specific data missed from earlier surveys.

The 2021 review shows that the LLB with Honours is the most commonly provided law program in Australia (see Appendix 1 for a full list of Australian universities offering an LLB with Honours). All Australian universities reviewed continue to offer an LLB (and often a JD as well), with the exception of the University of Melbourne and the University of Western Australia, which solely offer a JD.[22]

Consistent with previous survey findings, the 2021 review shows that none of the universities advertise an LLB with Distinction, but anecdotal evidence suggests that students who have studied an LLB at AQF Level 7 have been awarded Distinction based on a GPA of 6.5 or above out of 7 or an equivalent WAM, and dependent on wider university policies on that award. Some university websites disclose that the way Honours is awarded in law at their institution has changed in recent years. For example, the Australian National University and the University of Adelaide websites provide information on the change in the way Honours is awarded to students who were enrolled after 2015 (essentially after the new AQF came into force).[23] The University of Adelaide introduced an LLB (Honours) at the AQF Level 8 in 2017, replacing the automatic awarding of Honours that was in place pre-2015. The website explains how these changes impact law students who were enrolled pre-2015 or post-2015.[24] It is feasible that over time the information provided on university websites will fail to capture how

[22] 'Juris Doctor', *The University of Melbourne* (Web Page) <https://study.unimelb.edu.au/find/courses/graduate/juris-doctor>; 'Juris Doctor (JD)', *The University of Western Australia* (Web Page, 16 September 2021) <https://www.uwa.edu.au/study/courses/juris-doctor>.

[23] 'Program Management: Bachelor of Laws (Honours)', *ANU College of Law* (Web Page) <https://law.anu.edu.au/program-management-bachelor-laws-honours>.

[24] 'Honours', *The University of Adelaide* (Web Page, 26 May 2020) <https://law.adelaide.edu.au/intranet/honours>.

Honours was awarded at previous points in time, potentially leading to unfair comparisons between students awarded with Honours from the same institution.

The critical finding of the review is that there are considerably diverse approaches for determining student eligibility for Honours amongst Australian law schools. While there are some similarities (to a greater or lesser extent) between individual law schools, there is not a single, consistent state, territory or national approach to the eligibility and awarding of Honours in law in Australia. Moreover, there is little guidance on approaches to Honours by advisory and regulatory bodies or by employers.

The extreme diversity in approaches can be plotted along a spectrum, from institutions where it appears no law students are awarded Honours, such as at the Central Queensland University and the Royal Melbourne Institute of Technology University,[25] to those where all law students are awarded with a level of Honours, such as at the Australian National University, Monash University, the Queensland University of Technology, the University of Newcastle, the University of Queensland and the University of South Australia.[26] Other variations or options exist within this spectrum. The Central Queensland University's website expressly acknowledges that their law degree is taught at the AQF Level 7[27] — presumably, a law degree that does not offer Honours remains appealing to some law students because it can be completed within three years full time. The University of Queensland recently started awarding Honours to all law students in 2017, while the University of Adelaide stopped this practice in 2015.[28]

Interestingly, Charles Sturt University enables a law student to study an LLB, followed by a Bachelor of Applied Research (Honours) if they are interested in gaining Honours in law.[29] Most Australian universities award Honours to law students predicated on WAM or GPA, and the split between these two measures is fairly even.[30] However, there is considerable variation amongst institutions in the minimum WAM or GPA that forms the basis for awarding an

---

[25] 'Bachelor of Laws: CG98', *CQ University Australia* (Web Page) <https://www.cqu.edu.au/courses/bachelor-of-laws>; 'Bachelor of Laws', *RMIT University* (Web Page) <https://www.rmit.edu.au/study-with-us/levels-of-study/undergraduate-study/bachelor-degrees/bp335>.

[26] 'Honours in Law', *ANU College of Law* (Web Page) <https://law.anu.edu.au/honours-law>; 'L3001: Bachelor of Laws (Honours)', *Monash University* (Web Page) <https://handbook.monash.edu/2020/courses/L3001>; 'Bachelor of Laws (Honours)', *QUT* (Web Page, 27 August 2021) <https://www.qut.edu.au/courses/bachelor-of-laws-honours>; 'Bachelor of Laws (Honours) Combined', *The University of Newcastle Australia* (Web Page) <https://www.newcastle.edu.au/degrees/bachelor-of-laws-honours/handbook#program-structure>; 'Honours Class Calculation', *The University of Queensland Australia School of Law* (Web Page, 26 August 2019) <https://law.uq.edu.au/study/undergraduate-study/llb-information/honours-class-calculation>; 'Bachelor of Laws (Honours)', *University of South Australia* (Web Page) <https://study.unisa.edu.au/degrees/bachelor-of-laws-honours/dom>.

[27] 'Bachelor of Laws: CG98' (n 25).

[28] 'Honours Class Calculation' (n 26); 'Honours' (n 24).

[29] 'Bachelor of Applied Research (Honours)', *Charles Sturt University* (Web Page) <https://study.csu.edu.au/courses/police-security-emergency/bachelor-applied-research-honours>.

[30] See, eg, 'Bachelor of Laws (Honours) (LLBH): LLB (Hons)', *University of Southern Queensland* (Web Page) <https://www.usq.edu.au/handbook/current/law-justice/LLBH.html>; 'Law Honours Programs', *University of Wollongong Australia* (Web Page) <https://www.uow.edu.au/business-law/current-students/law-honours-programs>.

Honours grade. As this information was commonly found in wider university policies, procedures and handbooks, this minimum standard is likely to be decided at the university level rather than by a law faculty or school, though this is not always the case.

In addition to a WAM or GPA restriction, Curtin University imposes a quota restriction, which underscores the competitive nature of Honours but at the same time creates uncertainty because eligibility may vary from cohort to cohort.[31] The authors' experience of this review showed that university websites make it easier to explore Honours eligibility as compared to Honours grading, and it is suggested that, where possible, law schools should seek to make information on grading more transparent and available. Both eligibility and grading are usually based on the WAM or GPA for certain prescribed courses and/or on the quality of the Honours thesis.

Where some kind of thesis is a requirement for the award of Honours (not undertaken in an additional year but embedded in the existing program) the Honours thesis requirements similarly vary (like WAM and GPA minimums), often quite markedly, from institution to institution. For example, Macquarie University appears to have a unique approach where first-class Honours is awarded based on the Honours thesis, and second-class Honours based on the WAM.[32] Regardless of how Honours is awarded, an Honours thesis may be completed over one or two teaching periods.[33] The authors' research suggests that the split between these two timeframes looks reasonably even. The Honours thesis length ranges from 8,000 to 16,000 words, commonly prescribed at 10,000–12,000 words.[34] On some occasions, the word count explicitly includes footnotes, for instance at the Australian Catholic University, while other universities are silent on this issue.[35] Several university websites clarify that the Honours thesis is marked by two markers, for example, at the Australian Catholic University, the University of New South Wales and the University of the Sunshine Coast.[36] At the University of Sydney, the primary marker is independent but the other marker is the supervisor.[37] Notably, many universities do not publicly disclose whether the Honours thesis is marked by markers internal or external to the university, and this is a further area where university websites could provide

---

[31] 'Laws: Bachelor Honours Degree', *Curtin University* (Web Page, 2 August 2021) <https://study.curtin.edu.au/offering/course-ug-bachelor-of-laws-honours--bh-lawsv1>.

[32] 'Bachelor of Law (Honours)', *Macquarie University* (Web Page) <https://www.mq.edu.au/faculty-of-arts/departments-and-schools/macquarie-law-school/study-with-us/bachelor-of-law-honours>.

[33] 'Law Honours Pathway', *USC* (Web Page) <https://www.usc.edu.au/study/courses-and-programs/law-and-criminology/law-honours-pathway>.

[34] Regarding 8,000–10,000 words, see ibid; for an example of 10,000 words, see 'Handbook: Law (Honours)', *UNSW Sydney* (Web Page, 2021) <https://www.handbook.unsw.edu.au/undergraduate/programs/2021/4702?year=2021>; for an example of 10,000–12,000 words, see University of Wollongong Australia, 'Application for Transfer into the Bachelor of Laws (Honours) Program (2021/2022)' (2021) <https://documents.uow.edu.au/content/groups/public/@web/@lha/@law/documents/doc/uow262656.pdf>; regarding 16,000 words, see 'Program Management: Bachelor of Laws (Honours)' (n 23).

[35] 'Guidelines for Honours Programs', *Australian Catholic University* (Web Page, 25 September 2019) <https://archives.acu.edu.au/handbook/handbooks/handbook_2019/general_information/guidelines_for_honours_programs.html>.

[36] Ibid; 'Handbook: Law (Honours)' (n 34); 'Law Honours Pathway' (n 33).

[37] 'Sydney Law School Handbook 2021: Honours in the Bachelor of Laws', *The University of Sydney* (Web Page, 12 November 2020) <https://www.sydney.edu.au/handbooks/law/undergraduate/honours.shtml>.

more clarity for the benefit of prospective students. Conversely, some Australian universities do not require an Honours thesis in law, but it is available as an option. For example, the Australian National University and the University of South Australia enable students to choose whether or not they do an Honours thesis.[38]

As noted at the outset of this section, the University of Melbourne and the University of Western Australia offer a JD only instead of an LLB or LLB (Graduate Entry).[39] Similarly, Murdoch University clarifies that its JD replaces the LLB (Graduate Entry) to reflect UK and Asian courses.[40] Research of Australian university websites indicates that about half of Australian universities offer a JD program, often alongside an LLB combined degree program and as a replacement to a previous LLB (Graduate Entry) (for a list of Australian universities we reviewed offering a JD, see Appendix 1). No Australian universities in 2021 promoted a JD with Honours option, and this has not been possible under the AQF guidelines since 2015. Bond University clarifies that students who enrolled in the JD before 2015 could be awarded with Honours, while students who enrolled in or after 2015 could be awarded with Distinction.[41] The University of New South Wales and the University of Western Australia advertise a JD with Distinction option.[42] While it appears generally that Distinction in a JD is awarded based upon GPA or WAM, as noted previously, the minimum for these is anticipated to show some variation amongst institutions, though not in such a stark manner as is the case with Honours eligibility. At the University of New South Wales, the JD with Distinction has been offered since 2015.[43] The 2021 Handbook drops references to '2015' and describes their JD with Distinction policy thus:[44]

> **Juris Doctor with Distinction Policy**
> Students who complete the Juris Doctor Program will be eligible for the Juris Doctor with Distinction.
>
> To be awarded the Juris Doctor with Distinction, students:
>
> 1) must achieve a Distinction WAM of 75%. The Distinction WAM will be calculated using the WAM from core courses as 60% and the WAM from elective courses as 40%, of which courses completed at UNSW ONLY will count towards the Distinction WAM calculation.
> 2) NOT been found guilty of plagiarism nor serious misconduct.

---

[38] 'Honours in Law' (n 26); 'Bachelor of Laws (Honours)' (n 26). It is important to acknowledge again that it is possible to be awarded Honours in law without doing an Honours thesis, and the AQF requirements are silent on this.

[39] 'Juris Doctor' (n 22); 'Juris Doctor (JD)' (n 22).

[40] 'Graduate Entry to Law/LLB/Juris Doctor', *Murdoch University* (Web Page) <https://askmurdoch.custhelp.com/app/askmurdoch/answers/detail/a_id/1202/~/graduate-entry-to-law-%2F-llb-%2Fjuris-doctor>.

[41] 'Law Honours/Distinction Information', *Bond University* (Web Page) <https://bond.edu.au/law-honours-distinction-information>.

[42] 'Handbook 2018: Juris Doctor — 9150', *UNSW Sydney* (Web Page) <http://legacy.handbook.unsw.edu.au/postgraduate/programs/2018/9150.html>; 'Course Details: Juris Doctor', *The University of Western Australia* (Web Page) <https://handbooks.uwa.edu.au/coursedetails?id=c12#rules>.

[43] 'Handbook 2018: Juris Doctor — 9150' (n 42).

[44] 'Handbook: Juris Doctor — 9150', *UNSW Sydney* (Web Page, 2021) <https://www.handbook.unsw.edu.au/postgraduate/programs/2021/9150?year=2021>.

3) NOT have more than one failure in the JD program.

Note also that it is often the case that eligibility for an award of Distinction is tied to a larger institutional policy.

V DISCUSSION

As outlined, there is significant variation and inconsistency in approaches to the award of Honours among Australian law schools. Australia is unique amongst comparable jurisdictions for the breadth of its hybrid approach.[45] This diversity in approaches can be attributed to multiple factors, including law school academics taking a considered position based on their contemporaneous needs; wider institutional responses to regulatory ambiguity, including the need to respond to the 1999 Bologna Declaration; an emphasis on competitiveness pursued by Commonwealth governments in the years since the formation of TEQSA; and market pressures and feedback generally.[46] Backer and Benckendorff suggest that, while Honours programs across university disciplines as a whole continue to receive support despite intensive rationalisation activities at some institutions, current debate is largely financially driven, especially amongst research-intensive universities.[47]

Another perspective on the diversity in law is that law is not unique, and reflects the situation generally in Australia with the way that Honours is undertaken across most undergraduate programs.[48] Previous research identifies that Honours is misunderstood across multiple disciplines, and diverse approaches to Honours exist across all programs, including amongst different universities even when the program may be the same in most other respects (business degrees, nursing degrees, engineering degrees, etc).[49] Consistent with this review of law, the variation in Honours approaches even extends to the assessment, marking and grading of the Honours thesis itself.[50] This could lead to problems around how a program from one institution is recognised by another institution (including overseas), with the potential for confusion about the development of skills and competencies that are assumed to be (based on the AQF Level 8 criteria) part of the Australian Honours degree curriculum.

For example, Manathunga et al argue that despite the significant diversity in the models of Honours in Australia and globally, they share (assumptively) a common goal of transforming

[45] Note that New Zealand also has what may be termed a 'hybrid' approach to Honours amongst some institutions, including in law, though it is not as stark. There is also diversity amongst UK institutions/jurisdictions. A more in-depth comparative study between New Zealand, select UK jurisdictions and Australia is being considered by the LEAD executive.
[46] See, eg, Horstmanshof and Boyd (n 4).
[47] Backer and Benckendorff (n 2) 51. See also Horstmanshof and Boyd (n 4).
[48] However, it is worth noting that a standard LLB is a four-year program and involves a degree of complexity that warrants a Level 8 classification in a way that other three-year Bachelor degrees do not.
[49] Margaret Kiley et al, *The Role of Honours in Contemporary Australian Higher Education* (Report, Australian Learning and Teaching Council, Department of Education, Employment and Workplace Relations (AU), May 2009).
[50] Barron and Zeegers (n 3) 42.

a student from 'knowledge acquirer to knowledge creator'.[51] This is consistent with the conventional emphasis in Australia on Honours being a preparation for higher research. However, as Manathunga et al note, in more professionally orientated programs there appears to be considerably more emphasis placed on developing advanced disciplinary knowledge of immediate benefit to the workplace at the expense of developing research skills and undertaking independent research.[52] This is reflected in the diverse approaches to Honours in law identified in this study. The implications of this for the future may be profound. Manathunga et al argue:

> The priority appears to be that graduates should be more immediately work-ready in the sense of being able to practice effectively rather than generating new knowledge in a practice area, which, it is conventionally assumed, comes after developing a good knowledge of practice. *This could eventually be a problem, however, as more and more employers outside the university sector expect honours graduates to be adept at knowledge production as well as acquisition*.[53]

Thus, there is a concern that if students who graduate with Honours are not being exposed to methods of 'knowledge production' in a systematic manner, this could in fact have repercussions for their employability, and the standing of the institution amongst employers. It could also have an impact on their ability to complete higher research programs successfully.[54]

Zeegers and Barron argue that the tension created by these two apparent purposes of honours — preparation for the workplace and/or preparation for higher research study 'raises issues of pedagogy as well as policy'.[55] The majority of students are not concerned with undertaking academic or research focused careers, but are concerned with developing domain knowledge, and the skills to apply that.[56] What does this mean for course content and the assessment and recognition of excellence? If the assumption remains that Honours should have a primary aim to prepare students for further research programs, is it even achieving that under the current approaches? The regulatory implications are not to be ignored. As Barron and Zeegers argue, a key aim of the establishment of TEQSA was to ensure a measure of consistency between degree programs within Australia, ensuring that a student was qualified to undertake postgraduate education at any other institution, and that scholarships could also be awarded in

---

[51] Catherine Manathunga et al, 'From Knowledge Acquisition to Knowledge Production: Issues with Australia Honours Curricula' (2012) 17(2) *Teaching in Higher Education* 139, 141.
[52] Ibid 145.
[53] Ibid (emphasis added).
[54] It is worth clarifying that while it may be a conventional 'expectation' that Honours graduates are able to generate new knowledge and use existing knowledge in new ways, in reality or practice it is more of an 'assumption'. See, eg, Barron and Zeegers (n 3) 41. Having said that, whether expectation or assumption, it is nonetheless problematic if students are not acquiring the expected or assumed skills, including from the perspective of actual program design. A counter argument may be that the PhD or Master's process provides a filter, and students who are lacking requisite skills can be identified early and provided remedial support. However, this does nothing to allay the fact that the original program does not meet expectations, or assumptions, and that a higher degree should be about expanding skills, not acquiring skills already assumed to have been developed.
[55] Margaret Zeegers and Deirdre Barron, 'Honours: A Taken-for-Granted Pathway to Research?' (2009) 57(5) *Higher Education* 567, 573.
[56] Horstmanshof and Boyd (n 4) 14.

an objective and consistent manner.[57] The current fractured approach to Honours explicitly calls into question a core assumption for its place.

Nick James, Dean of Law at Bond University describes the defences advanced in favour of the traditional approach to Honours in Australian law schools as 'not always persuasive', namely that the need for an additional year of Honours study is negated by the fact that the study of law is, by nature, 'commensurately more advanced' than other disciplines.[58] If a key rationale for Honours is taken to be preparation for further research, then, arguably, as Manathunga et al allude to,[59] students who do not complete a period of structured curricula designed to foster skills in knowledge acquisition are not fit to proceed directly to higher research upon the award of Honours.

Furthermore, James argues that the current approach is creating a 'signalling problem' for the law school market, leading to confusion amongst students about how best to evaluate the differing approaches to Honours and the impact of those approaches on their futures.[60] This confusion and anxiety felt by students around navigating the landscape of Honours in law can be identified in multiple online forums, such as in a recent post on the Reddit sub-Reddit 'r/auslaw', where a potential undergraduate student began a thread asking, 'Is an Honours Degree in Law Really Necessary?' The responses were, perhaps predictably, diverse, with a general level of confusion somewhat palpable.[61] The point is that students are concerned about making a decision that will not be detrimental to their future careers. Previous surveys conducted by LEAD in conjunction with the current review underpin the authors' suggestion that, in the case of whether or not to pursue Honours, material currently available on a faculty website, for example, is not always helpful in providing clear guidance as to the best decision to be made. To support students to achieve academically and professionally, the 21st century law school needs to provide options that are evidence-based, transparent, and reflect the needs of the current national and global marketplace.

Critically, James suggests the current diverse approach identified in this study may be resulting in some apprehension by employers, who may no longer see Honours as a key 'reliable indicator' of the quality of a graduate, given that Honours awarded post-2013 may simply indicate the student achieved consistently well in their general academic studies, depending on the institution.[62] Or it may indicate they completed a thesis and/or an additional year's study. An issue then is how does a time-pressed employer or Human Resources department make sense of this for hiring purposes? James cites comments by Ian Humphries, a partner with major law firm Ashurst in its Brisbane office, that are illuminating as to the potential for a disconnect:

---

[57] Barron and Zeegers (n 3) 40.
[58] James (n 1).
[59] Manathunga et al (n 51).
[60] James (n 1).
[61] See BunyipChaser, 'Is an Honours Degree in Law Really Necessary?' (Reddit, 21 October 2020 GST) <https://www.reddit.com/r/auslaw/comments/jf4sd1/is_an_honours_degree_in_law_really_necessary>.
[62] James (n 1).

> The differing approaches to Honours is an annoyance to us as we conduct our graduate selection process. We are aware of the differing approaches and try, as best we can, to take them into account when making selection decisions. As the approaches of faculties diverge, it becomes more difficult. … The award of Honours was, and from certain institutions still is, a point of real distinction and something which stands for quality and effort; something which a person could and should take particular pride in. I think there is a real risk with the way some institutions are approaching it for Honours to be devalued. This would be a real shame.[63]

One implication of the above comment is that, because Honours can potentially no longer be seen as an indicator of quality, as it lacks a collectively accepted definition of how the standard should be met and consistently applied in practice, the fallback position is to prioritise 'certain institutions' over others in the recruitment process (at least by the 'top tier' firms), regardless of Honours. This process traditionally advantages the Group of Eight law schools, whose graduates are over-represented in top tier firms, even when their own approaches may be contributing to the market confusion. On the other hand, an institution that makes it relatively easier for students to gain Honours may actually be: contributing to a situation where the program is, in comparison with 'certain institutions', ultimately seen to be of little worth amongst sectors of the marketplace; contributing to the devaluing of other Honours programs broadly, and; actually disadvantaging their students in the marketplace by removing any perceived competitive advantage the award of Honours has once it is compared with a program that is considered 'high value', and standing for 'quality and effort'. Clearly, a deeper understanding of what a 'high value' Honours program looks like from the perspective of an employer is needed. This is critical.

Relatedly, Backer and Benckendorff argue that the 'rationalisation' of Honours programs broadly is encouraging questioning of their 'perceived value', not just in the domestic job market, but overseas as well, particularly when compared with Master's programs (coursework or research).[64] They argue that globalisation and demands for a mobile workforce have provided an 'impetus for harmonising qualifications between countries'. Given the reliance on the international student market, and the mobility of graduates, ensuring some consistency between jurisdictions nationally and internationally should be an important consideration in planning.[65]

Broadly, resolving tensions around which model of Honours should best be pursued in Australian undergraduate education (not just law) has been described as a great 'unsolved dilemma'.[66] Honours in law has been a topic of some consternation amongst law academics since at least 2011. There are overwhelmingly genuine commitments from law schools to provide the best opportunities for their students, and this includes in the ways to recognise excellence. Nevertheless, this current review demonstrates that a shared concept of what constitutes 'best practice' or 'excellence' in awarding Honours in law remains elusive.

---

[63] Ibid.
[64] Backer and Benckendorff (n 2) 51.
[65] Ibid.
[66] Horstmanshof and Boyd (n 4) 19.

Critically understanding the implications of this across multiple spheres requires further nuanced and sensitive research.

VI CONCLUSION

The authors' review of Australian university websites in July 2021 shows that the LLB with Honours is the most commonly provided law program in Australia (usually combined with another program). The review identifies a significant diversity in approaches to how Honours is assessed and awarded in Australian law schools, and these findings are consistent with the previous surveys of Honours practice in law schools undertaken by LEAD on behalf of its members.

Critically, there seems to be no commonly agreed definition of the purpose of Honours in law in the 21st century Australian law school. Is it to provide a pathway into higher research? Is it meant to distinguish excellence? Is it a tool by which students may be engaged deeper in the general learning process?[67] Is it primarily a means of differentiating institutions? Is it simply a means of further categorising students so they can be streamed efficiently into the workplace?

Similarly, there is no agreed model on how to best achieve the above outcomes, particularly as to how institutions can recognise excellence in such a way that value and quality is immediately identifiable by stakeholders. The inability to discern a common agreed meaning, model and associated value of the Honours degree in law, based on a critical consideration of evidence, encourages the suggestion that the current approach by some institutions may, through no direct fault of their own, be disadvantaging some students. This should give the legal academy pause.

The purpose of this brief article (and the conference presentation on which it was based) is to rekindle that conversation in light of a national and international legal education and legal practice landscape that has changed dramatically in the past two decades.[68]

Previous surveys conducted by LEAD on this topic, and this current review, were in response to direct requests from LEAD members to support them when considering policy and practice. This demonstrates the interest of the topic amongst legal academics and law school administrators. The question remains: where to from here? There is an urgent need for research to seek clarification on the views and concerns about the role of Honours — and excellence indicators more broadly — of, for example, employers, admitting authorities, advisory bodies, peak bodies, students (domestic and international) and academics.

The vision LEAD has is to identify and articulate an evidence-based framework that presents contemporary insights into what 'best practice' in recognising excellence in law may look like, which law academics can use to inform assessment and policy decisions undertaken in the future, while having confidence to differentiate and innovate. This would in turn encourage

---

[67] See, eg, Wendy Larcombe, 'Can Assessment Policies Play a Role in Promoting Student Engagement in Law?' (2009) 17 *Journal of the Australasian Law Teachers Association* 197.
[68] Zeegers and Barron (n 55) 573.

greater certainty for student and employment markets. It is hoped this framework and other future research in this field will be recognised as reflecting a collective endeavour (and the authors' research going forward will seek to engage widely, as always).

Appendix 1: Australian universities offering LLB with Honours and/or JD

Australian university	**LLB with Honours**	**JD**
Australian Catholic University	Yes	No
Australian National University	Yes	Yes
Bond University	Yes	Yes
Central Queensland University	No	No
Charles Darwin University	Yes	No
Charles Sturt University	No	No
Curtin University	Yes	No
Deakin University	Yes	Yes
Edith Cowan University	Yes	No
Flinders University	Yes	Yes
Griffith University	Yes	Yes
James Cook University	Yes	No
La Trobe University	Yes	Yes
Macquarie University	Yes	Yes
Monash University	Yes	Yes
Murdoch University	Yes	No
Queensland University of Technology	Yes	No
RMIT University	No	Yes
Southern Cross University	Yes	Yes
Swinburne University of Technology	Yes	No
University of Adelaide	Yes	No
University of Canberra	Yes	Yes
University of Melbourne	No	Yes
University of New England	Yes	No
University of Newcastle	Yes	Yes
University of New South Wales	Yes	Yes
University of Notre Dame	Yes	No
University of Queensland	Yes	No
University of South Australia	Yes	No
University of Southern Queensland	Yes	Yes
University of the Sunshine Coast	Yes	No
University of Sydney	Yes	Yes
University of Tasmania	Yes	No
University of Technology, Sydney	Yes	Yes
University of Western Australia	No	Yes
University of Wollongong	Yes	No
Victoria University, Australia	Yes	No
Western Sydney University	Yes	Yes

FOLLOW ME: USING SOCIAL MEDIA TO ENCOURAGE STUDENT ENGAGEMENT AT A REGIONAL LAW SCHOOL

Julia Day and Mary McMillan†*

ABSTRACT

Social media is increasingly becoming an integral part of people's lives. Traditionally, social media usage has been viewed as a form of entertainment. It is clear though that social media is being utilised in many divergent settings, including within universities. We know, anecdotally, that university students are using social media in an informal setting in parallel with their units of study. The question this paper explores is whether this usage could be successfully transferred to a more formal setting. To investigate the attitudes law students have towards using social media within their teaching setting, the authors distributed a survey to academic staff and students at the University of New England. This article provides a general overview of the student survey responses. For the purposes of this article, we isolate our analysis to the attitudes of law students towards using social media within their legal study units. The authors conclude that, given the current university environment, it is prudent to trial using social media platforms to incite student interest.

* Senior Lecturer, School of Law, University of New England.
† Senior Lecturer, School of Science and Technology, University of New England.

I INTRODUCTION

Since the start of the Covid 19 pandemic, higher education providers have rapidly moved to deliver education remotely, generally in an online format. This rapid online pivot has challenged academics to think about how to engage students outside of a traditional face-to-face setting.

Success in online education requires active engagement from both students and educators. In recent years social media has become an integral avenue for social interaction, peer-to-peer engagement and information sharing. Contemporary teaching methods are being adapted to include social media, with educators experimenting with incorporating social media into teaching and learning approaches. Introducing social media into legal courses may be a way to create interest and engagement, equip students with communication and collaborative skills, and build a sense of community.

This article reports preliminary findings on an investigation into the attitudes towards the use of social media as a teaching tool at the University of New England ('UNE'). Students and academic staff were surveyed about their social media habits and whether there was a perceived benefit or role for using social media in teaching. Although both staff and students expressed agreement that there is a role for the use of social media in teaching, the uptake of these tools to deliver legal education at UNE has been low. Because of this, the barriers and/or risks that might be preventing uptake, from both student and academic points of view, will be explored. It will be concluded that the survey results indicate there is interest in using social media as a teaching tool amongst law students at UNE.

The authors of this article have adopted the *Oxford Dictionary of English*'s definition of 'social media', which is 'websites and applications that enable users to create and share content or to participate in social networking'.[1] In other words, social media encompasses a wide variety of platforms and websites with which participants can engage. Some examples of social media platforms that will be examined in this article include Facebook, Instagram, YouTube and LinkedIn. Social media platforms and channels are ever-evolving, so the authors will focus on the platforms that are most popular with UNE Law students.

II SOCIAL MEDIA USE IN UNIVERSITIES

Education can't be separated from the social or technological contexts in which it exists. In this regard, it is no surprise that the higher education community is starting to discuss the use of social media, whilst adapting contemporary teaching methods to include social media. Commentators, however, have suggested higher education institutions have been slower at 'adopting or adapting to social media'.[2] Notwithstanding this, researchers have suggested that

[1] Taken from Patrick George et al, *Social Media and the Law* (LexisNexis, 3rd ed, 2020).
[2] Azeem Amin and Jegatheesan Rajadurai, 'The Conflict between Social Media and Higher Education Institutions' (2018) 10(3) *Global Business and Management Research* 499, 502.

social media has significant pedagogical potential in the higher education context.[3] It has the capacity to widen learning settings and disrupt the traditional boundaries of teaching, making information and resources widely accessible. It may also help foster real-world communication skills, support the formation of learning networks, blur the boundaries between formal and informal learning, support social interaction, and provide peer support.

Many of our current university students are known as 'digital natives', that is, people who have never known a world without the internet.[4] Surveys indicate that people now spend more than 12 hours per day interacting digitally.[5] There is no doubt much of this interaction takes place on social media sites. As an example, Facebook now has 2.45 billion monthly active users around the world.[6] In addition, LinkedIn has 673 million registered users,[7] whilst YouTube has 2 billion visitors a month.[8] YouTube broadcasts over 1 billion hours of videos per day to its audiences.[9]

These statistics demonstrate how social media is becoming more popular as people of all ages increasingly become users. Tertiary providers have realised the potential of social media for some time. In this setting, it is well established that social media is useful in terms of marketing, brand awareness and building up communities of practice.[10] Notwithstanding this, the literature indicates that social media is being used in university settings as much more than a brand awareness and marketing tool. The literature suggests that social media is being increasingly accepted as an important conduit between an institution and its wide range of stakeholders.[11] For example, surveys have indicated academics are already using social media within their teaching activities.[12]

It is apparent though that using social media within a tertiary teaching setting has not gained the traction it has in other contexts.[13] It has been reported there is considerable tension between tertiary institutions and their students in how they expect to use social media as a teaching and learning device.[14] Arguably, there is a mismatch between the way higher education institutions

---

[3] Michele Pistone, 'Law Schools and Technology: Where We Are and Where We Are Heading' (2015) 64(4) *Journal of Legal Education* 586, 594.
[4] For more information, see Murat Akçayır, Hakan Dündar and Gökçe Akçayır, 'What Makes You a Digital Native? Is It Enough to Be Born after 1980?' (2016) 60 *Computers in Human Behavior* 435.
[5] Raziye Nevzat, Yilmaz Amca, Cem Tanova and Hasan Amca, 'Role of Social Media Community in Strengthening Trust and Loyalty for a University' (2016) 65 *Computers in Human Behavior* 550, 550.
[6] George et al (n 1) 6.
[7] Ibid.
[8] Ibid 7.
[9] 'YouTube for Press: YouTube by the Numbers', *YouTube Official Blog* (Web Page) <https://blog.youtube/press>, taken from George et al (n 1) 1.
[10] Jenna Marie Condie, Ivett Ayodele, Sabirah Chowdhury, Shelley Powe and Anna Mary Cooper, 'Personalising Twitter Communication: An Evaluation of "Rotation-Curation" for Enhancing Social Media Engagement within Higher Education' (2018) 28(2) *Journal of Marketing for Higher Education* 192, 193.
[11] Ibid.
[12] Min Liu, Emily McKelroy, Jina Kang, Jason Harron and Sa Liu, 'Examining the Use of Facebook and Twitter as an Additional Social Space in a MOOC' (2016) 30(1) *American Journal of Distance Education* 14, 14.
[13] Amin and Rajadurai (n 2).
[14] Ibid.

attempt to communicate with students and the ways that students want to communicate with their higher education providers. We will now explore why this may be the case by analysing the benefits and barriers of using social media in this setting.

A *Introduction: Advantages and Disadvantages of Using Social Media in a Tertiary Setting*

As will become clear in the authors' survey results, the use of social media in a higher education setting creates polarising views and a wide range of perspectives. Generally, the key advantages of using these social platforms include improving student engagement and providing a substitute for the traditional 'coffee shop' interaction in the online setting.[15] The other advantages that will be considered in this article include democratising higher education and promoting the psychological needs of students. Creating a community of practice and helping students generate a positive digital footprint and ethical awareness are other advantages that have been previously explored in the literature.

In contrast, using social media within the tertiary teaching setting may cause concerns in terms of student and staff workload, as well as privacy and intellectual property issues. Mental health concerns of social media usage have also been explored in the literature, as have the adverse implications for academics, such as the loss of their intellectual property.

We will now explore these benefits and barriers in more detail, before discussing them in relation to our survey results.

B *Advantages of Using Social Media in a Tertiary Setting*

1 *Promoting Student Engagement*

The key themes surrounding the advantages of using social media in a tertiary setting generally relate to student engagement and interest. It is becoming increasingly clear, anecdotally and empirically, that student engagement is a concern in the tertiary environment.[16] One potential reason for this is the observation that traditional learning management systems largely fail to promote student engagement.[17] Social media integration may have a role to play in remedying this issue.

For example, Bhat and Gupta investigated how student engagement on social media affects the academic performance of medical students in India.[18] Their study ultimately finds that students' use of social media platforms within their medical studies promotes engagement and may

[15] Anastasia Stathopoulou, Nikoletta-Theofania Siamagka and George Christodoulides, 'A Multi-Stakeholder View of Social Media as a Supporting Tool in Higher Education: An Educator-Student Perspective' (2019) 37(4) *European Management Journal* 421.
[16] Ibid 422.
[17] Ibid.
[18] Ishfaq Hussain Bhat and Shilpi Gupta, 'Mediating Effect of Student Engagement on Social Network Sites and Academic Performance of Medical Students' (2019) 39(9/10) *International Journal of Sociology and Social Policy* 899, 899.

positively impact their academic performance.[19] Similarly, Stathopoulou et al opine that students today 'require highly engaging experiential learning methods and respond poorly to didactic approaches'.[20] Their survey results indicate that both academics and students support using social media within their tertiary classes.[21] In particular, they conclude that the use of social media can have a 'positive impact on students' deep learning experiences and engagement, as well as their enhancement of collaborative and organisational skills'.[22] In the authors' opinion, this is one of the key reasons the integration of social media usage should be considered in the tertiary environment.

2 *Creating a Community of Practice*

Another compelling reason to use social media in a tertiary context relates to the ability to create a community of practice. A community of practice can have many forms, but as a general proposition it enables a community or tribe to be formed around a particular area of interest.[23] It is clear that communities of practice are increasingly becoming the cornerstone of professional endeavours.[24]

In terms of using social media to create a community of practice, one of the over-arching benefits is that a group will not falter once a unit has been completed, as happens when a traditional learning management system is used on its own. In the current disrupted environment, it has never been more important for tertiary students to feel a sense of community and belonging.[25] Recent research has shown this sense of community and belonging is crucial to both 'social structure' and 'academic output'.[26] The importance of this concept has only been heightened as many more universities are entering into the online teaching space in light of the pandemic. In parallel with the concept of creating a community of practice is the notion of democratising higher education.

3 *Democratising Higher Education*

Students frequently use social media, so this may be one of the best ways to reach them in an increasingly busy world outside allocated class time.[27] The use of social media within higher education teaching goes some way to democratising higher education and allowing students to

---

[19] Ibid.
[20] Stathopoulou, Siamagka and Christodoulides (n 15) 423.
[21] Ibid 421.
[22] Ibid.
[23] See, eg, Tian Luo, Candice Freeman and Jill Stefaniak, '"Like, Comment, and Share": Professional Development through Social Media in Higher Education — A Systematic Review' (2020) 68(4) *Education Technology Research and Development* 1659, which discusses the evolution of a community of practice and the importance of relevance.
[24] Ward van Zoonen, Joost WM Verhoeven and Rens Vliegenthart, 'Understanding the Consequences of Public Social Media Use for Work' (2017) 35(5) *European Management Journal* 595, 596, 597.
[25] Brandon Brown and Joseph A Pederson, 'LinkedIn to Classroom Community: Assessing Classroom Community on the Basis of Social Media Usage' (2020) 44(3) *Journal of Further and Higher Education* 341, 342.
[26] Ibid.
[27] Pistone (n 3) 594.

have an equal role in their educational journey.[28] Traditionally, it has been accepted that the lecturer and the tertiary education provider are the sole sources of knowledge that needs to be imparted to students.[29] When utilising social media, student mentoring may be promoted as students can more directly help and interact with each other.[30] When social media is used, students and academics can both 'create, modif[y], transmit and share information'.[31] Autonomous learning is also promoted by utilising social media in tertiary courses.[32] Thus, social media usage in the tertiary environment helps aid the concept of education as not just a one-way interaction, and levels the playing field in terms of staff and student interaction.

In turn, 'social constructivist learning' may be promoted, where action and reaction can occur at the same time.[33] This allows lecturer and student interaction to take place consecutively and simultaneously.[34] If, for example, a university lecturer posts about a new case, current legislation, or legal concept, social media gives students the opportunity to directly interact with teaching staff in a more fun and informal way. This may help reinforce the principles and formal teaching that takes place within a tertiary unit.[35] In parallel with this concept is the possibility that social media usage within tertiary units may promote mental health benefits for students.

4 *Fulfilling the Psychological Needs of Students*

Interaction on social media has been reported as fulfilling the psychological needs of students.[36] In other words, social media usage within the higher education setting may promote 'relatedness and competence'.[37] This may help generate increased student enthusiasm, which provokes engagement[38] whilst building student self-confidence[39] in a less threatening environment.[40] The use of social media may also encourage independent learning, where 'learners becom[e] more autonomous and independent from their teachers by space and time'.[41] Independence is important in the modern world and may in turn help create a well-rounded professional.

---

[28] Amin and Rajadurai (n 2) 506.
[29] Ibid.
[30] Abu Elnasr Sobaih et al, 'To Use or Not to Use?: Social Media in Higher Education in Developing Countries' (2016) 58 *Computers in Human Behavior* 296, 297.
[31] Amin and Rajadurai (n 2) 506.
[32] Stathopoulou, Siamagka and Christodoulides (n 15) 423.
[33] Amin and Rajadurai (n 2) 504.
[34] Ibid.
[35] Stefania Manca and Maria Ranieri, 'Facebook and the Others: Potential and Obstacles of Social Media for Teaching in Higher Education' (2016) 95 *Computers and Education* 216, 217.
[36] van Zoonen, Verhoeven and Vliegenthart (n 24) 596.
[37] Ibid.
[38] Ibid.
[39] Sobaih et al (n 30) 297.
[40] Stathopoulou, Siamagka and Christodoulides (n 15) 423.
[41] Ibid.

5 *Creating a Digital Footprint/Ethical Practice*

In the authors' opinion, one of the most compelling reasons for integrating social media into tertiary teaching is the importance that is now attached to an individual's digital footprint.[42] This is particularly the case for students who will soon be entering professional spheres of employment. Incorporating social media platforms into teaching and learning activities may help increase 'correct etiquette and ethical behaviour for communicating on social media platforms'.[43] Furthermore, in relation to law students, the use of social media whilst at law school may help promote access to justice.[44] As Curro and Ainsworth have noted, this notion will be promoted by students' 'mastering twenty-first century/contemporary tools for enhancing communication and developing collaboration'.[45] Thus, in order to create graduates for contemporary times, legal educators need to ensure graduates are 'competent users of the technology'.[46]

A working knowledge of the ethical obligations that relate to social media usage when acting as a professional is imperative in the modern context. Curtis and Gillen discuss this issue in relation to medical students.[47] They find that there is a blurring of lines between 'the personal and professional lives of medical practitioners and students'.[48] One of the most interesting aspects of their article is the discussion relating to the ethical duties aspiring doctors need to uphold.[49] Clearly, social media use may prejudice some of these duties, such as confidentiality.[50] Similar issues arise in the legal context; thus, this is an important point to be analysed in light of social media usage in the tertiary legal education context.

In turn, it is becoming increasingly important for people to manage their own brand when acting within a professional environment. Forbes argues there is now a responsibility for educators to model 'transparency, network literacy, sharing and participation, underpinned by ethical and social responsibility'.[51] Promoting online etiquette using communications on social media within an academic setting will be advantageous to the overall development of students.[52] This discussion indicates there are many compelling reasons to use social media in the tertiary setting. However, there are also concerns and barriers to doing so, and these will be explored in the next section.

---

[42] Dianne Forbes, 'Professional Online Presence and Learning Networks: Educating for Ethical Use of Social Media' (2017) 18(7) *International Review of Research in Open and Distributed Learning* 175, 187.
[43] Gina Curro and Nussen Ainsworth, 'Social Media and Higher Education: Does Digitally Enabled Learning Have a Place in Law Schools?' (2018) 18(3) *Journal of the Scholarship of Teaching and Learning* 72, 73.
[44] Ibid.
[45] Ibid.
[46] Ibid 80.
[47] Fiona Curtis and Julia Gillen, '"I Don't See Myself as a 40-Year-Old on Facebook": Medical Students' Dilemmas in Developing Professionalism with Social Media' (2019) 43(2) *Journal of Further and Higher Education* 251, 251.
[48] Ibid 252.
[49] Ibid 253.
[50] Ibid.
[51] Forbes (n 42) 178.
[52] Curro and Ainsworth (n 43) 78.

C *Disadvantages of Using Social Media in a Tertiary Setting*

Even though there are clear benefits of using social media within the university teaching environment, there are also clear concerns that need to be explored and understood by educators. The main themes relating to the disadvantages of social media use within universities relate to time management, privacy and increased connectivity.

1 *Increasing Workload*

One of the key concerns with using social media in a teaching setting relates to adding additional time pressures to student workloads that are already stretched.[53] Social media usage can be very time-consuming and cause significant interruptions through increased messages, posts and requests.[54] This is a significant concern and one that several law students posited in the survey conducted by the authors. This, in turn, may have impacts on the mental health of both tertiary students and staff.

2 *Negatively Impacting Mental Health*

Even though this article has previously explored some of the positive impacts of social media usage on mental health, it is becoming increasingly apparent that there may also be adverse mental health implications. For example, some of the negative impacts of social media use can include addictive behaviours, mental health issues and the fear of missing out.[55] Notwithstanding this, Alt concludes that social media use in the tertiary setting could help facilitate learning.[56] In addition, she recommends further analysis on this issue,[57] noting, for example, that 'future studies should explore how [a] technology-based constructivist learning environment can leverage the benefits of using technology to support student engagement in class and by doing so decrease destructive social media engagement during class'.[58] Essentially, however, Alt finds that the ill-effects of using social media in a tertiary setting are more likely to be found in students who already have pre-existing concerns.[59] We will now explore some of the concerns academics hold about integrating social media into their teaching practices.

3 *Concerns from Academics' Point of View*

From academics' point of view there are several concerns relating to incorporating social media into their teaching practices. For example, the literature documents trepidation relating to the loss of intellectual property on content,[60] and a lack of training and familiarisation with social

---

[53] van Zoonen, Verhoeven and Vliegenthart (n 24) 596.
[54] Ibid 597.
[55] Dorit Alt, 'Students' Wellbeing, Fear of Missing Out, and Social Media Engagement for Leisure in Higher Education Learning Environments' (2018) 37 *Current Psychology* 128, 128.
[56] Ibid 137.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Forbes (n 42) 177.

media platforms.[61] Other commentators note the use of social media is yet another barrier to academic engagement and achievement.[62] In addition, it is argued using social media within university courses may promote a lack of credibility of the overall course.[63] Another concern that is relevant to both teaching staff and students in regard to using social media in teaching is privacy.

Privacy concerns are often noted as a rationale for why social media use should be jettisoned in the tertiary teaching environment.[64] Arguably, utilising social media in the tertiary education setting may increase the risk of exposing the private lives and information of staff and students.[65] In the authors' opinion, these are legitimate concerns that need to be addressed before there is any incorporation of social media usage into tertiary education units.

4 *Gaps in Literature*

After conducting a comprehensive literature review on this topic, it became clear to the authors that there is a dearth of literature on using social media in the tertiary teaching space. There is a particular lack of academic analysis of student opinions of using social media in their studies,[66] and a lack of discussion of the attitudes of tertiary educators towards using social media as an engagement tool.[67] In Stathopoulou et al, the authors also contend there is inadequate analysis — if any — of 'the benefits of using social media in both the delivery and assessment of courses in higher education'.[68] It is clear that, given the disrupted context we are living in, more research needs to be carried out in this regard.

As previously discussed, there are both benefits and barriers to incorporating social media into the tertiary teaching space. Notwithstanding this, there is little doubt the popularity of social media is rising exponentially. The dovetail to this is that student engagement in the tertiary setting appears to be decreasing. With the proliferation of online learning due to Covid 19 and student demand, it has arguably never been as important to promote student engagement. This, coupled with the increasing number of students who are first-in-family university attendees and are unfamiliar with higher education, are compelling reasons for utilising social media in the tertiary teaching setting. We will now move to the results of the survey instrument, which will build on the benefits and barriers that have been discussed in the relevant literature.

---

[61] Manca and Ranieri (n 35) 217.
[62] Sobaih et al (n 30) 298.
[63] Forbes (n 42) 186.
[64] Sobaih et al (n 30) 298.
[65] Ibid.
[66] Stathopoulou, Siamagka and Christodoulides (n 15) 422.
[67] Ibid.
[68] Ibid.

III SOCIAL MEDIA SURVEY

A *Methodology*

Between February and August 2020, the authors of this article ran an online survey for current academic staff and students at UNE.[69] It took approximately 15 minutes for participants to complete the survey. Participants were self-selecting, but needed to be either UNE staff or students aged over 18 years. They were contacted and recruited in several ways. An email from the central administrative team at UNE was sent to all current students and staff asking them to participate in the survey. The survey link was also posted on a selection of social media sites. Due to low survey participation rates and the large numbers of applicable UNE students, the researchers tried to recruit as many participants as possible.

The survey response was excellent: 106 UNE academic staff and 1,073 UNE students completed the survey. In this article, the researchers will focus on the 132 law student responses. Of the law student respondents, 37 were male, 94 female and 1 identified as non-binary. The authors acknowledge that there may be some bias with the final results as this was an online survey asking recipients about social media usage.

The survey instrument that was placed on Qualtrics comprised 17 questions. The first part consisted of six questions to collect participant demographics such as age, gender, general course of study and employment status. Academic staff were also asked the level at which they were employed. The second part of the survey asked students which social media platforms they use in their personal and professional lives. It then asked participants to document the types of social media with which they engage on a personal and professional level. Students and staff were asked for their attitudes towards the role of social media in a teaching and learning setting, and, in addition, academic staff were surveyed on how they use social media in their teaching, engagement and research activities. Academics were also asked about the main incentives and barriers in terms of using social media in their professional roles. Students were asked to document and reflect on the social media usage in their units and courses, and to make suggestions on how social media could be further utilised in their courses. Students were then asked if they would like to see social media utilised more extensively in their studies.

1 *Data Collection and Analysis*

Overall, the study employed a mixed-methods approach. The primary data source was survey responses to a mix of multiple-choice, yes/no, Likert-scale and open-ended questions. All responses to the survey were anonymous, with some background demographic information collected to provide a better understanding of the users of the platforms. The survey generated data for both quantitative and qualitative analysis. Regression analysis was used to analyse quantitative survey data and thematic analysis used to analyse qualitative data.

---

[69] Reference: HE20-011; approval date: 5 March 2020.

B *Survey Results*

This article will focus on the attitudes of UNE Law students towards the benefits and barriers of using social media within a teaching setting. We will now present the data and start some preliminary discussion based on the results. The percentages given reflect the responses from law students to the applicable question. When applicable, the results of the UNE student cohort as a whole will be presented in order to provide some context.

The first thing that was explored was how UNE Law students use social media in their personal lives, as shown in Table 1. Perhaps unsurprisingly all the survey participants used at least one form of social media on a regular basis. The results in terms of law students are predictable: 56% of participating law students noted they use Facebook often, whilst 26% use it sometimes. The next most popular social media platform for law students was YouTube: 39% of law students noted they use this platform often and 46% use it sometimes. Instagram and WhatsApp were the other popular social media platforms for law students: 37% of law students use Instagram often and 25% use it sometimes, whilst 25% use WhatsApp often and 26% use it sometimes. As you can see in the below dataset, the results between law students and other UNE students are fairly consistent.

Table 1: Students: What social media platforms do you use in your personal life?[70]

Platform	Law student respondents: often	Law student respondents: sometimes	All UNE student respondents: often	All UNE student respondents: sometimes
Facebook	56%	26%	57%	26%
YouTube	39%	46%	51%	44%
Instagram	37%	25%	36%	25%
WhatsApp	25%	26%	25%	28%

In terms of the social media platforms UNE Law students use in their professional lives, the most popular platforms are LinkedIn and YouTube, as shown in Table 2. The results indicate 20% of UNE Law students use LinkedIn often and 36% use it sometimes. In relation to Facebook, 18% use it often and 25% use it sometimes. Aside from some anomalies with YouTube, the results are fairly consistent between UNE Law students and other UNE students.

Table 2: Students: What social media platforms do you use in your professional life?[71]

Platform	Law student respondents: often	Law student respondents: sometimes	All UNE student respondents: often	All UNE student respondents: sometimes
Facebook	18%	25%	18%	31%
YouTube	8%	23%	15%	33%
LinkedIn	20%	36%	12%	26%

[70] Percentages relate to all student responses. Note students could select multiply platforms they engage with.
[71] Percentages relate to all student responses. Note students could select multiply platforms they engage with.

As can be gleaned from the above data, UNE students are using social media in both their personal and professional lives. Students are familiar with the platforms and there appears to be consistency with which platforms they use. This preliminary data suggests the incorporation of social media into teaching platforms at UNE would not present barriers in terms of the ability of students to use the platforms.

The survey's next set of questions relate to whether students think social media usage could be translated into a teaching and learning context. Anecdotally, students utilise social media in an informal context outside the formal learning management systems — usually using Facebook or WhatsApp groups. Therefore, the researchers sought to ascertain two things: first, to what extent is social media already being formally incorporated into teaching and learning at UNE; and second, is there an appetite for utilising these platforms within this setting.

To get a more accurate summation of how social media is used at UNE Law we asked academic staff if they use social media platforms within their teaching. Concurrently, we asked students what they have observed being used.

Only a small majority of academics at UNE Law use any form of social media in their teaching, as shown in Table 3. According to the results of the survey, the most popular social media platform that UNE Law academics use within their teaching is YouTube: 10% of UNE Law academic respondents reported that they use YouTube often, whilst 43% use it sometimes. Furthermore, 10% of UNE Law academic respondents noted they use Facebook and Twitter sometimes. From the survey responses it appears that social media is being used in a teaching context by legal academics, albeit to a limited extent.

Table 3: Academic staff: Which social media platforms have you used as a teaching instrument/aid in your work at UNE?

Platform	Law staff respondents: often	Law staff respondents: sometimes	All UNE staff respondents: often	All UNE staff respondents: sometimes
YouTube	10%	43%	23%	29%
Facebook	0%	10%	1%	8%
LinkedIn	0%	0%	0%	0%
Twitter	0%	10%	0%	18%

The law student observations are slightly different, as shown in Table 4, but there is certainly some correlation. Law students noted that they see UNE Law academics using YouTube and Facebook within their classes: 11% observe YouTube being used often, with 36% reporting it being used sometimes. The same proportion of 11% of law student respondents observe Facebook being used often in teaching, with 23% observing occasional usage. Interestingly, from the data it appears that lecturers in other disciplines use social media more extensively than those at UNE Law.

Table 4: Students: What social media platforms have you observed being used in teaching?[72]

Platform	Law student respondents: often	Law student respondents: sometimes	All UNE student respondents: often	All UNE student respondents: sometimes
YouTube	11%	36%	29%	46%
Facebook	11%	23%	7%	26%

The next question sought responses relating to the value perceived by UNE Law students in using social media within their classes. The responses from students, shown in Table 5, reflect that the majority think there is at least some value to using social media as a teaching tool.

Table 5: Students: Is there value for social media usage in teaching?

Response	Law student respondents	All UNE student respondents
Lots	31%	29%
Some	52%	54%
None	17%	17%

We next wanted to investigate why this was. In other words, what are the key benefits for using social media within a teaching and learning setting. There are four things that both law staff and students agree upon as being potential benefits, although they rank these differently. From the students' perspective, shown in Table 6, these four are: facilitating conversation between lecturers/students (48%); building a sense of community (47%); inspiring interest in subject matter (40%); and making information more accessible (42%). Interestingly only 14% of law students reported that using social media in a teaching setting has no benefits.

Comments from participants reflect the idea that using social media could help students, particularly those studying online, to feel like part of a community or cohort. One student respondent noted that 'social media replaces the physical student cafe and hangout environment'. Another student respondent noted:

> Social media has become the platform for sharing and learning in any other format. Students today are used to taking in information in these formats and skills in using social media for academic and professional reasons are becoming more necessary in the workforce. Social media also encourages creativity and individuality as you use platforms to present what you're working on. To further teach and encourage students to use these platforms for their professional development and to interact with them in the ways they most easily communicate would be a benefit.

Table 6: Students: What benefits do you think social media has in a teaching setting?[73]

Benefit	Law student respondents	All UNE student respondents
Facilitate conversation between lecturers/students	48%	45%

[72] Percentages relate to all student responses. Note students could select multiply platforms they have observed being used.
[73] Note students could choose multiple responses.

Build a sense of community	47%	41%
Inspire interest in subject matter	40%	38%
Make information more accessible	42%	39%
No benefits	14%	12%

One aspect of considerable importance is how both students and staff perceive the use of social media in their university courses. To some extent, our results affirm studies that have been previously undertaken. For example, in Al-Qaysi et al,[74] the authors' results show that 'information seeking, social presence, and academic and social activities are among the most positive effects of social media'. In contrast, they also show that 'negative feelings, reduction of cognitive development, social isolation, and security concerns are among the common negative effects'.[75] Of interest to the researchers of this project is the comment made by Al-Qaysi et al that there has been inadequate academic analysis of the student opinions of using social media in their studies.[76]

Alongside these benefits we also wanted to identify what barriers students could see in the use of social media in the tertiary education setting. As shown in Table 7, UNE Law students see the biggest barrier as being concerns about privacy in the online world. The other barriers identified as relevant by the UNE Law student respondents are productivity concerns (34%), interruption of work/life balance (26%) and lack of time (24%). Interestingly, lack of knowledge or lack of access are not seen as significant barriers to using social media in the teaching and learning setting.

Table 7: Students: What are the barriers to social media use in the teaching/professional setting[77]

Barrier	**Law student respondents**	**All UNE student respondents**
Privacy concerns	55%	49%
Impediment to productivity	34%	33%
Interruption of work/life balance	26%	29%
Lack of time	24%	26%

In relation to the possible barriers, there were several comments that reflect the privacy concerns held by individuals, and the idea that using social media just gives students one more thing that they have to check and keep up with. One student respondent noted: 'I can see how perhaps there might be benefits, but the overload would be too much. Is the info on Moodle, email, Facebook etc — what if I miss something on one platform because it's not on others. Too much.' Along the same lines, another student respondent noted that 'the increase of multiple streams of information can cause fractioning of core communication'. Missing

[74] Noor Al-Qaysi, Norhisham Mohamad-Nordin and Mostafa Al-Emran, 'What Leads to Social Learning?: Students' Attitudes towards Using Social Media Applications in Omani Higher Education' (2020) 25(3) *Education and Information Technologies* 2157, 2159.
[75] Ibid.
[76] Ibid.
[77] Note students could choose multiple responses.

essential information was a popular theme, with another respondent noting that they 'would be concerned about useless content burying essential information and becoming a long winded task to constantly monitor mostly useless chat for crumbs of crucial information'.

There are also concerns that information presented on social media is untrustworthy, and that it's difficult to verify information: 'I would never use social media for university and this is a privacy breach issue. Not interested and would not consider it.'

These are all valid points and provide guidance to how academics would need to structure any social media use within their teaching. In the authors' opinion, the use of social media within one's teaching would need to be supplementary and not central to teaching practices. Essential and core information should ideally be communicated clearly on the specific unit learning management system, and social media should not be relied upon.

To further gauge the attitudes of students, the survey asked if students would like to see teaching staff at UNE incorporate more social media into teaching practices, and how likely they were to engage with it. As shown in Table 8, law students are split on this issue, although most law students (57%) noted they would like to see social media used more at UNE.

Table 8: Students: Would you like to see social media used more at UNE?

Response	Law student respondents	All UNE student respondents
Yes	57%	51%
No	43%	49%

Prima facie, these results indicate that the majority of students would like to see an increase in the use of social media in their teaching and learning at UNE Law.

IV DISCUSSION

Within this article we have provided some preliminary data and discussion about how law students from UNE perceive social media being used in a teaching and learning setting. Most law students at UNE use social media in their personal and/or professional lives. They know how to use it and they have access to the technology.

Overall, using social media in the teaching and learning setting appears to be a polarising issue. Responses were often divisive, with students falling into one of two opinions. One camp sees there could be many benefits and they are willing to embrace these technologies. The students on the other side think there is little benefit to using social media at all and are unwilling to engage. Academics need to be aware of these differing attitudes if choosing to incorporate these methods into teaching.

One thing that came through strongly in the survey was the perception of social media as a waste of time, not as an avenue to access information or learn. Perhaps this reflects broader attitudes around what education/learning is and where it takes place? Arguably, some students see learning as ticking off specific outcomes/knowledge, rather than involving broader

immersion/investigation into a topic outside of the materials specifically provided by academic staff. So, if academics want to start using social media as a part of teaching it needs to have value that is transparent to students. Students need to be able to clearly see the connection between the formal course content and 'other' content that might be provided.

While the authors are not suggesting that social media replaces the role of other online learning systems, perhaps it could be used as another teaching tool that academics can add to their toolset. This approach has several potential benefits and can be an effective way to connect with our increasingly digitally connected students.

V CONCLUSION

As the authors' survey results demonstrate, the use of social media in a tertiary setting incites polarising views from students. This is unsurprising given the concerns commonly cited relating to social media use, such as privacy and time management issues. Even considering these concerns, the authors still contend the use of social media platforms is a viable option in terms of increasing student engagement. This is especially the case given the current university environment. University teaching has largely gone online since the Covid 19 pandemic. This means students are not subject to the usual informal engagement opportunities with each other and their educators. Using social media as a supplementary teaching tool allows students and academics to interact in an informal setting where issues can be explored in a friendly and interactive way.

However, university educators need to manage the risks when it comes to social media usage. In the authors' opinion, it would be disastrous to run a unit purely on social media without effective safeguards and a firm understanding of the possible risks. There also needs to be awareness of the workload ramifications for students: implementation of a social media presence should not become just another thing a student has to do. Essential unit information should not be placed onto social media. Instead, the social media platforms could be used to replace the bonding activities and engagement between academics and students.

THE MAINSTREAMING OF CLIMATE CHANGE AND THE IMPACT ON DIRECTORS' DUTIES

*Trish Keeper**

ABSTRACT

The New Zealand government recently enacted legislation that will make climate risk disclosure mandatory for approximately 200 organisations, including listed companies and certain other large entities. This article outlines the main features of the new laws. It also reviews the current requirements on boards to consider climate-related matters in their deliberations and in corporate disclosures, and concludes that the new legislation will provide increased protections for directors. However, globally and within New Zealand, there are evolving pressures on directors to consider other non-financial matters and New Zealand corporate law needs to be reformed to accommodate such pressures.

* Associate Professor of Commercial Law, Wellington School of Business and Government, Victoria University of Wellington.

I INTRODUCTION

New Zealand enacted the *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021* (NZ) ('the Act') on 27 October 2021.[1] However, only those parts of the Act that empower the External Reporting Board ('XRB')[2] to proceed with developing new climate standards are immediately in force. The passage of the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill ('the Bill')[3] through Parliament was relatively rapid as it was only introduced on 12 April 2021,[4] but there had been a significant degree of consultation on the legislation before its introduction.[5]

The Act is an omnibus bill as it amends the *Financial Markets Conduct Act 2013* (NZ) ('*FMC Act*'), the *Financial Reporting Act 2013* (NZ) ('*FR Act*') and the *Public Audit Act 2001* (NZ). The Act's principal objective is to broaden non-financial reporting by introducing a new requirement for certain *FMC Act* reporting entities ('FMC reporting entities') to make climate-related disclosures. The legislation reflects the New Zealand government's policy commitments to address the negative impacts of climate change. Other policy measures include the *Climate Change Response (Zero Carbon) Amendment Act 2019* (NZ) and the *Climate Change Response (Emissions Trading Reform) Amendment Act 2020* (NZ), which both substantially amended the *Climate Change Response Act 2002* (NZ). Together with the new Act, these measures will contribute to New Zealand achieving its 'nationally determined contribution under the Paris Agreement of 2015, which relates to climate change mitigation, adaption and finance'.[6] 'Nationally determined contributions' are public undertakings by each state party of the mitigation and adaption measures that each state agrees to work towards to achieve the Paris Agreement's temperature reduction goals.[7]

The enactment of this legislation also reflects the evolution of our understanding of climate change 'from a purely "ethical issue" or "environmental externality" to an issue that poses

---

[1] *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021* (NZ) received Royal Assent on 27 October 2021 ('*Climate-related Disclosures Act*').

[2] The External Reporting Board ('XRB') is an independent Crown entity that is responsible for the accounting, auditing and assurance standards in New Zealand. It was originally established under the *Financial Reporting Act 1993* (NZ), with continued existence under the *Financial Reporting Act 2013* (NZ) s 12 ('*FR Act*').

[3] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (30-1) (NZ), which was introduced under Standing Order 267(1)(a) because the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy ('Climate-related Disclosures Bill').

[4] The Climate-related Disclosures Bill (n 3) was referred to the Economic Development, Science and Innovation Committee after its first reading. This committee reported on 16 August 2021 and the Bill received its second reading on 28 September 2021, followed by the third reading on 21 October 2021.

[5] The Ministry of Business, Innovation and Employment ('MBIE') and the Ministry for the Environment issued a discussion document on 31 October 2019 outlining the proposals that underpin the policy of the Climate-related Disclosures Bill (n 3). Over 75 submissions were received. In MBIE, *Financial Sector (Climate-related Disclosures and other Matters) Amendment Bill* (Departmental Disclosure Statement, 30 March 2021) 10 ('Departmental Disclosure Statement') it is stated that this consultation process did not lead to any fundamental design changes for the proposed disclosure system, but minor modifications have been made to the Bill.

[6] Departmental Disclosure Statement (n 5) 7.

[7] *Paris Agreement to the United Nations Framework Convention on Climate Change*, adopted 12 December 2015, No 54113 (entered into force 4 November 2016) art 2(1) <https://unfccc.int/sites/default/files/english_paris_agreement.pdf>.

foreseeable financial risks and opportunities for companies across short, medium and long-term horizons'.[8] As the UK Financial Stability Board's Task Force on Climate-related Financial Disclosures ('TCFD') states in its 2017 final report, climate change is '[o]ne of the most significant, and perhaps most misunderstood, risks that organizations face today'.[9] Closer to home, the Governor of the Reserve Bank of New Zealand recently stated that climate change 'is a key risk to global financial stability' that has 'far-reaching implications for New Zealand's financial system'.[10]

This article outlines the structure of the rules for the new climate-related disclosures required to comply with new climate standards to be issued by the XRB. The article then overviews the main requirements of those climate standards. This is followed by an outline of the current regulations that apply to listed companies with respect to climate-related disclosures; this part of the article focuses only on listed companies and does not discuss other types of climate reporting entities. Finally, the article briefly discusses the obligations of New Zealand company directors to consider other non-financial factors — environmental, social and governance ('ESG') — in their decision-making.

II OVERVIEW OF THE NEW LEGISLATION

Part 1 of the Act inserts into the *FMC Act* a requirement for a climate reporting entity ('CRE') to make annual climate-related disclosures. It comes into force on the earlier of a date set by Order in Council or 27 October 2022, being the first anniversary of the Royal Assent with the effect that entities will need to comply from 2023 onwards.[11] CREs are a subset of FMC reporting entities,[12] which are already required by the *FMC Act* to keep accounting records and to annually prepare, have audited and disclose financial statements that comply with generally accepted accounting practice ('GAAP').[13] CREs are entities under s 461K of the *FMC Act* that are considered to have a higher level of public accountability and satisfy the requirements of the new s 461O. Section 461O encompasses large listed issuers (that are not otherwise excluded under s 461P), large registered banks, large credit unions and building societies, large insurers,

---

[8] Climate Governance Initiative and Commonwealth Climate and Law Initiative, *Primer on Climate Change: Directors' Duties and Disclosure Obligations* (Legal Primer, June 2021) 12 <https://www.tcfdhub.org/wp-content/uploads/2021/06/Primer_on_Climate_Change_Directors_Duties_and_Disclosure_Obligations_CGI_CCLI.pdf> ('*Primer on Climate Change*').

[9] Task Force on Climate-related Financial Disclosures, *Recommendations of the Task Force on Climate-related Financial Disclosures* (Final Report, June 2017) ii <https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf> ('TCFD Report').

[10] Adrian Orr, 'Progressing Climate Action by Driving Transformational Change' (Speech, 2020 Pacific Ocean, Pacific Climate Change Conference, 28 October 2020) <https://www.rbnz.govt.nz/research-and-publications/speeches/2020/speech2020-10-28>.

[11] *Climate-related Disclosures Act* (n 1) ss 2(2)–(3)(a).

[12] See definition of 'FMC reporting entity' in the *Financial Markets Conduct Act 2013* (NZ) s 451 ('*FMC Act*').

[13] *FMC Act* (n 12) ss 455–61D. Also, any company that does not fall within the definition of an FMC reporting entity, but is large as defined by the *FR Act* (n 2) s 45, or has public accountability, is required to prepare financial statements that comply with generally accepted accounting practice under the *Companies Act 1993* (NZ) ss 201–2.

and the managers of large managed investment schemes.[14] Large issuers are listed on New Zealand's Exchange ('NZX') with a market capitalisation over NZD60 million and are not an 'excluded listed issuer'. Originally, all listed issuers were caught by the definition of 'climate reporting entity', but in its report on the Bill, the Select Committee (the Economic Development, Science and Innovation Committee) restricted the application of the new rules to large listed issuers and excluded any issuer of securities that is only listed on a growth market or does not have any quoted equity or debt securities.[15] This change was a consequence of submissions that smaller businesses may struggle to meet the costs involved with making climate-related disclosures, and that listed issuers with a market capitalisation under NZD60 million are a very small percentage of NZX's total market capitalisation.[16] 'Large', for the purposes of entities other than listed companies and licensed insurers, means that, as at the balance dates of each of the two preceding accounting periods, the combined assets of an entity and its subsidiaries are more than NZD1 billion.[17] Licensed insurers qualify if they have greater than NZD1 billion in total assets under management, or if the combined annual gross premium revenue of the insurer and its subsidiaries is more than NZD250 million.[18] In addition, overseas incorporated organisations will be required to comply with the disclosure rules if their New Zealand business or group's New Zealand business falls into any of these categories.[19] The government has estimated that these thresholds for entities with higher levels of public accountability will ensure that 90% of assets under management in New Zealand are included within the disclosure system.[20] Approximately 200 organisations will be required to disclose their exposure to climate risk, including large Crown financial institutions such as ACC and the NZ Super Fund.[21]

The pt 1 provisions are inserted into the *FMC Act* as a new pt 7A. Part 7A contains the new disclosure rules requiring CREs to prepare annual climate-related disclosures, known as climate statements.[22] The new provisions also include obligations on boards to keep climate-related document records in order for the end-of-financial-year climate statements to be prepared.[23] The new rules, when in force, will sit alongside the existing financial reporting requirements in pt 7 of the *FMC Act*, which apply to all FMC reporting entities and will have the same deadlines as to preparation and filing that apply to financial statements prepared in

---

[14] *Climate-related Disclosures Act* (n 1) s 8 inserts a new *FMC Act* (n 12) pt 7A s 461S that sets out the meaning of large manager with respect to managed investment schemes. Section 461S is not yet in force.
[15] *Climate-related Disclosures Act* (n 1) s 8 inserts a new *FMC Act* (n 12) pt 7A ss 461P(2)–(5). These provisions are not yet in force.
[16] Economic Development, Science and Innovation Committee, *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill* (Final Report, 16 August 2021) 3–4 ('Select Committee Report').
[17] *Climate-related Disclosures Act* (n 1) s 8 inserts a new *FMC Act* (n 12) pt 7A s 461Q(1), which is not yet in force.
[18] *FMC Act* (n 12) s 461Q(2) (not yet in force).
[19] Ibid s 461Q(3) (not yet in force).
[20] James Shaw, 'New Zealand First in the World to Require Climate Risk Reporting' (Press Release, New Zealand Government, 15 September 2020) <https://www.beehive.govt.nz/release/new-zealand-first-world-require-climate-risk-reporting>.
[21] Ibid.
[22] *Climate-related Disclosures Act* (n 1) s 8 inserts a new *FMC Act* (n 12) pt 7A s 461Z, which is not yet in force.
[23] *FMC Act* (n 12) ss 461V–Y (not yet in force).

accordance with pt 7. Accordingly, climate statements or group climate statements must be completed within four months after the entity's balance date.[24] In addition, they must comply with the applicable climate standards and be signed and dated by two directors of the entity.[25] In order to ensure that climate statements are accessible to stakeholders and regulators, a copy of an entity's climate statement must be lodged with the Registrar of Financial Service Providers within the four-month deadline. For a registered scheme, climate statements must be prepared for each separate fund of the scheme.[26]

In addition, any CRE that is required to prepare an annual report under the *Companies Act 1993* (NZ) or any other enactment must include in that report a statement that the entity is a CRE and provide the URL or a link to the website where copies of the statements and any assurance report can be found.[27]

The Bill proposed a 'comply or explain otherwise' disclosure regime. This means that a business that reasonably determines that it is not materially affected by climate change does not have to comply with the regime, provided it complies with specific requirements.[28] However, the majority of the Select Committee removed the 'comply or explain otherwise' option from the regime as they were concerned it would result in 'substantially different reports and quality of reporting', which would undermine the 'goal of providing consistent and comparable climate reporting'.[29] Accordingly, any entity that falls within the definition of a CRE will need to disclose in accordance with the Act. The proposed extension in the Bill of the Financial Markets Authority's ('FMA') power to exempt any person or entity from compliance with certain parts of the *FMC Act* to include exemptions from compliance with pt 7A has been retained in the regime as enacted.[30] The FMA has powers to make an exemption subject to any conditions it thinks fit.[31]

The XRB is responsible for issuing the new climate standards and eventually new auditing and assurance standards that will apply to any assurance report in relation to a CRE's climate statements after October 2023. Part 3 of the Act amends the *FR Act* to give the XRB the power to prepare and issue these standards. These amendments are now in force,[32] and the XRB has already started consulting on the content of new climate standards.[33] At the time of writing, the final form of the standards has not been published, although it has been signalled that they will

---

[24] Ibid s 461ZA (not yet in force).
[25] Ibid.
[26] Ibid s 461ZC (not yet in force).
[27] Ibid s 461ZJ (not yet in force).
[28] Climate-related Disclosures Bill (n 3) cl 7 proposes a new *FMC Act* (n 12) s 461ZA.
[29] Select Committee Report (n 16) 6.
[30] *Climate-related Disclosure Act* (n 1) s 19, which is not yet in force, amends *FMC Act* (n 12) s 556.
[31] *FMC Act* (n 12) s 556(1).
[32] *Climate-related Disclosure Act* (n 1) s 2 provides that pt 2 of the Act (which authorises the XRB to issue climate standards) comes into force the day after the Royal Assent is granted, with the rest of the provisions (other than pt 2 and pt 4 sub-pt 1) commencing on a date or dates to be set by Order in Council, with a mandatory backstop of one year after the date of Royal Assent.
[33] XRB, 'First Ever Climate Change-related Disclosure Consultation Begins' (Press Release, XRB, 20 October 2021) <https://www.xrb.govt.nz/information-hub/news>.

align with the framework set out in the TCFD's final report, which is widely acknowledged as international best practice,[34] and is considered in more detail below. However, the new standards will include rules determining the extent to which entities will need to disclose greenhouse gas ('GHG') emissions. To protect against 'greenwashing', whenever an entity is required to report on GHG emissions, the entity's climate statements must be accompanied by a written assurance report by an assurance practitioner. As stated above, this requirement does not come into effect until three years from the date of Royal Assent.[35] An assurance practitioner who finds that a CRE is not complying with the climate standards relating to GHG emissions must report this to the XRB and the FMA within 20 working days of signing the report,[36] and it is an offence if an assurance practitioner fails to comply with this obligation.[37] The Act makes the FMA responsible for the independent monitoring and enforcement of the CRE's compliance with the new reporting standards.

Finally, the Act also allows the XRB to 'issue guidance on a wider range of environmental, social, governance (ESG) and other non-financial matters' that an entity may voluntarily apply. The purpose of any such publications by the XRB is to facilitate best practice reporting on such matters,[38] to improve 'the quality of disclosures on a range of issues beyond the types of information presented in financial statements'.[39]

III CONTENT OF THE CLIMATE STANDARDS AND TCFD'S REPORT ON CLIMATE-RELATED FINANCIAL DISCLOSURES

A *Climate Standards*

As stated above, the XRB is responsible for the issuance of the new climate change standards. The Act provides little guidance on the content of the standards, so the following discussion outlines the identified purposes of climate standards and the new disclosure regime generally. It then provides an overview of the TCFD's final report.

The new s 19B of the *FR Act* sets out the purpose of climate standards and climate-related disclosures. However, it provides little guidance as to the content of such standards. The provision states that the purposes of climate standards are to: provide for, or promote, climate-related disclosures in order to encourage entities to routinely consider the short-, medium- and long-term risks and opportunities that climate change presents for the activities of the entity; enable entities to show how they are considering these risks and opportunities; and enable investors and other stakeholders to assess the merits of such considerations. This provision is

[34] Departmental Disclosure Statement (n 5).
[35] *Climate-related Disclosures Act* (n 1) ss 2(3)(a)–(b).
[36] *Climate-related Disclosures Act* (n 1) s 8 inserts a new *FMC Act* (n 12) pt 7A s 461ZHB(2)(c), which provides that, in the case of a CRE that is an issuer of debt securities or a manager of a registered scheme, a copy of the report and the relevant climate statements must be sent to the manager. This provision is not yet in force.
[37] *FMC Act* (n 12) pt 7A s 461ZHB(5) (not yet in force).
[38] *Climate-related Disclosures Act* (n 1) s 40 inserts a new *FMC Act* (n 12) s 19A, which is not yet in force.
[39] Explanatory Note, Climate-related Disclosures Bill (n 3) 2.

effectively a restatement of the overall purposes of the new disclosure regime as discussed below.

More generally, the government policy behind the introduction of the Act is set out in the Explanatory Note to the Bill. This note expressly refers to the 'potentially disastrous effects of climate change for biodiversity and humanity', specifically citing the Intergovernmental Panel on Climate Change, which in 2018 'noted that human activities have already caused global warming of 1°C above pre-industrial conditions, and are on track to cause at least 1.5°C warming between 2030 and 2052'.[40] The note also identifies the impact of increased concentration of GHG as a factor 'resulting in further delay of temperature-reducing responses'.[41]

The Explanatory Note also identifies three specific purposes of the Bill, encompassing short-term to longer-term statutory objectives. Immediate and medium-term statutory purposes include: ensuring that the effects of climate change are routinely considered in business, investment, lending and insurance underwriting decisions; and helping entities demonstrate responsibility and foresight in their considerations of climate issues. With a longer time horizon, the third statutory purpose is moving to a smarter, more efficient allocation of capital and assisting in transitioning to a more sustainable, low-emissions economy.[42]

B *Recommendations of the TCFD*

As stated above, the XRB's climate standards will be aligned with the disclosure framework contained in the TCFD's 2017 final report.[43] The TCFD's framework structures its recommendations around four thematic areas that it considers represent the core elements of how organisations operate. These are governance, strategy, risk management, and metrics and targets. Governance refers to an entity's governance around climate-related risks and opportunities; strategy refers to the actual and the potential impacts of climate-related risks and opportunities on an organisation's business, strategy and financial planning; risk management includes the processes used by the entity to identify, assess and manage climate-related risks; and metrics and targets are used by the entity to evaluate and manage such risks and opportunities.[44]

The TCFD takes a broad view as to what are climate-related risks, and not only identifies and includes the physical impacts of climate change, but also classifies risks related to the transition to a lower-carbon economy as climate-related risks. Physical risks can be event-driven, resulting in direct damage to an entity and indirect disruption to its supply chain. They also may result from longer-term shifts in climate patterns, such as risks caused by sea-level rise

[40] Ibid 1.
[41] Ibid.
[42] Ibid 2.
[43] TCFD Report (n 9).
[44] Ibid 13.

disruption or chronic heat waves.[45] Risks from transitioning to a lower-carbon economy include varying levels of financial and reputational risks for entities. Such risks may result from policy changes that attempt to constrain existing activities that contribute to climate change, or policy actions that promote adaptations to climate change. Businesses may also face litigation or legal risk and, as the value of loss or damage arising from climate change grows, litigation risks are also likely to increase. Other 'transition risks' are those that arise from changes to technology, such as changes in the use of renewable energy, energy efficiency and carbon capture, and may inevitably mean that new technology will displace older systems and businesses.

Conversely, climate change will create opportunities for organisations through cost savings due to resource efficiency, development of new products, access to new markets and resilience building along the supply chain. Like risk, however, climate-related opportunities will vary depending on the region, market and industry in which an organisation operates.

The TCFD makes four high-level disclosure recommendations tied to each thematic area and 11 specific disclosure recommendations. An organisation should include disclosures on these matters in its financial statements to provide decision-useful information relating to climate-change risks and opportunities faced by that organisation.

IV CURRENT CORPORATE DISCLOSURE REQUIREMENTS

A *Current Reporting and Disclosure Requirements*

One of the advantages of mandating climate-related financial disclosures is that such disclosures become mainstream and routine in the same manner as FMC reporting entities' existing financial reporting obligations. Because financial climate-related disclosures will become compulsory once the relevant provisions of the Act are in force, this will remove any uncertainty for boards regarding whether and how climate-related factors should be disclosed.

Currently, climate-related risk disclosures may be included amongst other disclosures required to be made by listed companies. First, as stated above, New Zealand public issuers are required to prepare annual general purpose financial statements that comply with GAAP, which means the financial statements and accompanying information must comply with applicable financial reporting standards for that type of entity as issued by the XRB.[46] In order to comply with GAAP, general purpose financial statements must contain sufficient disclosures and information to make users understand the entity's financial position and performance. Currently, in meeting this requirement, boards need to consider whether climate change risks and opportunities should be disclosed in the same manner as any other information.

---

[45] 'Acute physical risks' refer to those that are event-driven, including increased severity of extreme weather events, such as cyclones, hurricanes and floods. 'Chronic risk' is the term used to describe physical risks due to longer-term shifts in climate patterns.

[46] *FR Act* (n 2) s 8(a), although s 8(b) provides that if there is no provision in applicable financial reporting standards in relation to a particular matter, then the statements or information must comply with an authoritative notice.

Also, any company that is listed on NZX must comply with NZX's *Listing Rules*. These require a listed company to disclose in its annual report the extent to which the company has followed the recommendations in NZX's Corporate Governance Code,[47] or provide reasons why not. The Code recommends that listed companies have a risk management framework and report on the company's material risks and how they are being managed. Accordingly, any board of a listed company that faces material climate-related risks to its business should include in the company's annual report information about these risks, together with a plan to manage them. The Code also recommends the company provide annual non-financial disclosures on ESG and economic sustainability factors and practices or explain why it has decided not to do so. NZX amended its *ESG Guidance Note* in December 2017 to refer to the TCFD final report's recommendations.[48] In addition, the FMA's handbook, *Corporate Governance in New Zealand*, recommends entities determine the appropriate level of non-financial reporting, considering the interests of their stakeholders and material exposure to ESG factors.[49]

Furthermore, the board of a listed company must ensure that all material information related to that company is disclosed to NZX promptly and without delay under the *FMC Act* and NZX's continuous disclosure rules.[50] Information relating to the climate-related risks and opportunities faced by the company must be disclosed if the information meets the threshold of material information. Material information is information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of the company's quoted financial products. The information must relate to the particular issuer or group of issuers or specific financial products, rather than to listed issuers or financial products generally.

Accordingly, corporate boards, especially boards of listed companies, are already required to report on and disclose climate-related risks to varying degrees. Also, reference needs to be made to the significant number of international and overseas bodies that recommend reporting of certain non-financial information or have published frameworks for entities when reporting on climate risks.[51] Despite these various recommendations and codes, or perhaps because of their number and variety, the government decided to implement mandatory climate-related financial disclosures. As the Explanatory Note to the Bill states, such disclosures will provide 'consistent, comparable, reliable and clear information about climate-related risks and opportunities that are, for the most part, not being made available to investors at present'.[52]

---

[47] NZX, *Listing Rules* (at 10 December 2020) Appendix 1: NZX Corporate Governance Code.
[48] NZX, *ESG Guidance Note* (at 11 November 2017) 8 <https://s3-ap-southeast-2.amazonaws.com/nzx-prod-c84t3un4/comfy/cms/files/files/000/003/274/original/ESG_Guidance_-_6_March_2018.pdf>.
[49] Financial Markets Authority, *Corporate Governance in New Zealand: Principles and Guidelines — A Handbook for Directors, Executives and Advisers* (Financial Markets Authority, 2018) 16.
[50] *FMC Act* (n 12) pt 5 sub-pt 4 ss 270–2; NZX, *Listing Rules* (n 47) ss 3.1–3.4.
[51] Eg, the Global Reporting Initiative Sustainability Reporting Standards, available at <https://www.globalreporting.org/standards>; the Integrated Reporting Framework, available at <https://www.integratedreporting.org/resource/international-ir-framework>; the United Nations Global Compact, which requires companies to commit and report against 10 universal principles, available at <https://www.unglobalcompact.org/what-is-gc/mission/principles>.
[52] Explanatory Note, Climate-related Disclosures Bill (n 3) 1.

B *Corporate Law and Climate-related Risk Considerations*

The amendments to the *FMC Act* to make annual climate-related disclosures compulsory for CREs responds to increasing expectations on directors from investors, employees, consumers and other stakeholders. The changes will also remove a great deal of the heat from the debate as to whether the current law governing directors' duties requires (or allows) directors to consider climate-related factors when exercising their decision-making duties. Once all parts of the Act are fully in force, directors will be under an obligation to disclose climate-related risks. This will heighten the degree of attention that directors must pay to climate change in the future and the extent to which they must take it into account in their decision-making. As the Hon James Shaw, Minister for Climate Change, stated, '[w]hat gets measured, gets managed — and if businesses know how climate change will impact them in the future they can change and adopt low carbon strategies.'[53]

The directors' duties set out in ss 131 and 137 of the *Companies Act 1993* (NZ) encompass the fundamental duties that establish the standard of behaviour required of directors. Section 131 sets out the duty of loyalty and requires directors to act in good faith and in what the director believes to be the company's best interests. However, s 137 is the most relevant duty,[54] providing that a director, when exercising powers or performing duties as a director, must exercise the care, diligence and skill that a reasonable director would exercise in the circumstances. To satisfy this standard of care, directors must have a general understanding of a company's business and be in a position to identify and consider the risks facing that business.[55]

In 2019, the Aotearoa Circle published a legal opinion provided by Chapman Tripp for the Sustainable Finance Forum. This opinion concluded that, as risks to a company from climate change are increasingly foreseeable, the standard of care that a court would expect of a reasonable director would be to take into account the specific climate-related risks confronting the company. The opinion acknowledged that climate change is a foreseeable financial risk and must be considered by directors in the same way as any other financial risk. In particular, where companies are affected by climate-related financial risk, directors' duty of care requires that they, at a minimum: identify that risk; periodically assess the nature and extent of the risk to the company, including by seeking and critically evaluating advice as necessary; and decide whether and, if so, how to take action in response, taking into account the likelihood of the risk occurring and possible resulting harm to the company.[56] This is particularly the case when a

---

[53] Shaw (n 20).
[54] Chapman Tripp, *Sustainable Finance Forum: Legal Opinion 2019* (Report, The Aotearoa Circle, 2019) 20 [89] <https://static1.squarespace.com/static/5bb6cb19c2ff61422a0d7b17/t/5f8e0158c25b93160fb19ae1/1603141987306/SFF_Climate%2BChange%2BRisk%2BLegal%2BOpinion_301019.pdf> ('Aotearoa Circle Legal Opinion').
[55] *R v Moses* HC Auckland CRI-2009-004-1388, 8 July 2011 at [404] *R v Moses* HC Auckland CRI-2009-004-1388, 8 July 2011 at [404]; *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC) [83].
[56] Aotearoa Circle Legal Opinion (n 54) 16–19.

company already has public disclosure obligations, such as under the *FMC Act*, NZX's *Listing Rules* or other statutory provisions.[57]

V SANCTIONS FOR NON-COMPLIANCE WITH THE NEW DISCLOSURE REGIME

Once the new disclosure regime is fully in force, any director of a CRE will need to ensure that the entity complies with it. Otherwise, the directors may be in breach of their duties under the *Companies Act 1993* (NZ) and may expose the company and themselves to a range of new civil and criminal sanctions for non-compliance with the *FMC Act* that have been 'designed to incentivise compliance'.[58]

Similar to the FMA's responsibility for the oversight of GAAP-compliant financial statement disclosures pursuant to pt 7 of the *FMC Act*, the FMA will also be responsible for the oversight and enforcement of climate-related disclosures. The Act sets out a new *FMC Act* offence that applies to both companies and directors when the entity has failed to comply with an applicable climate standard and the entity or directors know of the non-compliance.[59] In addition, there are new infringement offences, including failing to lodge climate statements within four months of the CRE's balance date and failing to make information available about climate statements in the company's annual report.[60] Non-compliance with the obligations to keep climate-related document records and to prepare and lodge climate statements may also give rise to civil liability.[61] Overall, the new penalties arise for non-compliance in the same manner as non-compliance with other financial disclosure provisions in the *FMC Act*.

VI NON-CLIMATE-RELATED SUSTAINABILITY CONSIDERATIONS

As outlined above, the Act also provides for the XRB to issue non-binding guidance on disclosures relating to ESG and other non-financial matters. Currently, under the *FR Act*, the Minister responsible for the administration of the Act (currently the Minister for Economic and Regional Development) may authorise the board to issue financial reporting standards that relate to certain non-financial matters, including the 'social, environmental and economic context in which an entity operates'.[62] As to what matters fall within the ESG framework, NZX's *ESG Guidance Note*[63] provides some guidance, amongst other sources,[64] although no

---

[57] Ibid 21–3.
[58] Department Disclosure Statement (n 5) 12.
[59] *Climate-related Disclosures Act* (n 1) s 8 inserts a new *FMC Act* (n 12) pt 7A s 461ZG, which is not yet in force. Under this provision, conviction in the case of an individual can lead to imprisonment for a term not exceeding five years or a fine not exceeding NZD500,000, or both, and for any other case, a fine not exceeding NZD2.5 million.
[60] *FMC Act* (n 12) ss 461ZI(4), 461ZJ(4) (not yet in force).
[61] Ibid s 461ZK(2) (not yet in force).
[62] *FR Act* (n 2) s 17(2)(a)(iii).
[63] NZX, *ESG Guidance Note* (n 48) 5–6.
[64] See, eg, 'Home', *Principles for Responsible Investment* (Web Page) <https://www.unpri.org>; 'Welcome to FTSE Russell Sustainable Investment Data', *FTSE Russell* (Web Page, 2021) <https://si.ftserussell.com>; New Zealand Institute of Directors and MinterEllisonRuddWatts, 'Stakeholder Governance: A Call to Review Directors' Duties' (White Paper, July 2021) ('IoD White Paper').

definitive list of such matters exists.[65] Environmental considerations may include environmental protection, biodiversity, water use, waste management and sustainable procurement. Social matters may include labour standards, human rights and modern slavery, diversity and inclusion, and consumer responsibility. Governance factors may include board composition, remuneration, ethics, anti-bribery and whistleblowing.

The final part of this article briefly considers the extent to which directors must take account of such matters when making decisions on behalf of the company. In contrast to climate-related risks, where the 'links between climate change and financial risk are becoming increasingly evident and inextricable',[66] the issue for directors is that ESG matters may pose less foreseeable financial risks and may conflict with the interests of shareholders. In addition, society's expectations and developments in the knowledge of material risks, together with changes in regulations and market practices, mean that the expectations placed on directors for good governance and prudent risk management are constantly evolving.

Accordingly, the issue that directors increasingly face is whether the failure to consider ESG matters when making decisions for the company could result in a court later finding them in breach of the duty of care or the duty to act in the company's best interests. However, directors who have approached ESG risks in the same manner as any other risk, taking the materiality of the risk into account when making decisions, obtaining independent advice as appropriate and taking concrete steps to address the company's exposure to financial risk from the particular risk, will likely be found to have discharged their duty to the company.

In respect of the duty of good faith, courts have tended to presume directors have acted in good faith in the absence of any evidence of self-dealing.[67] Concerning the more subjective part of the section, namely that directors must act in what the director considers to be the company's best interests, this then raises the question of what the company is in the context of this duty in New Zealand law? This is an issue that has been the subject of academic debate in New Zealand.[68] Chapman Tripp, in their legal opinion for the Sustainable Finance Forum, observes that, although New Zealand company law is generally understood to reflect the theory of shareholder primacy,[69] this does not prevent directors from considering climate change risk in their company management. A company is a different entity than its group of current shareholders, and the company's best interests may necessitate a longer-term perspective than focusing on present shareholders. Also, the current law does not preclude directors from considering wider stakeholder interests, provided they do not pursue those interests without regard to the company's interests. However, as Chapman Tripp concludes, it is

---

[65] NZX, *ESG Guidance Note* (n 48) 5.
[66] *Primer on Climate Change* (n 8) 12.
[67] *Holland Corporate Ltd v Holland* [2015] NZHC 1407, [39] (Duffy J); and see discussion in Aotearoa Circle Legal Opinion (n 54) 19–20.
[68] See, eg, in the New Zealand context: Peter Watts, *Directors' Powers and Duties* (LexisNexis, 2nd ed, 2015) ss 5.3–5.5; cf Susan Watson and Lynne Taylor (eds), *Corporate Law in New Zealand* (Thomson Reuters, online ed, 2018) ss 16.18.4.2–4.
[69] Aotearoa Circle Legal Opinion (n 54) 19–20.

> unclear whether and to what extent a New Zealand court could seek to interpret a director's duty to act in the best interests of the company as indirectly including a requirement to consider the interests of broader stakeholders. This is an issue for future discussion and beyond the scope of this legal opinion.[70]

There is growing pressure for law reform in this area.[71] For example, the Institute of Directors together with MinterEllisonRuddWatts published a White Paper calling for a review of the law regulating directors' duties in New Zealand.[72] The White Paper observes that, at a time when more and more is expected of directors, it is critical that directors have more clarity in relation to which stakeholders they can or should legitimately have regard to, to what extent, and whether they can or should give priority to others over the stated preferences of shareholders.[73] Also, in October 2021 a private member's Bill, the Companies (Directors Duties) Amendment Bill 2021 (NZ), was introduced into Parliament.[74] This Bill proposes amending s 131 of the *Companies Act 1993* (NZ) by making it clear that a company director can take into account broader matters other than the financial bottom line.[75] These include issues such as Te Tiriti (the Treaty of Waitangi), environmental impacts, corporate ethics, being a good employer, and the wider community's interests.[76] As of 1 November 2021, the Bill had yet to have its First Reading.

New Zealand organisations and politicians are not alone in calls for reform in this area of company law. For example, in 2020, the European Commission published a report titled *Study on Directors' Duties and Sustainable Corporate Governance*, prepared by Ernst & Young.[77] The starting point of this study is the view that publicly listed companies within the EU focus on the short-term benefits of shareholders, to the detriment of the long-term interests of the company.[78] Building from that starting point, the study sets out the authors' views on the root causes of short-termism, whether these root causes are due to current market practices or regulatory frameworks within the EU member states, and possible EU-level solutions.

Ernst & Young identifies seven key causes (referred to as problem drivers) that work together to promote a focus on short-term financial return within states in the EU. These include national corporate laws and judicial approaches that narrowly view director duties and company

---

[70] Ibid 20.
[71] Sustainable Finance Forum, *Roadmap for Action* (Final Report, November 2020) 8; Jane Horan et al, *Structuring for Impact: Evolving Legal Structures for Business in New Zealand* (Report, The Impact Initiative, produced for the Social Enterprise Sector Development Programme, 2019); Jo Smith and Sally Garden, 'New Zealand Boards and Frontier Firms' (Working Paper No 2020/02, New Zealand Productivity Commission, August 2020).
[72] IoD White Paper (n 64).
[73] Ibid 17.
[74] Companies (Directors Duties) Amendment Bill 2021 (75-1) (NZ) was introduced by Member of Parliament Duncan Webb on 23 October 2021.
[75] Explanatory Note, Companies (Directors Duties) Amendment Bill 2021 (75-1) (NZ).
[76] Companies (Directors Duties) Amendment Bill 2021 (75-1) (NZ) cl 4.
[77] European Commission Directorate-General for Justice and Consumers and Ernst & Young, *Study on Directors' Duties and Sustainable Corporate Governance* (Final Report, July 2020) <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>.
[78] Note that this categorisation of short-termism as detrimental has been criticised by the European Corporate Governance Institute: see Mark Roe et al, 'The Sustainable Corporate Governance Initiative in Europe' (2021) 7 *Yale Journal on Regulation Online Bulletin* 133–53.

interests and favour the short-term maximisation of shareholder value. Other drivers include board remuneration structures that incentivise a focus on short-term shareholder value rather than long-term value creation for the company, and current board composition rules that do not fully support a shift towards sustainability.

The report concludes by recommending that any future EU statutory intervention in this area should pursue the following three specific objectives: first, to strengthen the role of directors in pursuing their company's long-term interests by dispelling current misconceptions and errors concerning the purpose of the company and the duties of directors; second, to improve the accountability of directors towards integrating sustainability into corporate decision-making by making directors more accountable for the sustainability of their business conduct; and, finally, to promote corporate governance practices that contribute to company sustainability in areas such as corporate reporting, board remuneration and board composition, while encouraging stakeholder involvement.

VII CONCLUSION

The new climate-related disclosure provisions will provide clarity for boards as to their responsibilities to consider and disclose climate-related matters. However, companies globally and in New Zealand face evolving pressures from investors and other stakeholders to consider ESG matters. While directors should report on any circumstances that exist or could arise to materially increase the risks to their strategies or future plans and any plans to manage such risks, the issue that directors face is how to take into account longer-term non-financial considerations within the current legal framework governing directors' duties. Law reform on this issue is needed.

NEW ZEALAND SECONDARY SCHOOL PRINCIPALS' UNDERSTANDING OF LAWS RELATING TO STUDENT DISCIPLINE

*Nicola Leete**

ABSTRACT

Education is a fundamental human right. For some children their right to education is denied when they are removed from school on disciplinary grounds. New Zealand Ministry of Education data shows substantial variation across schools in the rates of formal discipline measures. Additionally, there is evidence of children being unlawfully removed from school on disciplinary grounds. Responding to suggestions that principals may be unaware of the relevant law, this article reports on research conducted in New Zealand that explores principals' familiarity with laws relating to student discipline. Consistent with overseas research into principals' legal literacy, the findings indicate wide variation in principals' awareness of the relevant law. Knowing how informed principals are about laws relating to student discipline means that support can be offered to principals to address any gaps in their understanding.

* MEd (Special and Inclusive Education), LLB (Hons), BA, GradDipTchg. Lecturer, University of Canterbury. This research forms part of the author's PhD study. The author would like to acknowledge the support and guidance of her supervisors in the preparation of this paper, Associate Professor Natalie Baird, Dr David Small and Dr Myron Friesen. To obtain a copy of the original survey, contact nicola.leete@canterbury.ac.nz.

I INTRODUCTION

All New Zealand children have the right to education in a world-class inclusive education system.[1] Where a student is to be removed from school on disciplinary grounds this must be done in accordance with the provisions set out in the *Education and Training Act 2020* (NZ) ('*ETA20*').[2] However, evidence of students being unlawfully removed from school on disciplinary grounds, coupled with inconsistent implementation of the formal discipline provisions in *ETA20*, raises concerns over principals' awareness and understanding of laws relating to student discipline.[3] Without a sound understanding of their legal obligations and in the absence of clear support and guidance, principals may unintentionally compromise a child's rights and ultimately their right to education (*ETA20* s 33). Results from this study, the first to involve a nationwide survey of New Zealand secondary school principals' awareness and understanding of laws relating to student discipline, suggest a need for professional development for principals in a number of aspects of law relating to student discipline.

This article is organised into three parts. Part I explains the background to the study. It begins by setting out the legal and policy framework relating to student discipline in New Zealand. The primary focus is on the formal discipline measures of stand-down and suspension (referred to as 'the formal discipline measures'). Concerns regarding principals' application of these provisions are outlined and situated within the wider context of research into principals' legal literacy. Part II details the development and administration of the 'Student Discipline: Law, Policy and Practice Survey'. Finally, Part III reports on the survey results and considers the implications of these for principals' professional development.

A *Student Discipline: New Zealand's Legal and Policy Framework*

The value placed on education in New Zealand society is reflected in both legislation and policy. *ETA20* s 33 guarantees the right to a free education to every child aged between 5 and 19 years. Various policies, including *Success for All*,[4] the *National Education Goals*[5] and the *Statement of National Education and Learning Priorities*,[6] reinforce the right to education in an inclusive education system that values all children. New Zealand has also demonstrated its commitment to education by ratifying numerous international treaties that protect the right to education, including the United Nations' *Convention on the Rights of the Child*[7] and

---

[1] *Education and Training Act 2020* (NZ) s 33 ('*ETA20*'); Ministry of Education (NZ), *Success for All* (2010) <https://www.education.govt.nz/assets/Documents/School/Inclusive-education/SuccessForAllEnglish.pdf>; Ministry of Education (NZ), *The Statement of National Education and Learning Priorities (NELP) & Tertiary Education Strategy (TES)* (2020) <https://assets.education.govt.nz/public/Documents/NELP-TES-documents/FULL-NELP-2020.pdf>. The latter was issued by the Minister of Education pursuant to *ETA20* s 5.
[2] *Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999* (NZ) Rule 8.
[3] See below Part I.B.
[4] Ministry of Education, *Success for All* (n 1).
[5] 'The National Education Goals (NEGs)', *Ministry of Education* (Web Page, 30 August 2019) <https://www.education.govt.nz/our-work/legislation/negs>. The Goals were last amended in December 2004.
[6] Ministry of Education, *Statement of National Education and Learning Priorities* (n 1).
[7] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 28–29.

Convention on the Rights of Persons with Disabilities.[8] Given the fundamental importance of education, any denial of this right, either temporarily or permanently, should be reserved for extreme circumstances.

Such circumstances are set out in *ETA20* ss 79–89, which specify the disciplinary grounds on which a principal may remove a student from school and the process that must be followed. The least serious of the formal discipline measures is a stand-down, whereby the principal may remove a student from school for up to five school days.[9] A limitation on the total period of time for which a student may be stood down within both a term and a year of five days and ten days, respectively, is imposed.[10] No such time limitations are imposed where a principal suspends a student. Instead, it is the board of trustees[11] who determines whether to lift the suspension so the student can return to school,[12] impose conditions for the student's return to school,[13] or impose the most serious response of excluding a student under 16 years of age[14] or expelling a student over 16 years of age.[15] Further regulation of the practices and procedures that are to be followed under *ETA20* ss 79–89 is provided by way of the *Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999* (NZ) ('*Rules*'). Additionally, the Ministry of Education ('the Ministry') has issued guidelines to assist principals and boards of trustees with meeting their legal obligations.[16] The guidelines reinforce Parliament's intention in *ETA20* ss 79–89 by stipulating that the formal discipline measures are actions of 'last resort'.[17]

B *The Current Context: Cause for Concern*

The Ministry reports annually on the rates of formal discipline measures. Latest figures show an increase in stand-down and suspension rates at a national level.[18] Interestingly, at an individual school level, Ministry data shows substantial variation across secondary schools in

---

[8] *Convention on the Rights of Persons with Disabilities*, UN Doc A/RES/61/106 (24 January 2007, adopted 13 December 2006) art 24.
[9] *ETA20* s 80(2).
[10] Ibid s 80(2)(a)–(b).
[11] In the New Zealand education system, every state and state-integrated school and kura has a board of trustees. The board is responsible for the governance and management of the school.
[12] *ETA20* s 81(1)(a).
[13] Ibid s 81(1)(b).
[14] Ibid s 81(1)(c).
[15] Ibid s 83(1)(c). It is only where a student is excluded that the principal has a legal obligation to try and arrange another school for the student to attend (at s 81(6)).
[16] Ministry of Education (NZ), *Guidelines for Principals and Boards of Trustees on Stand-downs, Suspensions, Exclusions and Expulsions: Part 1 — Legal Options and Duties* (December 2009) <https://assets.education.govt.nz/public/Documents/School/Managing-and-supporting-students/Stand-downs-suspensions-exclusions-and-expulsions-guidelines/17-5-18-SuspensionLegalGuideWEB-1.pdf>.
[17] Ibid 6.
[18] 'Stand-downs, Suspensions, Exclusions and Expulsions from School', *Education Counts* (Web Page) <https://www.educationcounts.govt.nz/indicators/main/student-engagement-participation/stand-downs-suspensions-exclusions-expulsions>. This is based on 2019 data, which is the most recent data available on the website at the time of this publication.

the rates of stand-downs and suspensions.[19] Schools with similar profiles have marked differences in their stand-down and suspension rates.[20] This is consistent with data gathered by YouthLaw Aotearoa ('YouthLaw'), which shows alarming discrepancies in the way that individual schools respond to student misbehaviour.[21] One of the reasons for this, YouthLaw suggests, is 'substantial misunderstanding'[22] among principals and boards alike as to the scope of their authority to discipline students under the *Education Act 1989* (NZ),[23] and the requirements of the principles of natural justice.

In addition to errors being made when a student is disciplined under *ETA20* s 80, there is evidence of unlawful disciplinary practices occurring. These include principals using provisions that relate to exemptions or restrictions on attendance[24] to send students home on disciplinary grounds,[25] and students being sent home from school as a disciplinary measure without the principal invoking *ETA20* s 80. The latter is colloquially referred to within the education sector as a 'Kiwi suspension',[26] and includes situations where a principal suggests to a student's parents that they remove their child from the school as a preferable alternative to the child facing the board disciplinary committee, which could result in exclusion or expulsion.[27] All such practices are unlawful, as the *Rules* specify that the only way in which a principal can send a student home from school on disciplinary grounds is by standing-down or suspending the student.[28] While the Ministry has condemned these unlawful removals,[29] it does not collect data on such practices, making it difficult to know how widespread they are.[30]

---

[19] 'Find Your Nearest School', *Education Counts* (Web Page) <https://www.educationcounts.govt.nz/find-school>.

[20] 'Profile' refers to school decile, region, area type and ethnic and gender composition. For an explanation of the school decile system, see below n 92.

[21] Jen Walsh, 'Barriers to Education in New Zealand: The Rise of Informal Removals of Students in New Zealand' (Research Report, YouthLaw Aotearoa, 2016) <http://youthlaw.co.nz/resources>. YouthLaw is a community law centre that provides free legal services to anyone aged under 25. They also carry out research and make submissions on law and policy affecting children and young people.

[22] Ibid 6.

[23] Repealed by *ETA20.*

[24] In particular *Education Act 1989* (NZ) ss 19, 27, repealed with minor amendments by *ETA20* ss 77, 45.

[25] Andrew Smith, 'New Zealand Families' Experience of Having a Teenager Excluded from School' (2009) 27(2) *Pastoral Care in Education* 89; Jen Walsh (n 21).

[26] The earliest use of the term the author could locate was in Jan Breakwell, 'Control and Management of Schools: Disciplinary Powers of Boards of Trustees' (1993) 5(4) *Education and the Law in New Zealand* 99. Despite being referred to as a 'Kiwi suspension', this practice is not confined to New Zealand. For a discussion of this practice in England and Wales, see, eg, Office of the Children's Commissioner for England, *Report on Illegal Exclusions: 'Always Someone Else's Problem'* (Report, 2013) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Always_Someone_Elses_Problem.pdf>.

[27] Robert Ludbrook, 'School Exclusions in Australia and New Zealand: Review of Laws and Policies' (2003) 1 *Education Law Journal* 15; Adele Redmond, 'Talks Underway to Pilot Appeals Panel for School Board of Trustees' Decisions', *Stuff* (online, 11 October 2017) <https://www.stuff.co.nz/national/education/97758384/talks-under-way-to-pilot-appeals-panel-for-school-boards-of-trustees-decisions>.

[28] *Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999* (NZ) Rule 8.

[29] John Gerritsen, 'Illegal School Suspensions on the Rise: Report', *Radio New Zealand* (online, 17 October 2016) <https://www.rnz.co.nz/news/national/315796/illegal-school-suspensions-on-the-rise-report>.

[30] YouthLaw Aotearoa, 'Out of School Out of Mind: The Need for an Independent Education Review Tribunal' (Research Report, 2012) <http://youthlaw.co.nz/resources>; Jen Walsh (n 21).

Evidence of these practices is primarily drawn from complaints made to YouthLaw[31] and the Office of the Children's Commissioner for Aotearoa,[32] along with media reports.[33] YouthLaw has suggested that there has been a 'dramatic increase' in these unlawful removals over time.[34] During the period between 2011 and 2015, the number of cases of unlawful removals that YouthLaw dealt with tripled.[35] Interestingly, Ministry data shows that there was a decrease in formal discipline measures during this same period.[36] Despite evidence of unlawful removals occurring and errors being made during the discipline process, there have not been any studies in New Zealand investigating whether principals are aware that such actions are unlawful. Indeed, writing back in 1994 about student discipline, Casey called for further research in the area and specifically questioned whether 'principals and boards are conversant enough with the *Education Act* and the *Ministry of Education Guidelines* to handle suspension cases properly and fairly'.[37]

C *Principals' Legal Literacy*

Internationally the importance of principals having an understanding of education law has received considerable attention from researchers. Studies across a range of jurisdictions have highlighted the relevance of the law to principals' daily practice.[38] There is widespread agreement in the literature that, while principals do not need law degrees[39] or to be legal

[31] Jen Walsh (n 21).
[32] Justice Andrew Becroft, 'Is New Zealand the Best Place in the World to Educate a Child?' (Guest Lecture, Equity through Education Symposium, Massey University, 13 February 2019).
[33] 'Are School Exclusions Happening under the Radar?', *Radio New Zealand Nine to Noon* (online, 19 July 2021) <https://www.rnz.co.nz/national/programmes/ninetonoon/audio/2018804539/are-school-exclusions-happening-under-the-radar>; 'Boy Unlawfully Suspended from School', *Stuff* (online, 10 September 2019) <https://www.stuff.co.nz/national/education/115661238/boy-unlawfully-suspended-from-school>.
[34] Jen Walsh (n 21) 34.
[35] Ibid.
[36] 'Stand-downs, Suspensions, Exclusions and Expulsions' (n 18).
[37] Cathy Casey, 'Suspensions and Expulsions in New Zealand State Schools' (1994) 3 *New Zealand Annual Review of Education* 253.
[38] For the United States, see, eg, Howard Eberwein, 'Raising Legal Literacy in Public Schools, a Call for Principal Leadership: A National Study of Secondary School Principals' Knowledge of Public School Law' (PhD Thesis, University of Massachusetts, 2008). For Malaysia, see, eg, Fatt Hee Tie, 'A Study on the Legal Literacy of Urban Public School Administrators' (2014) 46(2) *Education and Urban Society* 192. For Australia, see, eg, Allison Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017); Paul McCann, 'Principals' Understandings of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006). For Kuwait, see, eg, Ayeshah Alazmi, 'Principals' Knowledge of School Law in Kuwait: Implications for Professional Development' (2021) 35(1) *International Journal of Educational Management* 283. For Canada, see, eg, Nora Findlay, 'In-School Administrators' Knowledge of Education Law' (2007) 17(2) *Education Law Journal* 177.
[39] RD Mawdsley and JJ Cumming, 'The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia' (2008) 13(2) *Australia and New Zealand Journal of Law and Education* 7; Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996).

experts,[40] an accurate understanding of the law as it relates to their role is required.[41] Without an understanding of the relevant law, principals may unknowingly compromise students' rights, adversely affecting students' educational opportunities[42] and life outcomes.[43]

Given the importance of legal knowledge to the principal's role, studies have been conducted to assess principals' understanding of laws that are relevant to their practice. Surveys containing legal knowledge questions have typically been used for this purpose.[44] While most studies have examined principals' legal literacy across a range of areas of law relating to education, more recently a number of studies have focused on specific areas such as special education laws,[45] censorship laws[46] and cyberbullying.[47] Although the content and form of the survey questions used in these studies have varied, the findings with respect to the legal knowledge variable have been consistent: principals lack sufficient knowledge of education law. Table 1 illustrates this point by setting out the mean legal knowledge score from a selection of studies.

Table 1: Selection of studies exploring principals' legal literacy

Author, year	Participants	Country	Measure	Mean legal knowledge score
Overturf, 2007*[48]	122 principals	United States: Wisconsin	Survey	49.8%
Findlay, 2007[49]	193 principals	Canada: Saskatchewan Province	Survey	47.5%
Power, 2007*[50]	236 principals	United States: Virginia	Survey	65.6%

[40] Allison Trimble, Neil Cranston and Jeanne Allen, 'School Principals and Education Law: What Do They Know, What Do They Need to Know?' (2012) 18(2) *Leading & Managing* 46.
[41] Findlay (n 38); Mark Butlin and Karen Trimmer, 'The Need for an Understanding of Education Law Principles by School Principals' in Karen Trimmer, Roselyn Dixon and Yvonne S Findlay (eds), *The Palgrave Handbook of Education Law for Schools* (Springer, 2018) 3; Patrick Walsh, *Educational Management and the Law: A Practical Guide for Managers Involved in Pre-School, Primary, Secondary and Tertiary Education in New Zealand* (Longman, 1997).
[42] Tara M Brown, 'Lost and Turned Out: Academic, Social, and Emotional Experiences of Students Excluded from School' (2007) 42(5) *Urban Education* 432; Daniel Quin and Sheryl A Hemphill, 'Students' Experiences of School Suspension' (2014) 25(1) *Health Promotion Journal of Australia* 52.
[43] Sheryl Ann Hemphill and John Hargreaves, 'The Impact of School Suspensions: A Student Wellbeing Issue' (2009) 56(3–4) *ACHPER Healthy Lifestyles Journal* 5.
[44] Eberwein (n 38); McCann (n 38); Trimble (n 38); Stewart, 'School Principals and the Law' (n 39); Perry A Zirkel, 'A Test on Supreme Court Decisions Affecting Education' (1978) 59(8) *The Phi Delta Kappan* 521. In some studies, other methods such as focus groups, interviews and document analysis have also been used.
[45] Suruchi Singh, 'Knowledge of Special Education Law among Administrators in a Southern California Special Education Local Plan Area' (PhD Thesis, Brandman University, California, 2015); Wendy Overturf, 'Knowledge of Special Education Law among Individuals Recently Licensed as Principals in Wisconsin' (PhD Thesis, Edgewood College, 2007); Donna M Power, 'Study of Selected Virginia School Principals' Knowledge of Special Education Law' (PhD Thesis, Virginia Polytechnic Institute and State University, 2007); Marie Boyd, 'Public and Private School Principals' Knowledge of Special Education Law' (PhD Thesis, University of Nebraska, 2017).
[46] Philip Anderson and Karen Wetzel, 'A Survey of Legal Knowledge of High School Principals on Censorship Issues' (1982) 71(2) *English Journal* 34.
[47] N Purdy and C McGuckin, 'Cyberbullying, Schools and the Law: A Comparative Study in Northern Ireland and the Republic of Ireland' (2015) 57(4) *Educational Research (Windsor)* 420.
[48] Overturf (n 45).
[49] Findlay (n 38).
[50] Power (n 45).

Eberwein, 2008[51]	493 principals	United States: Nationwide	Survey	58.7%
Singh, 2015*[52]	65 principals and assistant principals	United States: California	Survey	52.6%
Trimble, 2017[53]	34 principals for survey, 26 interviews with a range of people in the Tasmanian education sector	Australia: Tasmania	Survey, interviews	52.7%
Boyd, 2017*[54]	97 private and public school principals	United States: Nebraska and Iowa	Survey	66%
Alazmi, 2021[55]	369 principals	Kuwait: Nationwide	Survey	48.9%

* Survey focused on knowledge of special education laws.

There have only been two New Zealand studies that have explored principals' knowledge of education law.[56] These were Master's theses with very small sample sizes of six[57] and eleven[58] principals, respectively. Additionally, both studies focused on principals' knowledge of various aspects of law, with only a small number of questions relating to student discipline. Consistent with overseas research, these studies found that the principals had limited knowledge of education-related law. Based on their findings, both authors recommended more extensive research into New Zealand principals' understanding of the law.

II THE PROJECT

In light of the concerns outlined above regarding student discipline practices and principals' legal literacy, this study aimed to explore New Zealand secondary school principals' awareness and understanding of laws relating to student discipline.

A *Research Method*

To achieve this study's objective, the 'Student Discipline: Law Policy and Practice Survey' was developed. The survey utilised a mixed methods design with both quantitative and qualitative questions designed to collect data that would provide an indication of principals' awareness and understanding of laws relating to student discipline. As discussed above, surveys have been used in previous studies exploring principals' legal literacy.[59] The survey

[51] Eberwein (n 38).
[52] Singh (n 45).
[53] Trimble (n 38).
[54] Boyd (n 45).
[55] Alazmi (n 38).
[56] David Wardle, 'School Related Law: Do Principals Know What They Need to Know?' (Master's Thesis, Massey University, 2006); Priscilla Naidoo, 'Legal Literacy: Auckland Secondary School Principals' Understanding of Education Law' (Master's Thesis, Auckland University of Technology, 2018).
[57] Wardle (n 56).
[58] Naidoo (n 56).
[59] Douglas Stewart, 'Legalisation of Education: Implications for Principals' Professional Knowledge' (1998) 36(2) *Journal of Educational Administration* 129; Matthew Militello, David Schimmel and Howard Eberwein, 'If They Knew, They Would Change: How Legal Knowledge Impacts Principals' Practice' (2009) 93(1) *NASSP Bulletin* 27; Trimble (n 38).

design was informed both by literature on survey best practice,[60] and by surveys used in previous studies to assess principals' legal literacy.[61]

The survey was organised into six sections. The first two sections gathered principal and school demographic data. Questions in the third and fourth sections asked principals to self-assess their knowledge of student discipline laws, before answering 21 questions relating to student discipline laws. The two final sections enquired into principals' experience with legal challenges as a result of student discipline decisions that they had made and their views on the legal framework relating to student discipline.

1 *Legal Knowledge Questions*

Although the survey design was informed by surveys used in previous studies, it was not possible to use the legal knowledge questions from these surveys to assess principals' legal literacy due to the different legal framework for student discipline in New Zealand. Additionally, as mentioned above, many of the surveys used in previous research have examined principals' legal literacy across a range of areas of their practice, with only a couple of questions relating to student discipline. The 21 legal knowledge questions ('LKQs') for this survey were therefore developed specifically for the New Zealand context. These questions were developed from statute, primarily the *Education Act 1989* (NZ)[62] and the *Rules*, along with common law.

Given the relative dearth of case law relating to student discipline in New Zealand, reference was made to data from a number of other sources to identify aspects of the law that were particularly pertinent in the New Zealand school context. Specifically, reference was made to data from the following agencies who provide advice and/or deal with complaints relating to students' access to education, including discipline issues: New Zealand Human Rights Commission,[63] Office of the Children's Commissioner for Aotearoa,[64] New Zealand School Trustees Association,[65] Office of the Ombudsman[66] and YouthLaw.[67] This data provided a useful insight into common legal issues relating to student discipline. For example, data from YouthLaw showed that the most common advice queries that they receive relate to schools'

---

[60] Don Dillman, Jolene Smyth and Leah Christian, *Internet, Phone, Mail and Mixed-Mode Surveys: The Tailored Design Method* (Wiley, 4th ed, 2014); Paul Lavrakas, *Encyclopedia of Survey Research Methods* (Sage, 2008).
[61] The six-section structure detailed above and the question format were guided in particular by the 'Principals' Education Law Survey' used by Eberwein (n 38).
[62] The *Education Act 1989* (NZ) was in force at the time the survey was administered. As noted at n 23 above, and in accompanying text, it has since been repealed and replaced by *ETA20*.
[63] Human Rights Commission, *Annual Report 2018/19* (Report, November 2019).
[64] Office of the Children's Commissioner for Aotearoa, Submission to Education and Workforce Committee, Parliament of New Zealand, *Access to Education for All at School: Submission of the Children's Commissioner for the Proposed Education Act Amendment about the Right to Attend School* (13 June 2019).
[65] New Zealand School Trustees Association, *NZSTA Membership Consultation: Supporting Students with Significant Behavioural Needs* (Report, 12 November 2018).
[66] 'Resources and Publications', *Ombudsman* (Web Page) <https://www.ombudsman.parliament.nz/resources>.
[67] YouthLaw Aotearoa, Submission to the Tomorrow's Schools Independent Taskforce, *Tomorrow's Schools Review* (2019); Kenton Starr and Naushyn Janah, 'Challenging the Barriers: Ensuring Access to Education for Children with Special Educational Needs' (Research Report, September 2016) <http://youthlaw.co.nz/resources>; Jen Walsh (n 21).

processes and, in particular, students being sent home on disciplinary grounds without the procedures under the *Education Act 1989* (NZ) being followed.[68] These aspects of the law were incorporated into the LKQs.

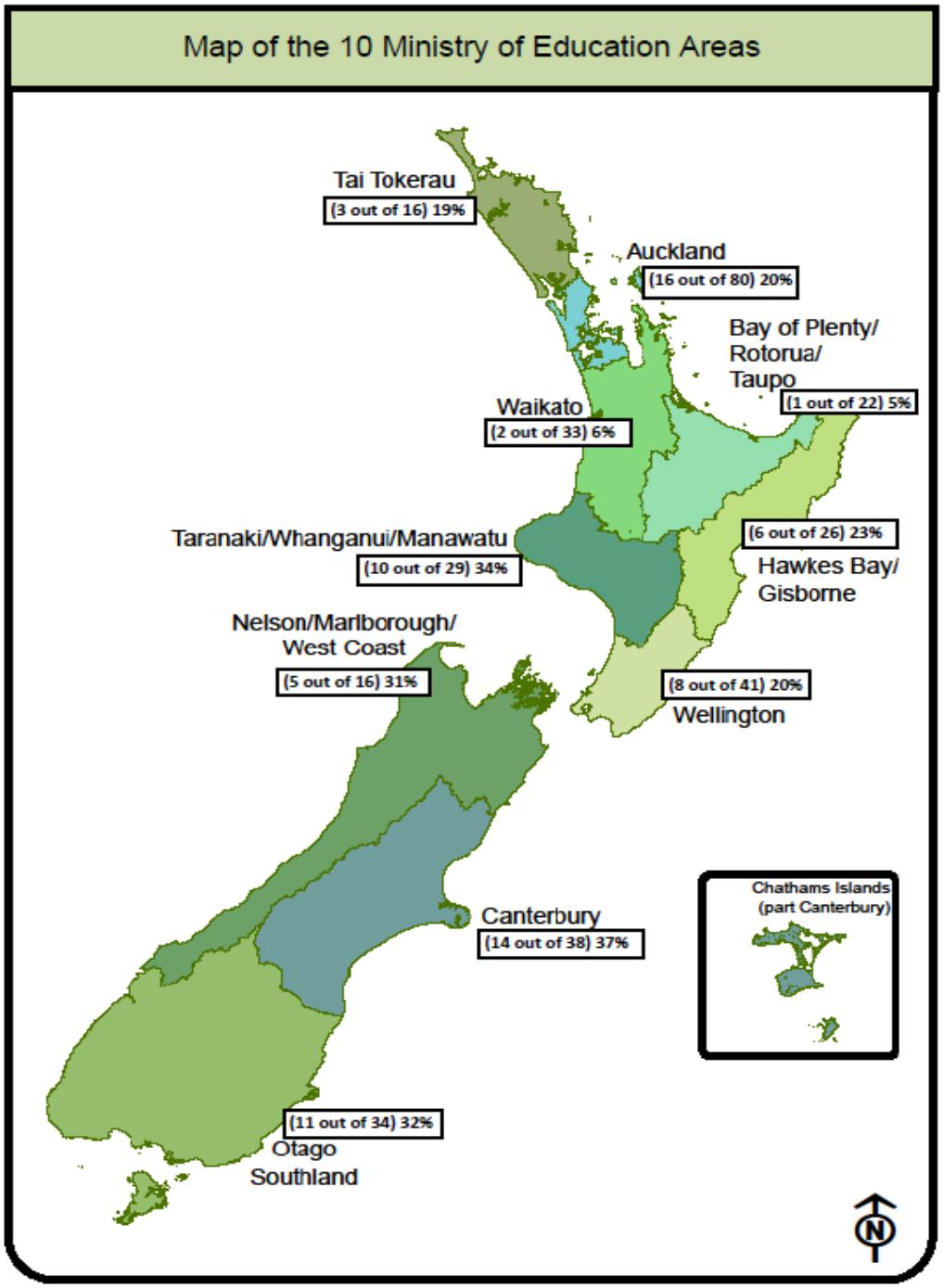
To establish its validity, the survey was reviewed by two academic experts. Their feedback was used to make minor amendments to the wording and order of several questions. The survey was then piloted with two principals to determine whether the questions were: (a) sufficiently clear; (b) logically ordered; and (c) effective in eliciting the desired information about principals' familiarity with laws relating to student discipline. Drawing on cognitive interviewing techniques,[69] the pilot participants were asked to explain their interpretation of each question and the response choices. Minor amendments to both question wording and layout were made based on feedback from the pilot. Once these amendments had been made the survey was reviewed by the Director of the Centre for Educational Evaluation and Monitoring at the University of Canterbury, based on his expertise in assessment and survey design.

B *Sample*

An email invitation to complete the survey was sent to all principals from state and state-integrated secondary schools throughout New Zealand. Secondary school principals were chosen because the average age for students being formally disciplined is 13–15 years,[70] which corresponds to Years 9–11 at secondary school. The principals' names and their contact information were obtained from the Ministry. As shown in Figure 1 below, a total of 76 principals (23% of the principal population) from across the 10 education regions completed the survey.

[68] Starr and Janah (n 67); Jen Walsh (n 21).
[69] Gordon Willis, *Cognitive Interviewing: A Tool for Improving Questionnaire Design* (Sage, 2004).
[70] 'Stand-downs, Suspensions, Exclusions and Expulsions' (n 18).

Figure 1: Map of survey respondents from each education region



C *Procedures*

The survey was delivered online using Qualtrics software. All principals who clicked the survey link from the email invitation were directed to an information and consent page. After reading this they were required to indicate their informed consent by ticking a checkbox. If they did so, they were directed to the first page of the survey. There was no time limit imposed for survey completion to enable principals to stop and start the survey if they were interrupted. The wide variation in the length of time taken by principals to complete the survey (from 9

minutes to 7 hours) suggests that some principals may have experienced such interruptions. A commitment statement was included in the information section at the start of the survey. This required participants to tick a box to indicate their commitment to answering the questions without assistance from an external source.[71] The study received ethical approval from the University of Canterbury's Educational Research Human Ethics Committee.[72]

D *Data Analysis*

The survey data was exported from Qualtrics into a Microsoft Excel spreadsheet, where the data was cleaned and coded. This included the removal of incomplete responses. The quantitative data was then imported into the Statistical Package for Social Sciences (version 25) for analysis, and the qualitative data was uploaded to NVivo 12 for analysis.

1 *Legal Knowledge Questions*

Total performance scores were calculated for the 21 LKQs, with a maximum of 28 points available. As shown in Table 2, with the exception of LKQ3, one point was awarded for each correct response to an LKQ. For LKQ3, one point was available for each of the four questions (a, b, c, d) relating to the issue of jurisdiction. An additional point was also available for each of the four branch questions (9a, 10a, 11a, 20a).[73]

Table 2: Points awarded for legal knowledge questions

Question number	**Points**
1, 2, 4, 5, 6, 7, 8, 12, 13, 14, 15, 16, 17, 18, 19, 21	16
3a, b, c, d	4
9, 9a, 10, 10a, 11, 11a, 20, 20a	8
Total	**28**

The qualitative data from the open-ended questions was quantified so that it could be statistically analysed alongside the other quantitative survey data.[74] This involved assigning a numerical value of zero or one to each text response based on the extent to which the respondent demonstrated an understanding of the relevant law. The criteria for making these judgements were reviewed by the same two academic experts who reviewed the survey. Additionally, the scoring methodology was reviewed by a retired lecturer with specific expertise in administrative law and whose legal commentary has been cited by the courts in cases involving judicial review of student discipline decisions.

[71] Research has shown commitment statements to be more effective than requests or time limits in reducing cheating on online surveys. See, eg, Scott Clifford and Jennifer Jerit, 'Cheating on Political Knowledge Questions in Online Surveys: An Assessment of the Problem and Solutions' (2016) 80(4) *Public Opinion Quarterly* 858.
[72] Reference number 2019/48 ERHEC.
[73] For these branch questions, an additional question was only displayed to respondents who chose a specific answer.
[74] Margarete Sandelowski, Corrine I Voils and George Knafl, 'On Quantitizing' (2009) 3(3) *Journal of Mixed Methods Research* 208.

III RESULTS AND DISCUSSION

This section provides an overview of the survey results. It begins by reporting principals' total performance scores for the LKQs, before discussing the results for a selection of individual LKQs. Relationships between principals' legal knowledge scores and a range of school- and principal-level variables are then explored along with differences in legal knowledge scores within variable groups.

A *Total Performance Scores*

As outlined above, a legal knowledge score was calculated for principals who completed the survey, based on their answers to the 21 LKQs. Figure 2 below shows the range in scores, from 9.0 (32.1%) to 23.0 (82.1%) out of a possible 28 points, with a mean legal knowledge score of 16.7 (59.5%) and a standard deviation of 3.0.[75] The mean legal knowledge score is consistent with the results from overseas studies that have used surveys to assess principals' legal literacy,[76] and the range is similarly reflective of the wide variation in principals' legal knowledge that has been reported in the literature.[77]

Figure 2: Principals' total scores on legal knowledge questions

B *Individual Legal Knowledge Questions*

To provide a deeper insight into principals' awareness and understanding of the various aspects of laws relating to student discipline that were assessed in the survey, frequency counts and

[75] Kurtosis and skewness statistics were examined and deemed to be approximately normal.
[76] See Table 1 above.
[77] See, eg, Boyd (n 45) where scores ranged from 45% to 85%.

percentages were calculated for individual LKQs. A selection of the results that are most relevant to the areas of concern identified in the preceding literature review is discussed below.

Questions with the highest rates of correct responses and that therefore seemed to be well understood by principals included the maximum length of time for which a student may be stood down at any one time (92.0%, *n* = 69) and within one year (90.7%, *n* = 68). Most principals (92.9%, *n* = 65) were aware that there is a statute that sets out the laws relating to stand-down and suspension of a student. However, of the 65 principals who answered the question correctly, only a smaller percentage were able to specify the statute (78.6%, *n* = 44). Incorrect answers included the '*Ministry of Education Guidelines*' and the '*Health and Safety Act*'. This result is consistent with Wardle's 2006 study involving New Zealand primary school principals, where only two principals (33%) said they were familiar with the *Education Act 1989* (NZ).[78] Given that the Act is the primary source of law in relation to student discipline, it is concerning that there is not a higher level of familiarity with this statute.

The highest percentage of correct responses was for LKQ20 (97.4%, *n* = 74), which asked whether a principal has discretion when it comes to deciding whether to stand-down or suspend a student. However, a smaller proportion (73.2%, *n* = 52) were able to answer LKQ20a correctly by explaining the purpose of this discretion. Responses were accepted as correct if the principal referred to the need for a case-by-case or individualised approach. Among the principals who answered this question incorrectly, there appeared to be some confusion between the exercise of discretion and the principles of natural justice. For example, respondents made comments such as, '[t]o ensure there is no bias decisions made. Student has the opportunity to be heard',[79] or simply stated, 'principles of natural justice'.[80]

Closely related to LKQ20 and LKQ20a, was LKQ1. Principals were invited to select from the options of 'true', 'false', 'unsure' and 'sometimes' in response to the statement, 'Students who are disciplined for the same behaviour must receive the same outcome'. Again, the majority (86.8%, *n* = 66) of principals answered this correctly by selecting 'false'. Of concern, however, is that 13.1% of principals (*n* = 10) responded with either 'true' or 'unsure'. Taken together, the results for these three questions (LKQ20, LKQ20a, LKQ1) suggest that while most principals recognise that they have discretion when disciplining students, there may be less understanding of how and why that discretion should be exercised. Support for this suggestion may be garnered from judicial review decisions and investigations carried out by the Ombudsman into student discipline decisions. Analysis of these decisions and recommendations shows that one of the main errors made by principals involves the failure to properly exercise their statutory discretion. This includes the fettering of their discretion by

[78] The *Education Act 1989* (NZ) was the main source of a principal's legal authority at the time of Wardle's study: Wardle (n 56).
[79] P123. Codes beginning with 'P' were given to survey respondents to ensure anonymity when reporting results.
[80] P107, P112.

rigid reliance on a rule or policy,[81] and the failure to take into account all relevant matters when exercising their discretion.[82]

The highest rate of 'unsure' responses was recorded in relation to LKQ5, which explored principals' understanding of the legal status of school rules. Twelve principals (16%) were unsure whether school rules sometimes take precedence over legislation. A further 18.4% (n = 14) answered this question incorrectly, indicating that these principals may not realise that school rules are subject to other legislation, such as *ETA20* and the *New Zealand Bill of Rights Act 1990* (NZ). The status of school rules was also examined in LKQ2. Principals were asked whether a student could be sent home immediately if they break a school rule. Of the 23.7% (n = 18) who answered this question incorrectly, the majority chose the 'sometimes' option and stated that a student could be sent home immediately either (a) on health and safety grounds or, (b) if the student's parents had agreed to him or her being sent home. This suggests that some principals may not be aware that a student can only be sent home on disciplinary grounds if he or she has been stood down or suspended.[83] The results for these two questions (LKQ2 and LKQ5), which relate to the legal status of school rules, are significant when considered in the context of the concerns discussed above regarding students being unlawfully removed from school.

Two questions investigated principals' familiarity with the principles of natural justice. Across both questions the percentage of correct responses was low. The first of these questions, LKQ7, asked principals to identify the principles of natural justice from a list of options. Only 3% (n = 4) of the 75 principals who answered this question did so correctly. The second question asked principals to select the statements that described the principles of natural justice from a list of three options. Of the 74 principals who responded to this question, only 20.3% (n = 15) answered it correctly by identifying the two statements that applied. All principals correctly identified that the principles of natural justice are aimed at ensuring students are treated fairly during the discipline process. However, more principals (25.7%, n = 19) selected the incorrect option of the principles being a fixed set of rules than selected the correct option (21.6%, n = 16) of the principles differing depending on the circumstances of each student's case. The results for these two questions relating to natural justice closely reflect the findings from previous studies both in New Zealand[84] and overseas.[85] Familiarity with the principles of natural justice is critical for principals in ensuring the student discipline process is carried out in a fair and impartial manner. Indeed, concern over the lack of procedural fairness during the discipline process was one of the key reasons behind the introduction of the current legislative

[81] *M & R v S and Board of Trustees of Palmerston North Boys' High School* [2003] NZAR 705; *D v M and Board of Trustees of Auckland Grammar School* [2003] NZAR 726.
[82] Ombudsman New Zealand, *Investigation of Decision to Expel a High School Student with Aspergers* (Final Opinion No 178591 (W60658), December 2014); *Battison v Melloy* [2014] NZHC 1462.
[83] *Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999* (NZ) Rule 8.
[84] See Naidoo (n 56), where the 11 principal survey respondents were described as lacking understanding of the principles of natural justice; Wardle (n 56), where only one of the six primary school principals was able to provide a comprehensive explanation of the principles of natural justice.
[85] See, eg, McCann (n 38).

framework.[86] This is reflected in *ETA20*, which specifically identifies one of the purposes of the provisions in ss 79–89 as being to ensure that individual cases are dealt with in accordance with the principles of natural justice.[87]

C *Mean Legal Knowledge Score on Selected Variables*

Inferential statistics were used to explore relationships between selected principal- and school-level variables, along with differences within variable groups in relation to the mean legal knowledge score. The conventional level for statistical significance ($p \leq 0.05$) was applied for all analyses.

There were no significant differences in the legal knowledge variable across any of the following school-level variables: region, authority (state or state-integrated), decile, gender (co-educational, single sex boys, single sex girls), area type (rural or urban) and PB4L School-Wide.[88] Similarly, there were few statistically significant differences among the legal knowledge scores when the data was disaggregated by principal-level variables. Males scored slightly higher than females, with a mean score of 16.9 (61.0%) as compared to 16.0 (57.2%). However, this difference was not statistically significant ($t = 1.3$, $df = 74$, $p = .20$). There was also no association between the number of years a principal had been in their role and their legal knowledge score ($r = -.01$, $N = 76$, $p = .97$). This result is consistent with findings from numerous overseas studies where no significant relationship was found between principals' survey scores and their years of experience.[89] Additionally, although the majority of principals (85.5%, $n = 65$) had received training in laws relating to student discipline, no statistically significant difference was found between principals who had and had not received training ($t = -1.99$, $df = 11.6$, $p = .07$). While this result may have been influenced by the small number of principals in the 'no training' ($n = 11$) group relative to the 'training received' group ($n = 55$), it is consistent with findings from several previous studies.[90] It has been suggested that the nature and duration of such training, which typically involves a half- or full-day workshop or seminar covering a range of areas of law, may account for these results.[91] Among principals in this study who had received training, most had attended a workshop (38.9%, $n = 42$) or seminar (47.2%, $n = 51$), with only 5.6% ($n = 6$) having completed a postgraduate course with content relating to student discipline laws.

One variable where there was a significant difference in legal knowledge scores between groups was in relation to legal action. Thirty-eight principals (50%) reported facing actual or threatened legal action as a consequence of a student discipline decision that they had made.

---

[86] Education Legislation Amendment Bill 1997 (NZ).
[87] *ETA20* s 78(c).
[88] PB4L (Positive Behaviour for Learning) School-Wide is a behaviour support framework based on the Positive Behavioural Interventions and Supports (PBIS) framework developed at the University of Oregon in the 1990s. It has been implemented in over 800 schools in New Zealand.
[89] See, eg, Boyd (n 45); McCann (n 38); Overturf (n 45); Singh (n 45). But see also Eberwein (n 38) and Trimble (n 38), who found that more experienced principals had higher legal knowledge scores.
[90] McCann (n 38); Stewart, 'School Principals and the Law' (n 39).
[91] Stewart, 'School Principals and the Law' (n 39); Eberwein (n 38).

The proportion of principals who had faced legal action increased the higher the school decile group,[92] with 38.1% of principals at decile one to three (n = 21) schools facing legal action compared to 58.3% of principals at decile eight to ten schools (n = 24). This result likely reflects access-to-justice issues and highlights the importance of the disputes panels that are to be established under *ETA20* and that will be free to access.[93] Interestingly, principals who had faced actual or threatened legal action had a significantly higher mean legal knowledge score than those who had not (t = -2.1, df = 74, p = .04, Cohen's d = 0.5). This suggests that experiencing legal action may increase a principal's understanding of laws relating to student discipline. Qualitative data gathered from principals supports this suggestion, indicating that for many principals learning occurs through making mistakes.[94] Considered alongside the result relating to the influence of training on principals' legal knowledge score, this highlights the importance of understanding the features of effective training both in terms of content and delivery. To be effective, training must have a meaningful impact on principals' practice.

D *Limitations*

While this study provides a useful insight into principals' familiarity with laws relating to student discipline, it has several limitations. First, although diverse and broadly nationally representative in terms of principal and school demographics, the sample was self-selected. It is possible that the principals who responded to the survey had a particular interest in student discipline laws. This study does not therefore claim that those who took part are representative of the New Zealand secondary school principal population. Second, the survey question format may have affected the results. Questions that required principals to tick all the correct options in order to get the question correct were potentially more difficult than dichotomous questions. The dichotomous question format may also have oversimplified some aspects of the law. Finally, knowledge of the law does not necessarily translate into application of the law in daily practice. The second phase of this study is intended to address several of these limitations by using semi-structured interviews to explore how principals apply the law to a variety of student discipline fact scenarios.

IV CONCLUSION

Notwithstanding these limitations, this study provides a valuable insight into New Zealand secondary school principals' awareness and understanding of laws relating to student discipline. Consistent with overseas studies of principals' legal literacy,[95] the survey results highlight a number of gaps in New Zealand secondary school principals' knowledge of the

---

[92] Deciles are used in New Zealand to target funding to state and state-integrated schools. A school's decile is a measure of the socio-economic position of its student community relative to other schools throughout the country. For further information about how deciles are calculated, see 'School Deciles', *Ministry of Education* (Web Page, 26 May 2021) <https://www.education.govt.nz/school/funding-and-financials/resourcing/operational-funding/school-decile-ratings>.

[93] *ETA20* ss 216–36 enable the establishment of these panels. No date has yet been set for their establishment.

[94] This data was gathered during phase two of this project, which involved semi-structured interviews with 16 of the 76 principals who responded to the survey.

[95] See above n 38.

relevant law. These results are significant when considered in the context of concerns discussed in Part I of this article over students' right to education being undermined by unlawful removal from school and inconsistent implementation of the formal discipline provisions in *ETA20*. The introduction under *ETA20* of minimum eligibility criteria for principal appointments,[96] along with a Leadership Centre,[97] offers a great opportunity to provide principals with support and guidance to ensure their legal obligations are met and children's rights are protected throughout the discipline process. The fact that 92% of survey respondents said they would change their discipline practices if they found out that they were unlawful, indicates an appetite for such training. Careful consideration now needs to be given to ensuring the content and delivery of such training translates into meaningful changes in practice.

[96] The eligibility criteria are to be set by the Minister following reasonable efforts to consult with children, young people and their parents, whānau and communities, along with a range of relevant national bodies (*ETA20* s 617(2)). The criteria are intended to, inter alia, ensure consistency in the skills, competencies, knowledge and expertise of principals (at s 617(1)(a) and (d)).

[97] The establishment of a national Leadership Centre was one of the recommendations made by the Tomorrow's Schools Taskforce. The Teaching Council of Aotearoa New Zealand has accepted an invitation from the Minister of Education to establish the Leadership Centre.

THE OPEN ACCESS LAW BOOK IN AOTEAROA NEW ZEALAND: RADICALISING THE FUNDING OF FUTURE PUBLISHING

*James Mehigan**

ABSTRACT

The budgets of university libraries in New Zealand are being squeezed by the costs of subscriptions to works necessary for teaching. This article advocates for a different approach to funding such works. Drawing upon experience of developing an open access textbook on the criminal process it is argued that open access publishing is the best way to make the most of the funding that is available for legal research and scholarship. The funding model for academic publishing may need to be recalibrated, but perhaps not radically.

* Senior Lecturer in Law, University of Canterbury.

I INTRODUCTION

The legal textbook today lives in a world of uncertainty, yet this is a time when the textbook is perhaps more necessary than ever. With the diversity of sources of legal information and the proliferation of easily accessible content on law and legal affairs there can be great value in a solid text that brings the fundamentals of a subject together in one place. A book setting out the foundations of the subject can help teachers to design their courses more easily while also allowing researchers to go on and build the more in-depth and cutting-edge knowledge and analysis that develops that subject area.

This article outlines the challenges (particularly around funding) facing the legal textbook in New Zealand and proposes an open access ('OA') funding model to help overcome these challenges. It builds upon the work of Peter Suber, who has demonstrated that OA does not mean a reduction in quality of production, a diminution of peer review or an unnecessary infringement of copyright.[1] It is simply a change in the way publications are funded. The article looks at a current project to produce an OA undergraduate textbook on the criminal process using centralised funding from the Council of New Zealand University Librarians ('CONZUL').

This article discusses some lessons derived from the exercise and some of the problems that have so far arisen. It also discusses other ways in which OA can be progressed by looking at two overseas examples of successful changes in funding of publications so as to increase free access to research and ideas. The article concludes that OA may be a way to increase the proliferation of legal knowledge while also reducing, rather than increasing, costs to New Zealand's universities.

In previous times, textbooks were published as hardcopy books, and students, if they had the inclination and money, bought them to read as part of their coursework. University libraries bought a certain number of them and those students who did not wish to buy them could use them in the library to progress their studies. Many such books brought great benefits to their authors, who became pre-eminent in their field perhaps partly as a result of being the author of the textbook. Authoring a leading textbook appears to bestow an academic status, although which way the causal chain goes may be disputed: is an author eminent because they have written a textbook or have they written a textbook because they are eminent? New Zealand law does not move fast enough to need a textbook to be rewritten annually and indeed many are not subject to a new edition for many years.

This model of textbook funding worked reasonably well and had a traditional manufacturing sense to it. The publisher, as entrepreneur, produced the books and took the risk as to whether they would sell or not. However, that risk was reduced if the textbooks were made a requirement by major courses and universities. Meanwhile, the authors did the substantive work involved in researching and writing the books. Authors receive royalties, but these are

[1] Peter Suber, *Open Access* (MIT Press, 2012).

unlikely to be commensurate with the work involved in producing a textbook. Most authors of law textbooks in New Zealand are academics with permanent posts in one of the six law schools. Other authors are, usually, judges or practising lawyers. Most textbooks are written by people with salaries paid for by the state to do something else (teaching and researching at a university or working as a judge). Making one's primary living from writing legal textbooks is unusual.

The textbook in this traditional model is expensive. With a small market, there are fewer economies of scale and higher prices are, to some extent, to be expected. Not every student can afford to buy a textbook under this model. Even so, with or without an extended market comprising practitioners, the judiciary and law firms, it is clear that the publishers were able to make a profit from publishing these texts. However, making that profit is not so straightforward anymore.

Students are beginning to question the academic value and value for money of textbooks in New Zealand.[2] This questioning coincides with legal publishing going through substantial changes driven by the digital revolution. Students no longer tend to buy textbooks in any great numbers. This is something that had been noticed before the Covid-19 pandemic. It is a trend that predates the pivot to home learning that took place at the height of lockdown in semester one of 2020. This may be part of a greater trend towards a cultural expectation that digital content be freely accessible. Those who work in journalism or other content-driven fields will recognise this problem. The digital provision of journalism has seen many publications trying to recalibrate their funding models from those relied on in the print era.[3]

How do you keep quality content produced (that is to say, paid for) while allowing the consumer to access it for free? In the case of the university the answer is that the digital revolution has allowed textbooks to go online where it is free to the student. The payment is the subscription paid by the university library. This, when it works smoothly, is good news for the student and good news for equality of access to teaching resources. However, the potential improvements in access are not always met with an increase in university library funding. Alternative ways of funding textbooks, perhaps by charging extra fees directly to students to fund increased subscription costs, have potentially serious implications for equality of access.

The end result of this for universities is that they inevitably have to cover the costs demanded by the multinational companies that publish the legal textbooks. The model described has been in place for decades, predates the digital revolution and has a storied and surprisingly colourful history.[4] It is a system involving corporate interests in academic research that has been called

---

[2] Sarah Stein et al, 'Student Views on the Cost of and Access to Textbooks: An Investigation at University of Otago (New Zealand)' (2017) 9(4) *Open Praxis* 403.
[3] Robert Picard, 'Funding Digital Journalism: The Challenges of Consumers and the Economic Value of News' in Bob Franklin and Scott A Eldridge II (eds), *The Routledge Companion to Digital Journalism Studies* (Routledge, 2016) 147.
[4] George Monbiot, 'Academic Publishers Make Murdoch Look Like a Socialist', *Guardian* (online, 29 August 2011) <https://www.theguardian.com/commentisfree/2011/aug/29/academic-publishers-murdoch-socialist>.

'unethical'[5] and 'bad for science'.[6] One particular problem with academic publishing is that research that should benefit humanity is not freely available to everyone. Research has traditionally been published by private companies, although the research itself has been paid for by universities and other state agencies (such as government research agencies). The consumers of this toll-access material are those same universities that conducted the research in the first place. The publisher then is taking free content and selling it back to those who produced it. Of course, they provide valuable services such as typesetting, copy-editing, marketing and distribution. The question is whether their high profits can be justified when the net effect of the process is to publish publicly funded work that is not freely accessible.

The OA movement provides an alternative to this publishing model. OA allows for work to be published, often online, in a format that is freely accessible to everyone. As Suber points out, OA does not mean that there is a change in quality, or peer review. Nor does it mean that copyrights need to be infringed. It is a simple proposition that by redirecting the funds that are already in place research can be made freely accessible, possibly even with the same publishers who work on this research already.[7]

II UNDERSTANDING THE PROBLEM: UNSUSTAINABLE TEXTBOOK SUBSCRIPTIONS

Not every publisher works on this basis and the publishing model for textbooks is different in some ways to the publishing model for toll-access journals.[8] Toll-access journals are usually paid for by subscription, whereas textbooks were traditionally paid for individually. OA journals and textbooks both need to be paid for by means other than a toll on the end user. For the purposes of this article, it is useful to look at three examples of the problems that arise in the funding model chosen by publishers who supply content to the School of Law at the University of Canterbury. Each of the three publishers has a different pricing model, but the outcome is the same; students do not buy the books and therefore the university has to pay the fees. All of the books are written or edited by academics working at the University of Canterbury. The following is the experience of the university library with these publishers. The experience may be different at other universities, as each university library negotiates separately with each publisher.

The first publisher, a commercial publisher that is part of a multinational corporation, publishes a law book for a core course. Under the system where hard copies of the book cost NZD150–200 per book, and the library obtains 10 books for students to use, the outlay amounts to NZD2,000. Given that books need to be updated every four to five years this is an expenditure

[5] Richard Smith, 'The Highly Profitable but Unethical Business of Publishing Medical Research' (September 2006) 99(9) *Journal of the Royal Society of Medicine* 452.
[6] Stephen Buranyi, 'Is the Staggeringly Profitable Business of Scientific Publishing Bad for Science?', *Guardian* (online, 27 June 2017) <https://www.theguardian.com/science/2017/jun/27/profitable-business-scientific-publishing-bad-for-science>.
[7] Suber (n 1).
[8] 'Toll-access' is Suber's term to describe material that must be paid for to be read: ibid.

for a prolonged period, which means the annual costs are lower. The current digital subscription costs the library NZD7,000 a year. That is a 1,400% increase. Digital subscriptions may have advantages such as search functions and ease of updates, but the consensus among librarians and academics is that these are not value for money in the context of such a staggering cost increase.

The second example has some similarities with the first, in that the second publisher is also a multinational corporation. In this case the textbook is for an optional course with fewer students than in the first example. Under the paper book model, only one or two books would be bought for the smaller optional course. This publisher charges NZD1,500 for three user licences, but with a class of about 75 it is clear that you would need a significantly larger number of licences than three. Licences can be bought with greater access, but the library is unable to afford them.

The final example is of an edited volume used extensively for teaching core and optional courses. It was edited by two members of staff, with many contributions from colleagues in the institution. It is published by a university press — not the press at the editors' institution, the University of Canterbury — but the digital rights have been sold on to an online distributor. The University of Canterbury must pay for access at a price based on the number of downloads, which need to be paid for in advance. When the maximum has been reached, access stops. Study habits being what they are, this maximum has been reached a number of times in the run-up to exams, which has led to delays in students accessing the material at highly stressful times.

In every case, the university paid for the research when it was done as part of the authors' contracts as academic staff. The university is therefore paying again to have access to that work, although in the third example a university press is benefitting from the profits associated with the funding model. Certainly the publishers have added digital searching facilities to these publications, but can these changes justify such price increases?

Alongside these enormous increases in costs, there is no matching increase in the university's library budget. Academics are regularly asked to consider costs of materials before prescribing texts, as the costs are unsustainable.

III A MODEL FOR CHANGE: THE OPEN ACCESS TEXTBOOK

While it is not known what the contractual arrangements between publishers and other universities are in New Zealand, it is not unreasonable to suspect that similar things are happening in the way they are paying for access to these and other textbooks. There are six law schools in New Zealand and each is within a publicly funded university. The money to pay for textbooks is coming from the state and going to the publishers. This article argues that this model needs to change. In making that argument, it draws on the author's experience trying to produce a criminal process textbook as an OA project funded centrally by CONZUL.

The project arose from the fact that there is a genuine need for textbooks like this. The authors of the textbook, Mark Wright and James Mehigan, teach about the criminal process, as opposed

to the substantive criminal law or technical criminal procedure, to undergraduate criminal justice students. There is no useful textbook for these courses. The last one from New Zealand, while excellent, is almost 15 years old.[9] There is a similar style textbook for England and Wales from 2019,[10] but that is not satisfactory for use in New Zealand. In the course of discussions with our librarians, it became clear there was a way in which this need for a textbook could be joined with an experiment in developing an OA textbook.

This is when OA publishing begins to be tested in practice. It is one thing to say you would like to publish an OA textbook; it is another thing to actually fund it. However, it is important to remember that most of it is already paid for. The work required to write it is paid for as part of the salary of the authors (who are university lecturers). Most legal textbooks do not require expensive research costs such as labs or fieldwork, so the overheads (such as library access and office space) are already covered. There is no marginal cost to this project in terms of producing the substantive material. The only outstanding outlay is the cost associated with publishing. These costs would include copy-editing, design or layout, printing and the labour of librarians working to ensure that the final OA material is as widely available and searchable as possible. This latter cost is already paid for by universities as part of library workloads. Once the book is freely available online, a print-on-demand model could minimise the costs associated with publication and distribution. There may be a loss of royalties from the sale of the book for the university press and the authors compared to keeping it toll-access. However, this is unlikely to be significant.

This means that the missing piece of the funding puzzle is the production cost, although this need not be staggering. In commencing this project, it was calculated that the most this would cost would be NZD30,000. This is based on a previous OA book by the same publisher that cost slightly less than that amount.[11] That book was finished to an unusually high standard for an academic monograph, was in A4 format and ran to some 580 pages. A textbook on the criminal process would be substantially cheaper to produce. It is smaller in format and number of pages, thus reducing the editing and typesetting costs. Although the final figure will not be known until the textbook is published, it is expected to be closer to NZD20,000. This is the equivalent of three years' subscription to a core textbook for one university. If this is scaled across all six New Zealand law schools then the cost per textbook is much reduced compared to the traditional print model.

There is of course a question of scalability. Would all law schools want the same textbook for each course? The beauty of academia is the diversity of opinions on what to teach and how to teach it, as well as what to research. So this model of 'single-payer' OA textbook publication may be argued to be a constraint. Having said that, the market in New Zealand is not awash with legal textbooks. There are, for example, two criminal law textbooks and this appears to

[9] Julia Tolmie and Warren Brookbanks (eds), *Criminal Justice in New Zealand* (LexisNexis, 2007).
[10] Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 5th ed, 2019).
[11] Elisabeth McDonald, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with Those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

satisfy the needs of the teachers of core subjects and practitioners. In the present example of a textbook on the criminal process, CONZUL was satisfied that there was sufficient interest across the law schools to ensure that it was worth investing in the textbook, which would be hosted by the publisher and accessible to all, regardless of university.

The numbers stack up for OA textbooks, but there remains a sticking point. Somebody, or some institution, has to pay the upfront costs. With OA there is a problem akin to the well-known philosophical dilemma known as the 'free-rider problem'.[12] If there is going to be an OA textbook, why should we be the ones to pay for it? Why should we not be the 'free rider' and let other users pay for it?

The answer to this has to come from collaboration between interested institutions. In this case, the organising has come through CONZUL. This is a representative body of librarians from each of the eight universities. It works to 'act collectively to enhance the value and capacity of New Zealand University libraries'.[13] CONZUL has done significant work on OA publishing in the New Zealand context. It therefore decided to fund this project with a NZD30,000 grant as part of that work. The idea is experimental, but the hope is that by producing a successful OA textbook this can be used as a template for future textbook production, at least in law but potentially in any discipline. As the output will be entirely OA, any reader in the world with internet access can benefit from the work, whatever their academic affiliation (if any).

The project will use Canterbury University Press ('CUP')[14] to publish the textbook in time for semester two of 2023. The choice of a university press is important because, in the case of CUP, a small publishing house owned by the university, the financial target is to break even every year. The income from the book has to cover the cost of publication (review, editing, layout, printing, distribution) and e-publication (digital hosting, online layout) and does not need to include a profit margin. The cost structures are built in such a way that the exact same quality control mechanisms (including peer review) that would be used with a toll-access publication remain in place.[15] The only difference is that, instead of paying for the book by selling copies or demanding subscriptions from universities, the costs are covered, without profit, within the university library system. If a successful textbook is produced commercially, it would be the university library system that would pay for it, and it would usually only be university library subscribers who would have access to it. By going OA, the same libraries pay for the book, but it is also open to anybody interested in the subject matter. Additionally, research indicates that OA publications get greater levels of citations than toll-access

[12] Russell Hardin and Garrett Cullity, 'The Free Rider Problem' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, Winter 2020 ed, 2020).
[13] 'Council of New Zealand University Librarians (CONZUL)', *Universities New Zealand* (Web Page, 2021) <https://www.universitiesnz.ac.nz/about-universities-new-zealand/unz-committees-and-working-groups/council-new-zealand-university>.
[14] 'Canterbury University Press', *University of Canterbury* (Web Page, 2021) <https://www.canterbury.ac.nz/engage/cup>.
[15] Suber (n 1).

publications.[16] This applies to both OA journal articles[17] and books.[18] The reach of a book beyond the academy is likely to be significantly enhanced by publishing in an OA format.

Although this is a small project, it may be a useful pilot scheme to help demonstrate the viability of OA textbook publishing in New Zealand and beyond. The only way that OA publishing will be expanded is through communal action. This communal action must involve rethinking the way that money goes from the major funder of research (the state) to those who do the work for research and publication. Rethinking the payment scheme could move away from individualised payments (where individuals or universities pay for the book or subscription) towards a centralised system (where libraries pay upfront for the cost of publication). It does not need to be a massive conceptual jump to go from one to the other, and the potential benefits in cost savings and improved access to knowledge are huge.

IV OVERSEAS COMMUNAL ACTION FOR OPEN ACCESS

New Zealand is a small jurisdiction, with a relatively small legal community. Yet it has a thriving culture of legal debate and analysis and a healthy body of legal professionals contributing to a system with a high respect for the rule of law. The question for OA advocates is how we can organise in such a way as to keep this legal debate as open to contributors and consumers as possible. The answer has to be in communal action, whether it involves all publishers and consumers of legal texts, or just a few. This can be demonstrated with two examples from overseas that have lessons for the New Zealand legal community: one from the University of California, and one in the field of particle physics. The first is raised as an example of the power of universities themselves to drive OA publishing, and the second is raised as an example of a field or discipline driving the reordering of the funding model for academic publishing. Both are good examples of where communal action has made it possible to move research into an OA format without increasing financial outlay in the process.

The University of California system is a public research university with 10 campuses across the state. It has an annual budget of USD41.6 billion and approximately 285,000 students.[19] In 2019 the University of California pulled out of its contract with one of the world's largest academic publishers, Elsevier.[20] It had subscriptions to some 7,000 journals through the contract. For two and a half years there was a stand-off between the university and the publisher and it was not clear that the contract would be renewed. Academics at the university had to obtain journal articles through other means, such as by contacting the author of a paper directly

[16] Heather Piwowar et al, 'The State of OA: A Large-Scale Analysis of the Prevalence and Impact of Open Access Articles' (2018) 6 *PeerJ* e4375.
[17] Xianwen Wang et al, 'The Open Access Advantage Considering Citation, Article Usage and Social Media Attention' (2015) 103 *Scientometrics* 555.
[18] Christina Emery et al, 'The OA Effect: How Does Open Access Affect the Usage of Scholarly Books' (Springer Nature Open Research White Paper, November 2017).
[19] University of California, 'University of California at a Glance' (Information Sheet, February 2021) <https://ucop.edu/institutional-research-academic-planning/_files/uc-facts-at-a-glance.pdf>.
[20] Jeffrey Brainard, 'California Universities and Elsevier Make Up, Ink Big Open-Access Deal', *ScienceInsider* (Web Page, 16 March 2021) <https://www.sciencemag.org/news/2021/03/california-universities-and-elsevier-make-ink-big-open-access-deal>.

to ask for a copy, or by looking to repositories for earlier versions (so-called 'Green OA').[21] In general, staff were supportive of the move and understood the difficult position that the publisher had put the library in. The university was contributing huge amounts of research to these publications, but this research was not freely available to those members of the public and the academy who did not have expensive Elsevier subscriptions.

In the end, the contract was renewed. Financially, the fees payable remained the same, but in real terms amounted to a 7% reduction in costs.[22] The larger benefit, beyond California, was that academics from the university will publish OA in Elsevier journals. They will pay a processing charge for this, but it will be less than before the deal was struck.[23] The overall effect of the deal is, according to a UC Berkeley librarian who was involved in the negotiations, to 'convert subscription payments into payments for open access publishing'.[24]

This marked a huge victory for the OA movement. It demonstrated that the major consumers of research-based publications did not need to always accept the financial terms of the publishers. In some ways this is a special case. The University of California is huge, with academics supplying significant amounts of content to the journals in question. Not all universities will be able to negotiate such a deal with a powerful publisher. However, if one thinks about the University of California as a union of 10 universities (each of the 10 campuses would potentially be a stand-alone university in most jurisdictions) then the power of uniting against exploitative commercial interests becomes clearer.

The second overseas example looks not at universities combining to restructure the funding of publication, but at communal action taking place at the level of a field or discipline. The leading example of this approach comes from particle physics (also known as high-energy physics). CERN,[25] the European Organization for Nuclear Research based in Switzerland, may be most famous for its giant underground particle accelerator. However, it is also the home of the world's largest OA initiative, the Sponsoring Consortium for Open Access Publishing in Particle Physics, more commonly known as SCOAP. SCOAP commenced operation in 2014,[26] and has since supported the publication of over 44,000 peer reviewed journal articles.[27] The articles are now freely available on the SCOAP repository; prior to 2014 those articles would

---

[21] Suber (n 1) ch 3.
[22] Gretchen Krell, 'UC's Deal with Elsevier: What It Took, What It Means, Why It Matters', *University of California* (Web Page, 18 March 2021) <https://www.universityofcalifornia.edu/news/uc-s-deal-elsevier-what-it-took-what-it-means-why-it-matters>.
[23] Lindsay McKenzie, 'Big Deal for Open Access', *Inside Higher Ed* (Web Page, 17 March 2021) <https://www.insidehighered.com/news/2021/03/17/university-california-reaches-new-open-access-agreement-elsevier>.
[24] Krell (n 22).
[25] Free dissemination of research is part of CERN's mission and indeed it is part of the organisation's convention. CERN's convention states: 'The Organization shall have no concern with work for military requirements and the results of its experimental and theoretical work shall be published or otherwise made generally available': 'Our History', *CERN* (Web Page, 2021) <https://home.cern/about/who-we-are/our-history>.
[26] Alexander Kohls and Salvatore Mele, 'Converting the Literature of a Scientific Field to Open Access through Global Collaboration: The Experience of SCOAP3 in Particle Physics' (2018) 6(2) *Publications* 15.
[27] 'What Is SCOAP^3?', *Sponsoring Consortium for Open Access Publishing in Particle Physics* (Web Page, 2021) <https://scoap3.org>.

have been toll-access and available only to subscribers. Under the system, a partnership of over 3,000 institutions work together to redirect funds previously used for journal subscriptions.[28] Instead of spending the money on subscriptions to the publisher, each participating institution pays a subscription to SCOAP. This communal money is then paid to the publishers as article processing charges that go towards funding the publication costs of such work. The benefit of this system, which is universally accepted as being a success, is that by pooling the resources of more institutions you are able to pay for the publication costs of research more equitably. It ensures that the research (much of which has been paid for by states through their university research budgets) is available for the benefit of all humanity, regardless of subscription budgets. Again, as with the University of California example, the important thing is the communal action to bypass the model of corporate interests demanding individual payments. It is only through this communal action that we can increase the amount of OA publication and open up knowledge generated by the academy.

There is no reason that a version of this communal action cannot be achieved even in a small jurisdiction such as New Zealand. Although it is diffused among many actors, the ultimate source of the funding of most legal publications in New Zealand is the state. Through university libraries, civil service departments, the judiciary and many private practitioners working in publicly funded areas such as criminal or family law, books or other legal resources are paid for using money that effectively comes from the state. It is submitted that if the vast amount of money spent on legal resources is paid for by the New Zealand taxpayer, then the New Zealand taxpayer should be able to freely access those resources. The only reason this is not currently possible is because we are trapped in a paradigm of paying for the production of research on New Zealand law, while private overseas corporations control the sale and distribution of most of that research. This could be changed forever. If we can move beyond this individualised payment structure towards communal payment for legal resources, we can move towards a situation where those resources can be made more freely available.

V CONCLUSION

In the final analysis, the role of the public university should be, among other roles, to distribute knowledge as widely as possible. Hiding research behind subscription paywalls is a direct barrier to the achievement of that goal. The OA movement has slowly started to break down these barriers by rethinking the way in which we fund the publication of research. The model that currently operates in the law libraries of New Zealand is no longer sustainable. Paying subscriptions for materials including journal articles, monographs and textbooks that have been written by the university's own staff as part of their role appears to be a form of double payment for legal research and analysis.

This article has described a possible way forward by using the communal resources of New Zealand's university library budgets to fund the publication of a much-needed textbook on the criminal process. Although this project is in its early days, it has some of the characteristics of

[28] Ibid.

successful overseas OA projects, such as those in particle physics and at the University of California. The most important of these characteristics is the centralisation of budgets to create a single purchaser to fund the publication costs. If this model can be successfully executed in this case, it may prove to be the way in which textbooks are written in future. Indeed, it may even start the legal community thinking about whether all legal resources could be centrally funded. That next step is for all of us in the New Zealand legal community to take together.

INNOVATIVE TEACHING AND ASSESSMENT METHODS TO ENHANCE STUDENT BELONGING IN ONLINE TEACHING

Elizabeth Shi and Jessica Helmi†*

ABSTRACT

Online courses present serious challenges to students' sense of belonging because of the lack of face-to-face interactions with peers and teachers. These challenges have a negative impact on course completion and program retention rates. This paper reviews the existing literature on the 'dos and don'ts' of fostering student belonging in online teaching. It then recommends two innovative online teaching strategies designed by the authors to facilitate a stronger sense of belonging: interteaching and the use of private and public 'channels' on Microsoft Teams. Detailed steps and tips are provided on how to carry out these strategies successfully. Student feedback comments are also provided to illustrate the impact of the strategies.

* Senior Lecturer, Graduate School of Business and Law, RMIT University.
† Lecturer, Graduate School of Business and Law, RMIT University.

I INTRODUCTION

In the face of the COVID-19 pandemic and extended lockdowns making face-to-face learning impossible, online learning and teaching in universities has been growing rapidly.[1] Even before the pandemic, online courses had been growing in popularity, offering students more flexibility. This flexibility is especially beneficial for students with full-time work or family responsibilities.[2]

While these advantages are initially attractive to students, course completion and program retention rates are lower in online courses than in their face-to-face counterparts.[3] These lower rates indicate an underlying issue that many online students are dissatisfied and not learning in an optimal way. A substantial reason for this is that online students experience a lower sense of belonging than face-to-face students, often feeling disconnected from not only their institutions but also their peers and teachers.[4] Peacock et al recently found online students feel dissatisfied and disconnected in course offerings that do not facilitate personal connections with teachers and peers.[5] Similarly, Exter et al found online students feel more dissatisfied and more disconnected from their teachers and peers than face-to-face students.[6] There are similar findings of disconnection and a lack of belonging for both undergraduate and postgraduate online students.[7] These findings are pressing reasons for research on strategies to increase online students' sense of belonging.

To increase student belonging and improve learning outcomes more generally, the authors designed and implemented several innovative teaching strategies at RMIT University in 2020 and 2021. These strategies proved to be successful at increasing student belonging, as evidenced by quantitative and qualitative feedback in Course Experience Surveys. Fully informed consent was obtained from students before they took part in the Course Experience Surveys, including consent that de-identified information collected may be used for academic research.

The article first provides a brief overview of the existing literature on the 'dos and don'ts' of online teaching methods to foster belonging, which is consistent with the authors' own teaching experiences. It then discusses the strengths of two innovative strategies to facilitate a stronger sense of belonging: interteaching and the use of private and public 'channels' on Microsoft Teams. Detailed instructive steps and tips are provided on how to carry out these strategies

---

[1] Wahab Ali, 'Online and Remote Learning in Higher Education Institutes: A Necessity in Light of COVID-19 Pandemic' (2020) 10(3) *Higher Education Studies* 16, 17.
[2] Subhashni Appana, 'A Review of Benefits and Limitations of Online Learning in the Context of the Student, the Instructor, and the Tenured Faculty' (2008) 7(1) *International Journal on E-Learning* 5, 17.
[3] Sarah Carr, 'As Distance Education Comes of Age, the Challenge is Keeping the Students' (2000) 46(23) *The Chronicle of Higher Education* 39, 40.
[4] Susi Peacock et al, 'An Exploration into the Importance of a Sense of Belonging for Online Learners' (2020) 21(2) *International Review of Research in Open and Distributed Learning* 18, 20.
[5] Ibid.
[6] Marisa E Exter et al, 'Sense of Community within a Fully Online Program: Perspectives of Graduate Students' (2009) 10(2) *Quarterly Review of Distance Education* 177, 191.
[7] Peacock et al (n 4) 20.

successfully. Student feedback comments from Course Experience Surveys are provided to illustrate the impact of the strategies.

It is prudent to point out at the outset that adopting the innovative strategies will, to a certain degree, increase the workload of the teachers currently teaching in a less engaging way. The increased workload should be considered by any teacher before trialling these strategies. However, it is important to also bear in mind the benefits of adopting the strategies.

II FOSTERING STUDENT BELONGING: THE 'DOS AND DON'TS'

Research into online learning tools that enable a sense of belonging has identified some specific ways to improve student belonging online, such as the use of online discussion boards.[8] However, the research often remains focused on specific tools, rather than the integration of these tools into students' learning activities. Nonetheless, out of the research emerge certain 'dos and don'ts' of online teaching to increase students' sense of belonging. This section explores the contributions of current literature into what works and what doesn't when it comes to facilitating belonging through online learning.

A *What Works?*

It remains important for online platforms to be used in a way that enables sufficient personal contact between students and the course facilitator. Making meaningful connections with academic staff has been found to help enable belonging.[9] Peacock et al identify that 'tutors [are] pivotal to the development of learners' sense of belonging'.[10] Retention and engagement rates increase with tutors who are welcoming, caring and enthusiastic,[11] and who establish and maintain a personal connection with students.[12] Tutors can use online platforms to set early examples of the expectations around engagement and personal connection in the class,[13] establishing a personal and casual connection with students[14] and a culture of sharing.[15] Studies have also found that teachers who are up to date with and even go beyond the required course material are more likely to engage students online.[16] The module and class setup should also

[8] Jean Lave and Etienne Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press, 1991); Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge University Press, 1998).
[9] Jacqueline Brodie and Renata Osowska, 'Supporting Entrepreneurship Students' Sense of Belonging in Online Virtual Spaces' (2021) 35(4) *Industry and Higher Education* 353, 354–5; 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, 1380.
[10] Peacock et al (n 4) 25.
[11] Meehan and Howells (n 9) 1396
[12] Ibid 1386.
[13] Brodie and Osowska (n 9) 5.
[14] Lisa Thomas, James Herbert and Marko Teräs, 'A Sense of Belonging to Enhance Participation, Success and Retention in Online Programs' (2014) 5(2) *The International Journal of the First Year in Higher Education* 69, 75.
[15] Peacock et al (n 4) 26.
[16] Brodie and Osowska (n 9) 5.

allow for multiple ways to contact the facilitator.[17] A welcoming teaching and learning community helps knowledge acquisition, which leads to more meaningful learning experiences.[18] Academic staff play an important role in creating a welcoming atmosphere that nurtures trust and inclusion.[19]

Meehan and Howells recently found that developing close friendships fosters students' belonging in higher education.[20] Students long for a sense of belonging in a welcoming and supportive community,[21] which includes both their peers and instructors. There is a correlation between a strong sense of 'classroom community' and a sense of 'community between students and their instructor', which relies on 'contact with the instructor' and 'instructor responsiveness'.[22] Studies have shown that students who feel connected to their peers are more involved in online learning, preventing the feelings of isolation that can negatively affect knowledge building.[23]

Tutors can facilitate this sense of connection and community by embedding it within the online curriculum,[24] including in the assessments.[25] To help foster this connection, they can provide opportunities for students to connect with each other throughout the course, establish synchronous learning activities through teleconference technology (such as Collaborate Ultra — see Part III.A.3),[26] and provide private online spaces through which students can interact and connect.[27] The liberal use of a variety of multimedia types has been shown to be effective,[28] including short videos[29] and social media.[30] Furthermore, balancing academic tasks with more informal, social tasks and discussions has been shown to increase engagement and belonging.[31]

B *What Does Not Work?*

Developing a 'sense of belonging' goes hand in hand with establishing a feeling of being integral to and involved in one's own learning environment.[32] This enables students to nurture

---

[17] Peacock et al (n 4) 27.
[18] Xiaojing Liu et al, 'Does Sense of Community Matter? An Examination of Participants' Perceptions of Building Learning Communities in Online Courses' (2007) 8(1) *Quarterly Review of Distance Education* 9, 22.
[19] Penny Jane Burke et al, 'Capability, Belonging and Equity in Higher Education: Developing Inclusive Approaches' (Research Report, Centre of Excellence for Equity in Higher Education, University of Newcastle, 2016).
[20] Meehan and Howells (n 9) 1382.
[21] Thomas, Herbert and Teräs (n 14) 71–2.
[22] Suzanne Young and Mary Alice Bruce, 'Classroom Community and Student Engagement in Online Courses' (2011) 7(2) *MERLOT Journal of Online Learning and Teaching* 219, 224.
[23] Mary E Engstrom, Susan A Santo and Rosanne M Yost, 'Knowledge Building in an Online Cohort' (2008) 9(2) *Quarterly Review of Distance Education* 151.
[24] Exter et al (n 6) 191.
[25] Thomas, Herbert and Teräs (n 14) 76.
[26] Exter et al (n 6) 191.
[27] Peacock et al (n 4) 27.
[28] Exter et al (n 6) 191.
[29] Peacock et al (n 4) 27.
[30] Exter et al (n 6) 191.
[31] Young and Bruce (n 22) 226.
[32] Bonnie MK Hagerty et al, 'Sense of Belonging: A Vital Mental Health Concept' (1992) 6(3) *Archives of Psychiatric Nursing* 172, 173.

interpersonal connections and social support networks,[33] which encourages retention, engagement and more meaningful learning experiences. When students feel like they do not belong and feel alienated from the culture of their institutions they are often less motivated to study.[34] We have, therefore, also identified several 'don'ts' of online teaching, or actions that could lead to a decrease in students' sense of belonging and therefore their engagement.

Recent research has found that unanswered questions on online discussion boards reinforce a sense of isolation.[35] Students have similarly identified the lack of real-time feedback as an ongoing challenge of online learning.[36] Additionally, if students do not keep up with the online discussions in forums on discussion boards they feel further isolated from their peers.[37] Sending regular emails to students is deemed important to improving student belonging, but students feel disconnected or overlooked when emails are not directly relevant to them or are clearly automated.[38] Some research has also found that striving too hard for a sense of belonging and engagement can actually have the opposite effect.[39]

Online learning has also been found to alienate students without existing information and communications technology ('ICT') experience or education,[40] making them feel 'left out' from the rest of the class online and thus depleting their sense of belonging and increasing their likelihood of leaving the class. A perceived difficulty in communicating with fellow students and staff can decrease students' engagement.[41] Wong suggests that the wealth of information available to students through online platforms may be overwhelming and encourage disconnection.[42]

In a similar vein, Dumford and Miller found that because many students are enrolled in multiple online courses at a time, students are more likely to engage in superficial, high-quantity but low-quality learning activities, rather than high-quality interactions such as collaborative learning, student–faculty interactions, effective teaching practices and discussions with diverse others.[43] As established above, a lack of these kinds of quality learning experiences is more likely to lead to a decreased sense of belonging and lower rates of engagement and retention.

---

[33] Ibid.
[34] Richard James et al, *Participation and Equity: A Review of the Participation in Higher Education of People from Low Socioeconomic Backgrounds and Indigenous People* (Report, Centre for the Study of Higher Education, University of Melbourne, March 2008).
[35] Brodie and Osowska (n 9) 4.
[36] Kyong-Jee Kim, Shijuan Liu and Curtis J Bonk, 'Online MBA Students' Perceptions of Online Learning: Benefits, Challenges, and Suggestions' (2005) 8(4) *Internet and Higher Education* 335, 341.
[37] Peacock et al (n 4) 26.
[38] Brodie and Osowska (n 9) 4.
[39] Ibid.
[40] Dominic Wong, 'A Critical Literature Review on E-Learning Limitations' (2007) 2(1) *Journal for the Advancement of Science and Arts* 55, 55; Appana (n 2).
[41] Kim, Liu and Bonk (n 36) 340.
[42] Wong (n 40) 59.
[43] Amber D Dumford and Angie L Miller, 'Online Learning in Higher Education: Exploring Advantages and Disadvantages for Engagement' (2018) 30(3) *Journal of Computing in Higher Education* 452, 458.

Whilst, as we explored above, synchronous learning can facilitate a connection with other students, relying on synchronous learning too much can cause difficulties in students' abilities to participate,[44] that is, if they are not available or able to access the platform at a specific time. This again can lead to students feeling 'left out' of the social aspects of learning, decreasing their sense of belonging.

Our research aims to add to existing scholarship on the role of online collaborative strategies and tools to help to facilitate belonging. It is challenging to achieve the same level of student belonging in an online learning environment as in a face-to-face classroom. Taking these benefits and limitations of online learning explored above into account, we designed and implemented tailor-made strategies to enable students to maintain peer communication and collaboration, engage actively with online classes and materials, and thus feel connected with teachers and fellow students and feel a sense of belonging. Table 1 summarises the 'dos and don'ts' of fostering student belonging.

Table 1: The 'dos and don'ts' of fostering student belonging in online learning

Do	**Don't**
• Establish and maintain a personal and meaningful connection with students via online platforms. • Set early examples of expectations around engagement. • Establish the culture of sharing. • Provide multiple ways to contact the teacher/facilitator. • Develop friendships between students. • Embed a sense of community into the curriculum and assessments. • Provide synchronous learning activities, online spaces, multimedia, social media and videos.	• Leave discussion board questions and posts unanswered. • Be slow to respond to queries. • Not provide real-time feedback. • Send irrelevant and automated emails. • Rely on online tools that students find difficult to use, especially students with no ICT experience. • Make communication difficult. • Overwhelm students with too much information. • Set low-quality learning activities. • Put too much reliance on synchronous learning activities.

III INTERTEACHING

Interteaching is a pedagogy originally developed by psychology faculties in the United States. It is a student-centred approach, in which students teach each other the course content using prior reading and discussion questions as guides.[45] Teachers play a more facilitative role, rather than a transmission role. The rationale for interteaching is 'the best way to learn something is to teach it'. One of the authors of this paper, Elizabeth Shi, has written previously on

[44] Wong (n 40) 59.
[45] Thomas E Boyce and Philip N Hineline, 'Interteaching: A Strategy for Enhancing the User-Friendliness of Behavioural Arrangements in the College Classroom' (2002) 25(2) *The Behaviour Analyst* 215, 218.

interteaching as an alternative instruction method for law education,[46] and since 2020 has integrated interteaching pedagogy into an online law course. Interteaching requires active participation from students, with students reporting 'increased student satisfaction, greater engagement in learning, increased confidence in speaking in class and enhanced learning outcomes'.[47] A positive correlation between the interteaching method and the development of a sense of belonging can be identified in the step analysis of the method in practice, discussed in the next section.

A *A How-To Guide*

The steps for online interteaching are described below, with a focus on how each step can increase student belonging.

1 *Written Guide*

First, the teacher writes an interteaching guide based on the reading material for the week. Structuring each class around an interteaching guide makes it clear to students what is expected of them each week, establishing a common goal for the entire class. This common goal helps foster a sense of being part of a community, and thus a sense of belonging.[48] As one student of the interteaching method described, '[it is] very easy to understand [the] layout of [the] topic and teaching schedule' (student, Semester 2, 2020). This transparency sets the tone for the semester.

The interteaching guide contains a range of question types — from simple definitions to more complex questions, such as problem-based, normative, and personal experience questions. The questions are designed to guide students through the course content and reading material. These questions are used throughout the course across different topics to deepen the students' connections to one another over the course of the semester, which has been recognised as important to online learning and belonging.[49] Personal experience questions are especially helpful in fostering students' sense of belonging, as they require students to engage with the material as it pertains to their own lived experiences. These questions serve as both a learning activity and an icebreaker activity. Sharing personal experiences also gives students the opportunity to connect their personal experiences with the learning material. Below is an example of a personal experience question used in the interteaching guide for a class on workplace bullying in employment law:

> Have you or your friends or family experienced workplace bullying? Was there a written anti-bullying policy in place at the workplace? Was the dispute resolved in accordance with the anti-bullying policy?

---

[46] Elizabeth Shi, Paul Myers and Zhong Freeman, 'Interteaching: An Alternative Format of Instruction for Law Classes' (2018) 11 *Journal of the Australian Law Teachers Association* 58, 62.
[47] Ibid.
[48] Peacock et al (n 4) 24.
[49] Thomas, Herbert and Teräs (n 14) 74.

2 *Explanatory Video*

The teacher then films a video explaining the key concepts for the topic, which is then uploaded to a learning management system ('LMS') (such as Canvas) and made accessible to students. The videos ensure that the students can become familiar with the teacher prior to live online classes (described in the next section). As discussed in Part II.A, familiarity and rapport with the teacher is a major factor in building students' sense of belonging. This type of visual engagement is more powerful than written communication, allowing communication through body language, emotion and personality. The teacher can build a relationship of camaraderie and trust through the video, and this can then develop further through the interactions in the live class.

3 *Live Online Classes*

Students then attend online interactive classes via an LMS — in this instance, the course used the platform Collaborate Ultra. The class initially takes place in the same Collaborate Ultra 'room' for 10–20 minutes. The teacher makes announcements and discusses some general points relating to the topic. It has been identified from both staff and students that a 'teacher's presence contributed to a sense of belonging'.[50] This initial point of contact helps to reinforce a teacher's presence and is therefore crucial in ensuring students' involvement in the class and their sense of belonging.

The structure of Collaborate Ultra facilitates 'real-time interactions'[51] between students on a weekly basis. One student from the interteaching course articulated:

> I really like the interaction in this course. It's a good way to communicate as we study online now. (Student, Semester 2, 2020)

The interactivity of online classes allows students the opportunity to connect their personal experiences with the material and with the other students, further facilitated by the personal experience questions included in the interteaching guide (see Part III.A.1).

During this initial segment of the class, the teacher can ask the students to share any related news they have heard during the preceding week. Depending on the size of the class, only a few students may be able to speak during this segment, with the rest of the students listening to what is being discussed. If this is the case, it is best to encourage a range of students to speak week-to-week; for example, the teacher can say something like 'I would love to hear from some students who did not speak last week'.

When the students share related news, they may have varying degrees of sophistication in the explanation of the topic. This is where the chat function of the online teaching platform can assist. The teacher can ask the students who shared news items to post links to the stories in

[50] Ibid 75.
[51] Ibid 74.

the chat. Because the teacher is recording the session, students can go back to the recording to access the links after the session finishes.

As a form of 'synchronous instant messaging', the use of the chat function can help foster a sense of 'camaraderie',[52] particularly for students who are unable to participate verbally/via microphone, or for those better able to express themselves in writing. It can also allow those who have not yet had the opportunity to speak to provide their insight or ask questions without interrupting the flow of class.

Throughout the live online classes, the teacher's presence remains essential to ensuring student engagement and facilitating a sense of belonging. Some feedback from students highlight this:

> [My teacher] had a role in motivating me to eliminate my concerns of talking [in] public … she always encourages us to interact with each other and … motivates students to participate. [S]he always says [to] talk and participate [and that] there is no wrong answer which enhance[s] student[s] to exchange opinions and ideas. (Student, Semester 2, 2020)

4 *Breakout Rooms*

After the initial 20 minutes of class discussion, the teacher then places students into small breakout rooms of two or three students for 15–20 minutes. The teacher can either randomly allocate students or place specific students in each room. In our experience, it works well to allocate students randomly but still allow them to move between breakout rooms. That way, students can move into another room if they prefer to discuss with their friends rather than strangers, mimicking the freedom of movement in face-to-face classrooms.

The teacher assigns a different interteaching question to each breakout room. The groups must then report back their discussion to the larger group. One student reiterated how this part of the interteaching process can provide a level of confidence, reassuring students that they are on track with their research:

> Inter[teaching] provides an opportunity to interact, discuss with my classmates. (Student, Semester 1, 2020)

Breakout rooms have become an instrumental part of online learning, particularly in fostering students' connections on a smaller scale. Enabling smaller group discussions improves the bond between students.[53] In these smaller group discussions, students who might not be comfortable sharing with a larger audience are given the opportunity to communicate and connect.

On the other hand, some students have highlighted a potential challenge of breakout rooms. Sometimes there is very little discussion, which defeats the purpose of allowing students to

[52] Young and Bruce (n 22) 226.
[53] Peacock et al (n 4) 27.

review their material with each other before participating in the main discussion with the rest of the cohort:

> The breakout rooms are pretty hard as some students don't want to talk. (Student, Semester 2, 2020)

Under the interteaching model, the teacher can resolve this potential issue by entering breakout rooms and asking questions that facilitate conversation and encourage students to speak. In most cases, it will only take the arrival of a teacher in the breakout room to start some form of conversation.

5 *Assessment and Feedback*

During the online classes the tutor observes and marks student participation as a form of assessment. The tutor delivers these marks halfway through the semester and then again at the end of semester. The students can therefore gain feedback on their participation at two points over the course of the semester. Students find this ongoing process of feedback engaging and helpful. As one student reported:

> I like the interteaching! It's so much easier than having to do an exam and actually forces you to participate and engage in the content. (Student, Semester 1, 2020)

The marks provided at a midway point of the semester offer students the opportunity to reflect on this mark and see what they can improve on. They are also given the opportunity in their online classes to seek individual feedback from their tutor based on their grades. This highlights the availability and presence of their tutor in the online learning spaces, which has been found to facilitate a higher sense of belonging.[54] The interteaching method takes this one step further by providing students with the opportunity to receive formal feedback based on the assessment of their class participation and the opportunity to speak with their teacher based on the feedback they have received.

B *Consistency in Delivery*

It is important to maintain consistency of the delivery in interteaching across the entire semester. The repetitiveness of the structure mimics a routine for students that ensures they remain engaged throughout the semester, whilst the breadth of topics and questions allows for students to maintain interest in the field:

> The course structure helped me remain engaged with the content [throughout], even in weeks when we were covering material I had thought I was familiar with due to working in [the field]. (Student, Semester 1, 2020)

Some studies into online learning have found students are well supported at the onset of the course but become 'disengaged and lonely' as the course goes on.[55] Clearly there is a need for a level of consistency in the engagement of students as the course progresses, not just in the

[54] Young and Bruce (n 22) 224; Brodie and Osowska (n 9) 5.
[55] Thomas, Herbert and Teräs (n 14) 72.

introductory stages. The interteaching method provides solutions to this challenge via its consistent framework and structure throughout the semester. As discussed earlier, by inviting new students to contribute each week, teachers ensure that students are less likely to fade into the background and become disengaged as the course progresses.

Young and Bruce's study into online learning reiterates that a higher level of 'organizational skills' is a characteristic of student engagement that facilitates 'connection between students and their own learning'.[56] A positive correlation between student engagement and a sense of community amongst students provides insight into how being more engaged with material helps foster a sense of belonging within the cohort online.[57] The routine nature of the interteaching format can support students to improve their organisational skills as it becomes a weekly practice of engaging with the material. Young and Bruce suggest that 'future studies need to focus on … learning experiences that bring students together to collaborate, socialize and interact'.[58] The interteaching model is an example of how online learning can maximise collaboration, socialisation and interaction between students who would otherwise not have met or collaborated.

IV ONLINE 'CHANNELS'

As a separate and independent strategy from interteaching, the authors also designed and implemented the use of online 'channels' in Microsoft Teams ('Teams') to improve students' sense of belonging. The strategy was trialled in a different course from the course using the interteaching strategy. The methods the authors used are described below.

Teams has a group chat function called 'channels' that allows chat threads with various subgroups of the class to be formed. To optimise student-to-student connection, the teacher can create multiple public channels for each tutorial subgroup or discussion theme, a Q&A channel, post-tutorial discussions, or icebreaker channels. These latter channels are optimal spaces for the sharing of engaging and often casual links such as news, graphics and images. The public channels serve as community hubs that enable students to interact with other students across their cohort.

Channels allow students to interact with each other across the duration of the course, not just in their allocated class time. The instant notification when someone posts in the channel creates a smaller delay time between replies. Delays in response time, such as those that often occur in traditional course discussion forums, have been identified as a source of isolation for students.[59] In contrast to discussion boards, using chat over channels can be likened to social media chat functions, such as WhatsApp and Messenger. Receiving immediate feedback from peers in this context helps to ameliorate the lack of peer-to-peer engagement on discussion boards. Thomas, Herbert and Teräs have also found a disparity between students engaging with

[56] Young and Bruce (n 22) 225.
[57] Ibid.
[58] Ibid 227.
[59] Brodie and Osowska (n 9) 2.

a tutor on discussion boards and students engaging with their peers. According to their study, students tend to be more receptive to questions posed by staff than those posed by a fellow student.[60]

Before the implementation of channels in this course, though students posted links to their article on the discussion board, very few (if any) comments were made in response to the posts. After the implementation of channels, students began to receive more frequent responses.

Students can also post messages on chat channels that are not necessarily course-related. For example, many students posted funny GIFs to cheer each other up during assessment submissions. Media such as GIFs and videos make students feel less isolated by providing an opportunity for them to connect with their peers and the teacher in a more meaningful way outside class hours. The channels therefore facilitate camaraderie amongst the cohort beyond the course material. The use of emojis and 'reactions' also helps students who are not comfortable typing in long form or unable to participate using cameras or microphones, ensuring they are also given the opportunity to connect with classmates. One student commented on these opportunities for connection:

> [It is an] interactive method that encourages and motivates us to participate and share ideas and examples … we were told to use emojis to express our moods and could freely discuss in the class, made sure that despite it being thoroughly an online medium, it would be a fun learning experience… Even utilising emojis created a kind of interaction … (Student, Semester 2, 2020)

We ensured the use of inclusive language and emojis on channels. Brody and Caldwell found that the use of emojis in class activities helps students to better understand what they have learned,[61] especially in an online classroom.[62] Vareberg and Westerman also found that teachers' use of emojis during initial communications with students is perceived as a sign of goodwill and genuine care, although when used excessively can negatively affect the teacher's image of competence.[63] It is therefore important that the teacher leads students by showing examples of how the platform will be used throughout the semester, but remains aware of the limitations the use of such language and emojis may place on students' engagement and sense of connection and belonging with the class.

The below section describes the use of channels in this course both before and during class and outlines how this platform has helped facilitate students' sense of belonging and led to better learning outcomes.

---

[60] Thomas, Herbert and Teräs (n 14) 73.
[61] Nicholas Brody and Lesley Caldwell, 'Cues Filtered In, Cues Filtered Out, Cues Cute, and Cues Grotesque: Teaching Mediated Communication with Emoji Pictionary' (2019) 33(2) *Communication Teacher* 127, 130.
[62] Joanna C Dunlap et al, 'What Sunshine Is to Flowers: A Literature Review on the Use of Emoticons to Support Online Learning' in Sharon Y Tettegah and Martin Gartmeier (eds) *Emotions, Technology, Design, and Learning* (Academic Press, 2016) 163, 178.
[63] Kyle Vareberg and David Westerman, 'To :-) or to ☺, That Is the Question: A Study of Students' Initial Impressions of Instructors' Paralinguistic Cues' (2020) 25(1) *Education and Information Technologies* 4501, 4501.

A *Channels before Class*

At the start of the course, the teacher creates a Teams site for each student group and posts a welcome message in the general Teams channel. Students are prompted to post a reply or to write their own messages in this channel and 'react' to each other's messages using Teams' multiple reaction functions (for example, 'like', 'love', 'happy', 'laugh', 'sad', 'angry'), which mimic the reaction buttons found in more familiar social media platforms. A large number of students immediately react to the teacher's welcome message by posting messages within the channel. This helps create an instant sense of community within the course even before the semester begins.

Using relevant and modern ways to communicate with students, such as emojis and reactions, fosters closeness amongst students and a welcoming online atmosphere before the start of the semester. This is highly critical, since students' perceptions of teachers are highly influenced before the official start of the class.[64] One student identified why the Teams groups and channels increased a sense of belonging by building relationships:

> [Our teacher] was able to make online learning efficient by building a relationship with us and facilitating the creation of groups using Microsoft Teams … In order to keep us engaged with our respective team, [our teacher] frequently kept breakout room sessions on Microsoft Teams along with a class activity to be done. This was supporting in forming a good level of relationship with the tutor and other students in the class. All this was highly effective in contributing to the beneficial value of this … (Student, Semester 1, 2021)

B *Channels during Class Time*

During online tutorials, the Teams platform facilitates icebreaker activities, such as using virtual backgrounds and turning on student cameras. Students are encouraged to choose a creative, fun and interesting video background to show to others, which encourages students to turn on their cameras in order to show the video background. This demonstrates how channels are an effective way to build rapport, as students organically comment on and react on others' virtual backgrounds. Another icebreaker activity facilitated by channels involves asking students to use an emoji in the channel chat to represent how they are currently feeling. In addition to fostering engagement, this exercise allows teachers to offer support to those who post a 'sad' or 'unhappy' emoji, or to those who are not confident in writing messages but are happy to use emojis.

C *Channels after Class*

Post-tutorial discussions can be made available through channels to allow students to reflect on what they have learned together. Using private channels outside of class times in particular facilitates students' sense of community and collaboration beyond the live online class.

[64] Ibid 4504.

Students confirmed this contributed to their sense of community, providing a positive impact on student satisfaction and online learning quality.[65]

After class, teachers may also use private channels to form collaborative learning networks ('CLNs'), a mode similar to breakout rooms. The CLNs are most helpful in facilitating group assessments. Only group members of a particular CLN's channel can see and participate in the discussions, allowing for personal and private collaboration between students when discussing their assessments. Teachers can then see how each group organises their meetings outside of class time, who attended, and how long meetings were conducted. This allows teachers to monitor student progress and provide help when necessary. If students need help during their CLN meetings, they can use the 'tag' function within the channel to invite the teacher for an ad hoc consultation. The 'tag' function works just like the social media '@' function, where teachers will receive a real-time notification when students need help.

Overall, based on the feedback provided by students in the course, this strategy has enabled highly interactive online learning and has contributed to students' learning experiences:

> [I]t was a very wholesome learning experience and taught me things I would look forward to implementing in my future career. (Student, Semester 1, 2021)

V CONCLUSION

This paper has contributed to the ongoing discussion in literature regarding practical ways of community building and enhancing students' sense of belonging in online classrooms. It offers educators novel strategies to design an online pedagogy that is welcoming, inclusive, contemporary and engaging. The strategies suggested build upon the themes in the existing literature on belonging, such as the importance of having sufficient contact with the teacher and developing friendships with fellow students.

Detailed steps are described in this paper on how to use the interteaching method to encourage and incentivise students to prepare for and actively participate in online classes. This method enables students to teach and learn from each other while being guided by the teacher, and is proven to increase the students' sense of belonging in the learning community.

Detailed steps are also described on how to use public and private channels in Microsoft Teams to encourage students to connect professionally and personally with their peers and teachers before, during and after class. This method creates a strong sense of community and fosters a sense of camaraderie and a collaborative spirit.

The authors have used student feedback comments to demonstrate the positive impact of these strategies. Students report feeling connected, having fun and experiencing high interaction and motivation as a result of the teaching strategies.

---

[65] Liu et al (n 18) 22.

There are some limitations and workarounds in these tactics. For example, the breakout room discussions work best if students are happy to talk, but work less well for quieter students who are reluctant to talk. In those situations, the teacher needs to intervene with more words of encouragement or suggest to the students that they type chats to each other over the chat function if talking is less comfortable for them.

To sum up, the online teaching strategies put forward in this paper should be considered when educators are designing their online teaching pedagogies. This is especially important in light of the lower course completion and program retention rates in online courses than in their face-to-face counterparts.[66] The strategies put forward in this paper will have a positive impact on course completion rates, as they address and alleviate students' feelings of isolation when participating in online courses.

[66] Carr (n 3) 40.

DEMOCRATIC DEFICIT: THE ELECTORAL SYSTEM UNDER FIJI'S 2013 CONSTITUTION

*Gaurav Shukla**

ABSTRACT

Fiji has introduced four constitutions since independence in 1970. Each Constitution offered the opportunity to establish an electoral system that complies with established democratic principles and meets the particular needs of Fiji. This article engages with the shortcomings of the electoral process under the current *Constitution of the Republic of Fiji 2013* (Fiji). Questions regarding the electoral system are raised, such as whether the D'Hondt/Jefferson model is the right choice for a multi-party jurisdiction; whether the electoral bodies are sufficiently independent to conduct free and fair elections; and whether the judiciary has sufficient capacity to resolve electoral grievances. The article concludes that the *Constitution 2013* does not provide adequate checks and balances for free and fair elections, and electoral bodies hamper the implementation of democratic principles.

* Lecturer in Law, University of South Pacific. Email: gaurav.shukla@usp.ac.fj; gaurav.gauravshukla@gmail.com.

I INTRODUCTION

Democracy is not just a way of governance: it is a way of life. Democratic principles — such as the rule of law, free and fair elections, the freedom to elect representatives and be elected, freedom of assembly and political participation, freedom of speech and expression, and transparency in elections and governance — are essential for protecting an individual's rights.[1] Free and fair elections are a fundamental component of democracy.[2] The Inter-Parliamentary Union declares that free and fair elections reaffirm 'the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights'.[3] The fairness of elections depends on multiple standards based on voting and election rights, candidature, campaigning rights and responsibilities, and the rights and responsibilities of states.[4]

The purpose of this article is to examine the election process established under the *Constitution of the Republic of Fiji 2013* (Fiji) ('*Constitution 2013*'), evaluating the standards of states' responsibilities to conduct free and fair elections, the transparency in the election process, and the adjudication of election disputes. The article exemplifies the journey of Fiji's election process from first-past-the-post ('FPP') to the proportional representation ('PR (List PR)') system. Furthermore, the article illustrates the impact of PR (List PR) and the 5% clause in the *Constitution 2013* for securing a seat in Parliament.

In this article, I explicitly conceptualise the role of the Fijian Electoral Commission, the equal participation in the government, the appointment process of members of electoral bodies, and the appointment process of judges who have the jurisdiction to decide on election disputes. This article argues that the process of appointment for electoral bodies and adjudication authorities should be more neutral, and that the opposition in a democracy should have a greater role in these critical appointments.

II THE ELECTORAL SYSTEM IN FIJI

This part of the article considers the different electoral systems adopted and experimented with in Fiji, from FPP to the present PR (List PR) system. Under the *Constitution 2013*,[5] members of the unicameral Parliament are elected by secret ballot on a proportional representation ('PR') basis. Responsibility for a free and fair election lies with the Electoral Commission.[6] The

---

[1] 'Declaration on Criteria for Free and Fair Elections', *Inter-Parliamentary Union* (Web Page, 2021) <https://www.ipu.org/our-impact/strong-parliaments/setting-standards/declaration-criteria-free-and-fair-elections>.

[2] See, eg, National Academy of Sciences, Engineering, Medicine, *Securing the Vote: Protecting American Democracy* (Consensus Study Report, National Academies Press, 2018); Patrick Merloe, *Promoting Legal Frameworks for Democratic Elections: An NDI Guide for Developing Election Laws and Law Commentaries* (National Democratic Institute for International Affairs, 2008).

[3] 'Declaration on Criteria for Free and Fair Elections' (n 1).

[4] 'Chapter 23: Monitoring Human Rights in the Context of Elections' in Office of the United Nations High Commissioner for Human Rights, *Manual on Human Rights Monitoring* (United Nations, 2011) 7.

[5] *Constitution of the Republic of Fiji 2013* (Fiji) s 162(2) ('*Constitution 2013*').

[6] Ibid s 52.

Constitution 2013 abolished the Senate and the House of Representatives, which existed from 1970 to 2006.[7] The PR (List PR) electoral system in Fiji is a multi-member open-list PR system, with a single, multi-member constituency. Each voter has a single vote of equal value.[8] Seats are allotted to the candidates in proportion to the total number of votes cast in favour of each political party.[9]

Between independence in 1970 and the 1987 coups, Fiji used an FPP system for House of Representatives elections. However, the major drawback of the FPP system was that candidates with a small percentage of the overall vote could be elected, often in those constituencies where multiple candidates contested the election.[10] During this period, separate ethnic constituencies were used to provide a degree of proportionality in disproportionate results produced by the FPP system. A new *Constitution 1990*, introduced after the twin Sitiveni Rabuka coups of 1987, did not change the electoral system, and so national elections in 1992 and 1994 were also conducted using the FPP system.[11]

After the 1994 election, with the support of two Indo-Fijian Members of Parliament ('MPs') Jai Ram Reddy and Mahendra Chaudhry, the Rabuka government initiated a constitutional review process.[12] In 1996, the Constitution Review Commission ('CRC') addressed the issues that were faced by the FPP plurality voting system.[13] This system may be considered logical when voters choose between only two candidates.[14] However, the CRC observed that in a multi-party system such as Fiji's, the FPP system has disadvantages — for example, a winning candidate may receive less than 50% of the votes. Furthermore, under this system, a particular party may gain a majority in the House if they have the most candidates elected via FPP but have fewer than half of all votes cast.[15]

To overcome these defects, the CRC proposed the alternative vote ('AV') system. This system requires voters to rank candidates in order of their preference. A candidate must have a majority of the votes cast to be elected, which in a single-member constituency is over 50% (see the formula for calculating this quota below). However, in a single-member constituency, if two

---

[7] 'History of the Parliament of the Republic of Fiji', *Parliament of the Republic of Fiji* (Web Page, 2021) <http://www.parliament.gov.fj/our-story>.
[8] *Constitution 2013* (n 5) s 53(1).
[9] Ibid s 53(2)(a).
[10] Norm Kelly, 'A New Electoral System for Fiji in 2014: Options for Legitimate Representation' (Pacific Islands Brief No 3, Pacific Islands Development Program, East-West Center, 15 February 2013) <https://www.eastwestcenter.org/sites/default/files/private/pib003.pdf>.
[11] Steven Ratuva, 'Shifting Democracy: Electoral Changes in Fiji' in Steven Ratuva and Stephanie Lawson (eds), *The People Have Spoken: The 2014 Elections in Fiji* (Pacific Series, ANU Press, 2016) 17, 18–19 <http://press-files.anu.edu.au/downloads/press/p337333/pdf/ch022.pdf>.
[12] Kelly (n 10).
[13] DG Arms, 'Fiji's Proposed New Voting System: A Critique with Counter-Proposals' in Brij V Lal and Peter Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution Review* (ANU E Press, 2012) 97, 101; Sir Paul Reeves, Tomasi Rayalu Vakatora and Brij Vilash Lal, *The Fiji Islands: Towards a United Future — Report of the Fiji Constitution Review Commission 1996* (Parliamentary Paper No 34, Parliament of Fiji, 1996) 305 <http://www.paclii.org/fj/constitutional-docs-archives/reeves-report/ch10.pdf> ('Reeves Report').
[14] Reeves Report (n 13) 310.
[15] Ibid 305.

candidates receive 50% of all votes then the candidate who has the highest number of first-preference votes, as opposed to second- or third-preference votes, will be elected.[16] Furthermore, in a single-member constituency, if no candidate surpasses the 50% threshold, the first-preference votes are counted for each candidate, and the candidate with the lowest number is eliminated. Then, in the second round of counting, any ballot papers giving a first-preference vote to the eliminated candidate are re-examined and votes are re-allotted to the remaining candidates for whom those voters have expressed a second preference.[17] Once the second preferences are added to the first preferences for the candidates still in the running, the candidate with the lowest number of votes is again eliminated and the process goes on until one of the candidates surpasses the required 50% threshold.[18]

For calculating the threshold (or quota) that must be achieved by a candidate in a single- or multi-member constituency in order to obtain a seat in Parliament, the AV system uses this formula:[19]

$$\text{Quota} = \frac{\text{votes}}{\text{seats} + 1} + 1$$

For example, if the total number of votes cast is 10,000 and the number of seats is one (that is, a single-member constituency), then 10,000 / ((number of seats = 1) + 1) + 1 (so 10,000 / 2 + 1) = 5,001 votes. If there are two seats, then 10,000 / 3 + 1 = 3,334.33, and therefore the quota for a constituency with two seats will be 3,334 votes. If the country has multiple single-member constituencies, then the quota will be over 50% of total votes cast and the same will be applicable for every constituency.

The general election of 1999 used the AV system, resulting in the victory of the Fiji Labour Party and, for the first time, the appointment of an Indo-Fijian Prime Minister, Mahendra Chaudhry.[20] From 71 members of the House of Representatives, the Labour Party won 37 seats, thereby having a majority in the house.[21] The Labour Party won all the Indo-Fijian ethnic seats, as well as 18 of the open seats, making a total of 56 seats.[22] This dominance of the Indo-Fijian

---

[16] Arms (n 13) 102.
[17] Ben Reilly, 'Constitutional Engineering and the Alternative Vote in Fiji: An Assessment' in Brij V Lal and Peter Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution Review* (ANU E Press, 2012) 73, 76.
[18] Donald L Horowitz, 'Encouraging Electoral Accommodation in Divided Societies' in Brij V Lal and Peter Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution Review* (ANU E Press, 2012) 21, 29.
[19] Andrew Reynolds et al, *Electoral System Design: The New International IDEA Handbook* (International Institute for Democracy and Electoral Assistance, 2005) 76 <https://www.ifes.org/sites/default/files/electoral-system-design-the-new-international-idea-handbook.pdf>.
[20] Stewart Firth and Jon Fraenkel, 'Changing Calculus and Shifting Visions' in Jon Fraenkel and Stewart Firth (eds), *From Election to Coup in Fiji: The 2006 Campaign and Its Aftermath* (ANU E Press and Asia Pacific Press, 2007) 1, 6–7 <https://library.oapen.org/bitstream/handle/20.500.12657/33744/459242.pdf?sequence=1>.
[21] Rae Nicholl, 'Broken Promises: Women and the 2006 Fiji Election' in Jon Fraenkel and Stewart Firth (eds), *From Election to Coup in Fiji: The 2006 Campaign and Its Aftermath* (ANU E Press and Asia Pacific Press, 2007) 160, 162, Table 12.1 <https://library.oapen.org/bitstream/handle/20.500.12657/33744/459242.pdf?sequence=1>.
[22] Robert Norton, 'Understanding the Results of the 1999 Fiji Elections' in Brij V Lal, *Fiji before the Storm: Elections and the Politics of Development* (ANU Press, 2012) 49, 57 <https://www.jstor.org/stable/j.ctt24h84v.11>.

community motivated the George Speight coup of 2000.[23] The AV system was also used in the 2001 and 2006 general elections. In these elections, the pro-Indigenous Soqosoqo Duavata ni Lewenivanua Party (SDL or United Fiji Party) won the election with a total of 44% of votes, edging out the Labour Party's 40%.[24] However, the elected government of 2006 did not survive for long and, in the same year, another coup put the country under a military regime led by Commodore Voreqe (Frank) Bainimarama.[25] From 2006 to 2014 the country remained under the military regime.

The principal drawback of the AV system is that the counting of votes takes a long time to achieve an absolute majority. The candidate with the highest first-preference count may be surpassed by a lower-polling candidate who receives a higher number of second and third preferences, creating confusion and anger amongst voters.[26]

The *Constitution 2013* introduced the PR system.[27] The PR system has its own drawbacks — for example, in electorates with a low number of candidates to be elected, high levels of proportionality are difficult to achieve, and in electorates with a high number of candidates to be elected, representatives with a relatively low number of votes can be elected. This is what happened in the 2014 and 2018 elections.[28]

There is no single electoral system that can achieve simplicity, local representation, a strong party system, stable government, protection of minorities, and a direct correlation between votes and results.[29] However, the question is which electoral system can achieve most of these attributes. The FPP and PR (List PR) systems do have attributes like simplicity, local representation, protection of minorities, and proportionality of results. The AV system is good in terms of simplicity, but is limited in other attributes.[30] The *Constitution 2013* adopted the PR (List PR) system, because it was believed that neither the FPP nor AV systems produced

---

[23] Brij V Lal, *Islands of Turmoil: Elections and Politics in Fiji* (ANU E Press and Asia Pacific Press, 2006) 185 <https://press-files.anu.edu.au/downloads/press/p27031/pdf/book.pdf>.

[24] Jon Fraenkel, 'Bipolar Realignment under the Alternative Vote System: An Analysis of the 2006 Electoral Data' in Jon Fraenkel and Stewart Firth (eds), *From Election to Coup in Fiji: The 2006 Campaign and Its Aftermath* (ANU E Press and Asia Pacific Press, 2007) 272, 272–5 <https://library.oapen.org/bitstream/handle/20.500.12657/33744/459242.pdf?sequence=1>.

[25] Brij V Lal, 'Anxiety, Uncertainty and Fear in Our Land: Fiji's Road to Military Coup, 2006' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (State, Society and Governance in Melanesia Program Studies in State and Society in the Pacific No 4, ANU E Press, 2009) 21, 21–3 <https://press-files.anu.edu.au/downloads/press/p7451/pdf/book.pdf>.

[26] W Glenn Harewood, 'Comparing the Advantages & Disadvantages of First Past the Post [FPTP], Alternative Voting [AV], and Proportional Representation [PR] Electoral Systems' (External Brief, House of Commons, Canada, 31 August 2016) 3–4 <https://www.ourcommons.ca/content/Committee/421/ERRE/Brief/BR8555618/br-external/HarewoodWGlenn-e.pdf>.

[27] *Constitution 2013* (n 5) s 53.

[28] Kelly (n 10) 2–3.

[29] Ibid 6–7.

[30] Arms (n 13) 102–3.

desirable results, and that ethnicity-based constituencies promoted power struggles between ethnic groups.[31]

The PR system is often promoted in diverse societies like Fiji to reduce the dominance of one ethnic group. The major disadvantage of the FPP system is that candidates receiving fewer votes can win the election. However, this disadvantage applies to the PR system also: in the 2014 and 2018 elections, some of the candidates won the election even though they received fewer votes than other candidates. On the other hand, the most important benefit of the FPP system — that is, the direct relationship between the elected MP[32] and their constituents, where the constituents can raise questions to the elected MP if the constituency's interests are not represented — is lost in the PR system. In the PR system, members of the public do not know who their elected MP is, so they cannot specifically raise their constituency's (local) grievances.

III THE ELECTORAL SYSTEM AND THE 5% CLAUSE

In this part of the article, the effects of the 5% clause for securing a seat in Parliament are illustrated, with the help of mathematical calculations. The electoral system adopted in Fiji is known as the D'Hondt/Jefferson model. Thomas Jefferson was the third President of the United States; Victor d'Hondt was a Belgian lawyer and mathematician who developed a model in the 1880s in an attempt to better accommodate different linguistic groups and political traditions. This method works on the quotient received after each party's total number of votes is repeatedly divided by 1 plus the number of seats already allocated (1, 2, 3…) until all seats are filled. This division produces an average, and the party with the highest average vote is awarded the first seat, the next highest the second seat, and so on.[33]

Fiji is a multi-ethnic society, including: iTaukei, or Indigenous Fijians (the majority); descendants of indentured labourers from British-occupied India, commonly known as Indo-Fijians; Rotumans, who came from Rotuma Island; Rabi Islanders (Banabans); and others.[34] In the absence of affirmative action, the D'Hondt method does not equalise representation of all communities, and the *Constitution 2013* is silent on protecting the rights of minorities. It does not further one of the goals of the 1996 CRC, which was 'to encourage the emergence of multi-ethnic parties or coalitions'.[35] The *Constitution 1970* s 32 prescribed the number of seats for every community so that every community got equal representation in the House of Representatives.[36] It also specified separate voter rolls for iTaukei, Indo-Fijians and others, and

---

[31] Ratuva (n 11) 30.
[32] Kelly (n 10) 4.
[33] Silvia Kotanidis, European Parliamentary Research Service, 'Understanding the D'Hondt Method: Allocation of Parliamentary Seats and Leadership Positions' (European Parliament Briefing, June 2019) 3.
[34] Alan Howard, 'Plasticity, Achievement and Adaptation in Developing Economies' (1966) 25 *Human Organization* 265, 265–6.
[35] Brij V Lal, 'Fiji Constitution Review Commission Recommendations for a New Electoral System in Fiji' in Brij V Lal and Peter Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution Review* (ANU E Press, 2012) 39, 40.
[36] *Fiji Independence Act 1970* (UK).

from each separate roll, 22 MPs each were to be from iTaukei and Indo-Fijian communities, and 8 from other ethnic groups present in Fiji.[37]

Similar provisions were included in the *Constitution 1990*, whereby the House of Representatives had 70 seats, with 37 for iTaukei,[38] 27 for Indo-Fijians, 5 for other ethnicities, and 1 representative from Rotuma Island.[39] The MPs were responsible for their respective constituencies, making them answerable to the people directly, and, most importantly, the citizens knew the person with whom they could direct their grievances. However, neither the *Constitution 1970* nor *1990* were effective enough to bridge the gap between the ethnic groups, especially between the iTaukei and Indo-Fijians.[40]

Under the *Constitution 2013*, the winning candidate is determined by totaling the number of votes cast in favour of each candidate of that political party, which should be at least 5%[41] or more of the total votes in that election to qualify for a seat in Parliament.[42] In a hypothetical scenario, if a candidate receives 10,000 votes but their political party receives less than 5% of the total number of votes cast, then they are ineligible to become an MP. However, if a candidate receives 5,000 votes but their political party receives more than 5% of the total votes, they are eligible for a parliamentary seat.[43] Therefore a candidate receiving more votes can lose out to a candidate receiving fewer votes.

Bainimarama of the FijiFirst Party, the present Prime Minister (the head of the Fijian government), received 167,732 votes out of the total 227,241 FijiFirst Party votes (or 74% of his Party's total). Therefore, the other FijiFirst candidates to whom seats in Parliament were allocated only received 59,509 votes collectively, with a total of 27 FijiFirst seats in a 51-

---

[37] Stephen Sherlock, 'Constitutional and Political Change in Fiji' (Parliament of Australia Research Paper No 7 1997–98, 11 November 1997) 7 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9798/98RP07>.

[38] Lal, *Islands of Turmoil* (n 23) 100. In 1994, Sitiveni Rabuka's party Soqosoqo ni Vakavulewa ni Taukei (SVT) returned to power with 32 out of 37 seats reserved for iTaukei under *Constitution 1990*. They formed a coalition government with the General Voters Party, which won four out of five seats allocated to them. However, while this arrangement gave representation to every ethical group, it excluded any possibility for the second-highest ethnic group — the Indo-Fijians — to occupy power. Sherlock (n 37) 5, states that '[t]he philosophy underlying the Fiji Constitution of 1990 was that the interests of indigenous Fijians could be protected only if Fijian leaders were guaranteed political ascendancy, a formula based on the effective political exclusion of the Indo-Fijians.'

[39] Lal, *Islands of Turmoil* (n 23).

[40] Brij V Lal, 'The Sun Set at Noon Today' in Brij V Lal and Michael Pretes (eds), *Coup: Reflections on the Political Crisis in Fiji* (ANU E Press, new ed, 2008) 8, 8–9. For example, Apisai Tora, a Fijian nationalist leader, stated that 'Indians came as slaves, and they are now our masters. Fiji should have a Fijian Prime Minister and nothing less will do'; the chair of the landowners' council attacked the Chaudhry government and threatening the non-renewal of the expiring native leases to (mostly) Indo-Fijian farmers; Taniela Tabu, former Taukei movement supporter and trade unionist, accused the Chaudhry government of 'Indianising the public service'. These instances and many more resulted in the George Speight coup of 2000. All these instances have divided Fijian society to its deepest core and this divide is exploited for political gain.

[41] *Constitution 2013* (n 5) s 53(3).

[42] Ibid s 53(2); *Electoral Act 2014* (Fiji) s 104(3) ('*Electoral Act 2014*').

[43] After the enforcement of the *Constitution 2013* two general elections were conducted, one in 2014 and another in 2018. The FijiFirst Party won 32 out of 51 seats in 2014, and 27 in 2018, with a total vote share of 59.17% in 2014 and 50.02% in 2018.

member Parliament.[44] So, the Prime Minister holds one seat with 167,732 votes while the rest of the FijiFirst MPs hold the remaining 26 seats with 59,509 votes. If we divide 59,509 votes by the 26 seats, that averages to only 2,288 votes per MP.

In the 2018 general election, 458,532 votes were cast out of 637,527 registered voters, a 71.9% turnout.[45] To qualify for a seat in Parliament, 5% of 458,532 is needed, that is 22,926 votes. The *Constitution 2013* requires an independent candidate to gain 22,926 votes to qualify for a seat, compared with an average of 2,288 votes (59,509 votes divided by 26 seats) for a member of a political party, which not only qualifies them but practically won them seats in the 2018 election. Even if we divide the total number of votes (458,532 voters) in the general election of 2018 into 51 seats equally, each elected MP would have received 8,990 votes. However, in the present context, candidates receiving 2,288 votes or even fewer became MPs.

The 5% clause applies to independent candidates and these candidates are eligible for one seat each in Parliament.[46] In the 2014 election, two independent candidates ran for election, but neither of them received the minimum of 5% of the total votes cast. In the 2018 election, no independent candidates ran.[47] The effect of the 5% clause is that, if any political party or an independent candidate receives less than 5% of the total votes cast, they will not be eligible for a seat in Parliament.[48]

In some democracies, independent candidates contest elections against the political party within a constituency, not the whole country. This may be fairer, as the independent candidate runs against another individual and not against an entire political party. A voter can therefore consider either the individual or the political party when casting a vote. In most federal structures, votes may distinguish between local constituency issues and national issues, though not necessarily. Nevertheless, this distinction gives a chance to an independent candidate against a political party. In Fiji, voters have no opportunity to distinguish between local and national issues. Independent candidates are, therefore, fighting a losing battle.

IV ELECTORAL BODIES: POWERS AND FUNCTIONS

Electoral bodies have the most important role in conducting free and fair elections: this part of the article examines the appointment process for members of electoral bodies. The Electoral Commission was constituted under the *State Services Decree 2009* (Fiji),[49] and continues in existence under the *Constitution 2013*.[50] The Electoral Commission, which comprises a

---

[44] Jope Tarai, '2018 Fiji Elections: The Real Losses and Wins', *Devpolicy Blog* (Blog Post, 30 November 2018) <https://devpolicy.org/fiji-2018-elections-the-real-losses-and-wins-20181203>.
[45] Ibid.
[46] *Constitution 2013* (n 5) s 53(2)(b).
[47] Fijian Elections Office, *FEO Results App* (App, 12 March 2018). Mohammed Saneem, Supervisor of Elections, *2018 General Election: Joint Report by the Electoral Commission and Supervisor of Elections* (Final Report, 10 January 2019) 1: the general election of 2018 was contested by six political parties and there were no independent candidates.
[48] *Constitution 2013* (n 5) s 53(3).
[49] *State Services Decree 2009* (Fiji) s 4 ('*State Services Decree 2009*').
[50] *Constitution 2013* (n 5) s 75(1).

chairperson and six other members,[51] is independent and must perform its functions and powers without being subject to the control of any person or authority.[52] The chairperson must be a judge or qualified to be a judge.[53] Fiji consists of four kinds of courts, which in ascending hierarchy are the Magistrate Court, High Court, Court of Appeal and Supreme Court.[54] The *Constitution 2013* is silent on which kind of court judge is required for the chairpersonship, because the qualifications for the appointment of a judge in the three highest courts are identical.[55]

The *Constitution 2013* provides a list of persons ineligible to become one of the six additional members,[56] but does not specify the minimum qualifications required to become a member. The Fijian President (the head of state of Fiji) appoints the chairperson and other members on the advice of the Constitutional Offices Commission.[57] The Constitutional Offices Commission consists of the Prime Minister (chairperson), the Attorney-General, and the leader of the opposition. The President appoints two members on the advice of the Prime Minister and one member on the advice of the leader of the opposition.[58] The government has four members and the opposition has two. Indeed, the ruling party will always have an upper hand.

In addition to the Electoral Commission, the office of the Supervisor of Elections, established under the *State Services Decree 2009* (Fiji), continues to exist.[59] The Supervisor of Elections works under the direction of the Electoral Commission.[60] The minimum qualifications for becoming the Supervisor of Elections are not stipulated. The Supervisor of Elections is appointed by the President on the advice of the Constitutional Offices Commission following consultation between the Constitutional Offices Commission and the Electoral Commission.[61] The *Electoral Act 2014* (Fiji) stipulates the independence of the Supervisor of Elections. However, the Supervisor must comply with the direction of the Electoral Commission concerning the performance of their functions, and is also bound by the decision of a court of law.[62]

In 2014, the High Court of Fiji at Suva held that the Supervisor of Elections is not bound by the direction given by the Electoral Commission.[63] Aggrieved by this judgement, the Electoral Commission appealed to the Court of Appeal in 2016. The Supervisor's lawyer argued that, in terms of the *Electoral Act 2014* (Fiji) s 8 and the *Constitution 2013* s 76(3), the Supervisor is

---

[51] Ibid s 75(6).
[52] *Electoral Act 2014* (n 42) s 4(1).
[53] Ibid.
[54] *Constitution 2013* (n 5) s 97(1): 'The judicial power and authority of the State is vested in the Supreme Court, the Court of Appeal, the High Court, the Magistrates Court, and in such other courts or tribunals as are created by law.'
[55] Ibid s 105(2).
[56] Ibid s 75(8).
[57] Ibid s 75(7); cf *State Services Decree 2009* (n 49) ss 4(7)–(8).
[58] The Fijian Constitutional Offices Commission held its First Meeting in 2015.
[59] *State Services Decree 2009* (n 49) s 5(1); *Constitution 2013* (n 5) s 76(1).
[60] *Constitution 2013* (n 5) ss 76(2)–(3).
[61] Ibid s 76(4).
[62] *Electoral Act 2014* (n 42) s 8.
[63] *Election Commission v Supervisor of Elections* (2014) FJHC 627, 637.

'required' to seek relief from the court if they think that the Commission's direction is wrong. The objection to this plea was that nowhere in any of the provisions cited by the Supervisor's lawyer is it stated that the Supervisor is required to seek relief from the court. The Court of Appeal partly allowed the appeal and ruled that 'section 76(3) of *Constitution* read with section 8(a) of *Electoral Act 2014* the Supervisor of the Election has to comply with all the directions given by the Electoral Commission regarding its functions'.[64]

In some democracies, an electoral commission is sufficient to conduct elections.[65] Some of these countries have a three-tier system of governance, whereby there are elections for Parliament, state legislative assemblies, and local bodies, such as town or municipal corporations. The need to have two constitutional bodies in Fiji — the Electoral Commission and the Supervisor of Elections — for conducting only one general election every four years puts a burden on the taxpayer to maintain an additional office for conducting elections.[66] This is doubly problematic, as the country does not have any other elections, even for local bodies.

The Electoral Commission can review the number of seats in Parliament one year before the date of general elections,[67] and can increase or decrease the number of seats in Parliament based on the population-to-seat ratio.[68] While determining the population, the Commission must refer to the most recent census, the register of voters, or any other official information available.[69] This change of seats is made to ensure that, as far as practicable, at the date of any such review (one year before the general election), the population-to-seat ratio is the same as the population-to-seat ratio at the date of the first general election held under the *Constitution 2013*,[70] which was the 2014 election. For the general election of 2022, the Commission has increased the number of seats by four, from 51 to 55.[71] The *Constitution 2013* also empowers Parliament to make a written law for further provisions to give effect to the review of the number of seats.[72] In the exercise of powers vested under s 54(5), Parliament enacted the *Electoral Act 2014* (Fiji). The Electoral Commission holds the responsibility and authority to formulate policy for the determination of the number of seats in Parliament before every general election.[73]

---

[64] *Election Commission v Supervisor of Elections* (2016) FJCA 159, 178.
[65] Countries like Australia, Bangladesh, Canada, India, Jordan, Nigeria, Poland, Romania, United Kingdom, etc.
[66] *Constitution 2013* (n 5) s 75(1). The Electoral Commission is responsible for registering voters; regularly revising the register of voters; registering candidates; settling electoral disputes; and monitoring and enforcing compliance with any written law governing elections and political parties. Under s 76(2) the Supervisor of Elections, acting under the direction of the Electoral Commission, is responsible for administering the registration of voters for election of MPs; conducting elections of MPs, and such other elections as Parliament prescribes; and performing such other functions as are conferred by written law. In a broad sense, it is difficult to distinguish the functions of these two constitutional bodies, as their essential functions are the same.
[67] Ibid s 54(5).
[68] Ibid.
[69] Ibid s 54(3).
[70] Ibid s 54(2).
[71] Fijian Electoral Commission, 'Electoral Commission Approves 55 Seats in Parliament for Next General Election', *Fiji Sun* (online, 25 June 2021) <https://fijisun.com.fj/2021/06/25/electoral-commission-approves-55-seats-in-parliament-for-next-general-election>.
[72] *Constitution 2013* (n 5) s 54(4).
[73] *Electoral Act 2014* (n 42) s 3(1)(c).

The proportionate ratio in 2014 was 17,329 people to 1 seat (50 seats); in 2017 it was 17,205 people to 1 seat (51 seats); and for 2021 it was 16,424 people to 1 seat (55 seats). The difference in the proportionate ratio between 2017 and 2021 is 781. Can 781 votes be considered negligible when the present Minister of Commerce is holding his parliamentary seat with 589 votes?[74] Since the population-to-seat ratio at the date of the first general election held under the *Constitution 2013* in 2014 was 17,329 people to 1 seat, if the 2021 population of 903,359 is converted into seats, keeping 17,329 people to 1 seat, there should be an increase of just 1.1 seats, totaling 52.1 seats (903,359/17,329 = 52.1).

A July 2021 press release by the Electoral Commission did not explain the formula or method used for the determination of the number of seats, or for increasing the number of seats in Parliament from 51 to 55 seats between 2017 and 2021. The press release simply stated that, while exercising its powers under the *Constitution 2013* s 54(2), the Electoral Commission increased the number of seats from 51 to 55.[75] There is a method in place for the determination of the number of seats, but that method is neither available in the public domain nor explained by the Electoral Commission in the recent increase in the number of seats for the 2022 general election. The Electoral Commission is responsible to people and is required to provide relevant information so that people can understand the method or process used for increasing the number of seats for the 2022 general election.

V COURT OF DISPUTED RETURNS: POWERS AND FUNCTIONS

This part of the article discusses the powers and functions of the Court of Disputed Returns, along with the appointment process to the court. Disputes regarding elections are heard by the High Court as the Court of Disputed Returns, having original jurisdiction to hear and determine whether a person's election is valid,[76] and to receive submissions by way of proceedings and make judgements on whether the seat of an MP has been vacated.[77] The *locus standi* for bringing the motion before the court is with any person who has the right to vote in that election, or by a candidate contesting that particular election, or by the Attorney-General.[78] If the petition is not filed by the Attorney-General or if the dispute is about the validity of the election of an MP, the Attorney-General may intervene in the proceedings.[79] If the seat becomes vacant under s 63 of the *Constitution 2013*, the Electoral Commission will offer the seat to the highest-ranked candidate of that political party.[80] By-election would only be conducted in the case that there was no candidate from the same political party or, if there was, the candidate did not agree to hold the post.[81] If the High Court declares an election void, a by-election must be conducted

[74] Fijian Elections Office (n 47).
[75] Fijian Electoral Commission (n 71). The same press release is not available on 'Press Releases', *The Electoral Commission: Republic of Fiji* (Web Page, 2021) <http://www.electoralcommission.org.fj/category/press-releases>.
[76] *Constitution 2013* (n 5) s 66(1)(a).
[77] Ibid s 66(1)(b).
[78] Ibid ss 66(3)(a)(i)–(iii).
[79] Ibid s 66(4).
[80] Ibid s 64(1).
[81] Ibid.

within 60 days of the decision of the court.[82] However, for the by-election, there must be knowledge of the electoral pool of that candidate, but since there is just one multi-member constituency in the PR (List PR) electoral system in Fiji, would the entire country need to go to the election for the sake of one seat of Parliament?

The Attorney-General,[83] as well as the Supervisor of Elections, can intervene in election petitions.[84] The nature of an intervention is not specified. While the High Court has the jurisdiction to decide election disputes, if an electoral dispute arises in Vanua Levu, one has to travel to Viti Levu, the island where the High Court is situated. This exhibits 'justice out of reach' in a nation with 330 islands, some situated very remotely. In the age of 'justice on the doorstep', the *Constitution 2013* should ensure that all the people of Fiji, including those living in the remote islands, are capable enough (economically, politically and socially) to at least reach the door of justice. As there are no constituencies, they are left with minimal information and the result is that no one has challenged the election of any candidate in either the 2014 or 2018 elections.

The court has to conclude the election petition within 21 days, though the *Constitution 2013* is silent on what happens if the dispute is not addressed within that timeframe — will the petition be considered as dismissed or allowed?[85] An MP whose seat becomes vacant under s 63(1) and applies to the High Court under s 63(5) is suspended from Parliament, pending the decision of the court.[86] Proceedings under the declaration of whether an MP's seat has become vacant can be brought before the court by any other MP, a registered voter, or the Attorney-General,[87] but not by the MP themselves.[88] If the proceedings are not brought by the Attorney-General, then they may intervene in the proceedings;[89] the nature of the intervention is not specified, nor is there a requirement to seek the approval of the court before intervening. This executive intervention in judicial proceedings is inconsistent with the democratic principle of separation of powers.[90]

High Court judges are appointed by the President on the recommendation of the Judicial Service Commission, after consultation with the Attorney-General.[91] The Judicial Service Commission was established under the *State Services Decree 2009* (Fiji)[92] on the recommendation of the 1996 CRC. The CRC accepted the recommendation of the Beattie Commission (a 1994 Commission of Inquiry into the judicial system of Fiji) of having a

---

[82] *Electoral Act 2014* (n 42) s 131(c).
[83] *Constitution 2013* (n 5) s 96(1). The post of Attorney-General is appointed to a Minister, and they are the chief legal advisor to the government and have executive powers.
[84] Ibid; *Electoral Act 2014* (n 42) s 124(3).
[85] *Constitution 2013* (n 5) ss 63(6), 66(8).
[86] Ibid s 63(8).
[87] Ibid s 66(5).
[88] Ibid s 66(7).
[89] Ibid s 66(6).
[90] See also Roslyn Atkinson et al, *Dire Straits: A Report on the Rule of Law in Fiji* (International Bar Association Human Rights Institute Report, March 2009).
[91] *Constitution 2013* (n 5) s 106(2).
[92] Ibid s 104(1).

separate commission to deal with judicial appointments.[93] However, Fiji also appoints visiting judges to its highest courts on a fixed-term contractual basis.[94] A state should refrain from appointing judges on a fixed-term contractual basis because a judge's position is well described as a public office rather than a private contractual relationship.[95] If such contractual appointments are inevitable, then they should be subject to the appropriate security of tenure and require special justification;[96] however, in no case should these appointments be made in the Supreme Court.[97] Fiji disregards almost all of these safeguards and allows a serious intervention of the executive in the judiciary.

VI CONCLUDING REMARKS

It seems that the drafters of the *Constitution 2013* missed the opportunity to establish an electoral system that complies with established democratic principles and meets the particular needs of Fiji. The 5% clause that is the benchmark for securing a seat in Parliament enables political parties to have a strong advantage over independent candidates. The same 5% clause allows candidates with fewer votes to secure a seat in Parliament with the help of the overall performance of their party. The appointment process of members of electoral bodies favours the party in power; though these bodies are independent, the role of the government in the process ensures the appointment of pro-government individuals. Even the appointment process of judges to the Court of Disputed Returns has an inclination towards pro-government individuals. Though there is no concrete evidence to establish that judges of the Court of Disputed Returns and members of electoral bodies are pro-government, it was said by Lord Hewart, former Lord Chief Justice of England 1922–1940, in the case of *R v Sussex Justices, ex parte McCarthy*,[98] that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'. The appointment process must be done, and be seen to be done, justly. Apart from the appointment process, there has been no judicial review of these provisions, and so they have not passed the test of validity and fairness. The *Constitution 2013* has very few judicial precedents because each regime change has resulted in a new Constitution. Consequently, the country has had four constitutions since independence.

---

[93] Reeves Report (n 13) 430, para 13.19. See also Brij V Lal, 'Towards a United Future: Report of the Fiji Constitution Review Commission' (1997) 32(1) *Journal of Pacific History* 71.

[94] For a critique of contractual judicial appointments, see Marc de Werd, 'Appendix III: Overall Assessment of the Draft Law Introducing the Visiting Judge Concept in Slovakia through the Perspectives of Relevant Experience in the Netherlands' (Council of Europe, nd) <https://rm.coe.int/appendix-iii-the-visiting-judge-concept-in-slovakia-through-the-perspe/1680966e48>.

[95] J van Zyl Smit, Bingham Centre for the Rule of Law, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report, 2015) 63.

[96] Ibid 58.

[97] Ibid 184.

[98] [1924] KB 256; [1923] EWHC KB 1.

WHY LEGAL SCHOLARSHIP MATTERS: JULIUS STONE, A LEGAL SCHOLAR WE ADMIRE

*Steven Stern**

ABSTRACT

Julius Stone identified the extent to which the law might constitute a self-contained logical system, the ideals to which a legal system ought to conform, and the law's interaction with social behaviour and attitudes. He is firmly established as one of the leading legal philosophers of his day. Stone's impact on the teaching and practice of law in Australia truly is unique, and is unlikely hitherto to have been exceeded by any other Australian legal academic in the country's history. This paper examines the extent (if any) to which two criticisms of Stone, namely that he undermined the rule of law by his critique of precedent and that he failed to establish his own definitive school of jurisprudence, are at all sustainable. In response to both of these criticisms, it is suggested that they bypass Stone's central thesis, namely that law is inherently dynamic, only able to be understood relatively and incrementally. Philosophy, as a discipline, exemplifies this kind of approach by Stone.

* BEc LLB (Mon); LLM PhD (Melb); CTA FIPTA ICC; Barrister-at-Law, List S Svenson Barristers, Victorian Bar; Registered Tax Agent; Registered Trade Mark Attorney; Senior Fellow, Economic Society of Australia; Member, Australian Academy of Forensic Sciences; Adjunct Professor and Academic Sessional (Research Support), Office of the Dean, College of Law & Justice, Victoria University, Melbourne.

I INTRODUCTION

Julius Stone profoundly influenced generations of students and made major contributions to the law.[1] In 1986, the then Prime Minister RJL Hawke described Stone as being firmly established as one of the leading legal philosophers of his day.[2] Hawke spoke of how Julius' spirit inspired students to translate the Stone philosophy into reality.[3]

Stone enlightened his students as to the moral responsibility of those who advance legal arguments or who sit in judgement upon them.[4] Stone rebutted the notion that for every legal problem there is a determinate solution. Stone brought out the institutional legal constraints within which judges had to exercise their decision-making responsibilities.[5]

II STONE'S APPROACH

Stone's central contribution is that some creativity is inevitable and desirable through which courts must exercise their interpretative latitude. Within broad contexts, there is an openness in judicial decision-making. Adjudication inherently involves a concern for policy. The social sciences have an influential role to play in the adjudicative process. The core of appellate judicial tasks is not any mechanical implementation of precedents. The task that distinguishes appellate judges is 'the choosing between alternatives left open by the shortfalls of precedent or by the fertility of language in which precedents are expressed'.[6]

A *Pound's Sociological Jurisprudence*

Stone came to Australia and New Zealand bringing with him the challenge of Harvard University Professor Roscoe Pound's school of jurisprudence.[7] Pound led a school of legal theory that originated in the United States known as sociological jurisprudence. This school posited the idea that law is a social institution; the law has to satisfy social wants. The school

---

[1] Stone's published works include 34 books, treatises and monographs and over 120 principal articles, chapters and papers. Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control: A Study in Jurisprudence* (Associated General Publications, 1946) won worldwide recognition. The great Stone trilogy of the 1960s — Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland, 1964), Julius Stone, *Human Law and Human Justice* (Maitland, 1965), and Julius Stone, *Social Dimensions of Law and Justice* (Maitland, 1966) — has been described as the most comprehensive account yet written on modern jurisprudential thought, by the publishers of Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 1985). A biography of Stone has been written by Leonie Star, *Julius Stone: An Intellectual Life* (Oxford University Press, 1992). A relatively recent collection of essays commemorating Stone's impact has been published by Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010).
[2] RJL Hawke, 'Julius Stone: Humanist, Jurist and Internationalist: Inaugural Julius and Reca Stone Memorial Lecture' (1986) 9 *University of New South Wales Law Journal* 1, 2.
[3] Ibid 8.
[4] Anthony R Blackshield, 'The Legacy of Julius Stone' (1997) 20(1) *University of New South Wales Law Journal* 215, 218.
[5] Martin Krygier, 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law' (1986) 9 *University of New South Wales Law Journal* 26, 37.
[6] Stone, *Precedent and Law* (n 1) 105.
[7] Justice Michael Kirby, 'HLA Hart, Julius Stone and the Struggle for the Soul of Law' (2005) 27(2) *Sydney Law Review* 323 <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/SydLawRw/2005/14.html>.

analysed the social foundations and consequences of the law, studying the relationship between legal systems and the cultures in which they are embedded. It studied law in its social context,[8] how the law operated by reference to 'the postulates of civilisation in the time and place … for the purposes of systematic exposition of … the law governing individual interests and relations of individuals with their fellows'.[9]

As described by Stone, in a given controversy Pound's first step was to ascertain what interests were in conflict and to state them in common terms. As a practical matter, it was usually simplest to put them all in terms of social interests. Any solution of this particular case was going to give legal effect to part of the scheme at the expense of some other part, so the solution that had to be chosen was one that would cause the least disturbance to the scheme of interests as a whole. Therefore, the process was one of evaluating the conflicting interests against each other in terms of the scheme of interests as a whole.[10]

B *Stone as an Antidote to the Established Legal Positivism School*

Stone was seen as a vital antidote to the established school of legal positivism that had taken root in Australia.[11] Its finest practical expression in judicial decision-making might be seen as reflected in the enounced commitment of Chief Justice Sir Owen Dixon to the resolution of great disputes by 'strict and complete legalism'.[12]

Positivism's origin may be found in the works of the English utilitarian philosopher John Austin.[13] Austin regarded jurisprudence as an analytical study, its purpose being to clarify meanings. Austin rejected the idea that there was a necessary relationship between law and morality. What was relevant was the identification of a 'command': a demand that a person act in a certain way or abstain from some action accompanied by the threat of sanction in the event of disobedience. Since 1946, Stone had been pointing out that modern scholarship had not

---

[8] Ray Finkelstein et al, *Australian Legal Dictionary* (LexisNexis, 2nd ed, 2016) 1178, 1435.
[9] Roscoe Pound, *Social Control through Law* (Yale University Press, 1942) 112–16: these postulates included such precepts as 'that others will commit no intentional aggressions upon them', 'that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order', 'that those with whom they deal in the general intercourse of society will act in good faith', 'that those who are engaged in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others', and 'that those who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds', with it having 'become more and more evident that the civilization of the time and place presupposes some further propositions which it is by no means easy to formulate, since the conflict of interests involved has by no means been so thoroughly adjusted that one may be reasonably assured of the basis upon which the adjustment logically proceeds' where, eg, in relation to 'a postulated claim of a job holder to security in his [or her] job … exactly in what sort of job holders and in what sort of jobs, a right is to be recognized is far from clear' as is the extent to which 'the risk of misfortune to individuals is to be borne by society as a whole'.
[10] Stone, *The Province and Function of Law* (n 1) 361–2.
[11] Kirby (n 7).
[12] Sir Owen Dixon, 'Jesting Pilate' in Susan Crennan and William Gummow (eds), *Jesting Pilate and Other Papers and Addresses by the Right Hon Sir Owen Dixon* (Federation Press, 3rd ed, 2019) 74.
[13] These works include John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995); Robert Campbell (ed), *John Austin's Lectures on Jurisprudence: The Philosophy of Positive Law* (John Murray, 5th ed, 1885).

adequately acknowledged Austin's early recognition of judicial creativeness and his call for judges to take responsibility for the results.[14]

Positivism can be contrasted with other legal theories such as metaphysical realism — namely that words refer to objects whose existence and properties are independent of conventional beliefs or observers' beliefs about the objects[15] — or neo-scholastic theories associated with natural law and natural rights.[16] Philosophical jurisprudence is based on a philosophical foundation.[17] It is possible to give a rigorously philosophical account of a legal theory including many versions of legal positivism while being flexible in identifying the foundations or lack of any single foundation of any given legal system.[18]

Positivism comprises various schools of legal theory that subject laws to structural analysis, and positivism in jurisprudence comprises widely divergent approaches to law. For example, there is 'scientific positivism', focusing on empirical bases and founded on the concept of social solidarity — law is an aspect and requisite of social solidarity, with there being a duty to maintain social solidarity thereby allowing judges to be creative in such a respect.[19]

Positivists reject the view that the dependence of legal validity on moral considerations is an essential feature of law. Inclusive positivism maintains that the dependence of legal validity on moral considerations is contingent; it does not derive from the nature of law or of legal reasoning. Moral considerations affect legal validity only in certain cases. The rules of

---

[14] Stone, *Precedent and Law* (n 1) 93.
[15] Brian H Bix, 'Natural Law: The Modern Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 61, 91 ('*The Oxford Handbook*').
[16] Eg, John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980); John Finnis, 'Natural Law: The Classic Tradition' in *The Oxford Handbook* 1.
[17] Finkelstein et al (n 8) 124, 1153, 1173.
[18] Eg, Kenneth Einar Himma, 'Inclusive Legal Positivism' in *The Oxford Handbook* 125; Gerald J Postema, 'Philosophy of the Common Law' in *The Oxford Handbook* 588 ('conventional foundations of common law and their more familiar rivals, positivism and natural law theory' would all benefit from spending 'philosophical energies' on conceptions of law); Benjamin C Zipursky, 'Philosophy of Private Law' in *The Oxford Handbook* 623 (private law is available only through our entire public system concentrating valid exercises of power in the state); Arthur Ripstein, 'Philosophy of Tort Law' in *The Oxford Handbook* 656 (questions of how people treat each other and whose problem it is when things go wrong are the same question); Jody S Kraus, 'Philosophy of Contract Law' in *The Oxford Handbook* 687 (philosophical foundations of the economic analysis of law); Peter Benson, 'Philosophy of Property Law' in *The Oxford Handbook* 752 (fundamental question must concern justice of private property as a main institution that distributes benefits and burdens through social cooperation); Larry Alexander, 'The Philosophy of Criminal Law' in *The Oxford Handbook* 815 (philosophical underpinnings of criminal law pertain to what justifies the legality of punishment); Allen Buchanan and David Golove, 'Philosophy of International Law' in *The Oxford Handbook* 868 (why contemporary philosophers of law should proceed as if there were an international legal system to be theorised about); Christopher L Eisgruber, 'Should Constitutional Judges be Philosophers?' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, 2006) 5 (an argument for the moral reading of the Constitution must explain why it reasonably prescribes specific rules only with respect to some issues, leaving others for debate); James E Fleming, 'The Place of History and Philosophy in the Moral Reading of the American Constitution' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, 2006) 23 (the Constitution should be interpreted in the best way for the present time, rather than enshrining the original, now imperfect, interpretation that does not deserve fidelity).
[19] David M Walker, *The Oxford Companion to Law* (Oxford University Press, 1980) 969–71.

recognition of a given legal system may require resorting to moral considerations. Accordingly, for inclusive positivists, the relevance of morality is determined in any legal system by the contingent content of that system's rules of recognition. Exclusive legal positivism maintains that a norm is never rendered legally valid solely by any moral content. Legal validity is dependent only on the conventionally recognised sources of law.[20] Conventional morality, the ideals of particular social groups and moral criticism by individuals transcending currently accepted morality can influence the law's development at all times and places. It does not follow that the criteria of legal validity of particular laws must require their basis in morality.[21]

C *Stone's Contention that a Jurist Should Garner Wisdom from Philosophy*

Stone enunciated that it was the place of a jurist to garner what wisdom the jurist could from the philosophers. It was permissible to recall that some distinguished philosophical minds had by another path reached a conclusion that had been reached in juristic terms. Stone cited Bertrand Russell, who had described the *a priori* demonstration of ethics as one by which the philosopher first invents a false theory as to the nature of things, and then deduces that wicked actions are those that show that the philosopher's theory is false. A metaphysic could never have ethical consequences except in view of its falsehood. If it were true, the acts by which it defined as sin would be impossible.[22]

In so far as existential phenomena are subject to any *a priori* criterion by reference to the existential world, the theory would have no ethical consequences, because it would be for that reason there has to be obedience. With positivist theories that purport to derive their criterion exclusively from supposed scientifically observed facts, the criterion would have no ethical effectiveness, there being no tendency to disobedience to call it into play.[23] 'Due process', 'reason', 'the common good' and 'public policy' are no more determinate than formulae of 'legal justice' and 'philosophic justice'. The varied content of abstract principles of law give a superficial appearance of stability in change.[24]

III ESTABLISHMENT CRITIQUE

A *The Establishment Case*

The classical theory of adjudication is that the function of the courts is to settle disputes between members of a social order by the application of principles of law to findings of fact. It is not to design a new order to be imposed upon society; that, if it is to be done, is for

---

[20] Andrei Marmor, 'Exclusive Legal Positivism' in *The Oxford Handbook* 104, 105.
[21] HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 185. Cf HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593; LL Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630 (whether law can be built only on a foundation of 'law' or whether law ultimately must always have a foundation in 'morality').
[22] Stone, *The Province and Function of Law* (n 1) 373 n 6, citing Bertrand Russell, *Sceptical Essays* (George Allen & Unwin, 1928) 91.
[23] Stone, *The Province and Function of Law* (n 1) 373.
[24] Ibid 374 n 11.

Parliament, the legislature. Nor is it to execute the commands of such an imposed order by calling into account those who infringe its commands; that is a task for the executive branch of government.[25]

The trenchant opposition of the legal establishment to Stone would seem well summarised by Professor Geoffrey de Q Walker:

> Legal realism came to Australia through the works of Professor Julius Stone who … had a profound influence on forty years of Australian law graduates. Stone did not describe himself as a realist, but as an exponent of sociological jurisprudence. But sociological jurisprudence was just a variant of realism. It postulated a pseudo-scientific and essentially retroactive approach to adjudication involving a notional weighing of competing interests. Stone was clever enough to hedge his theory around with so many qualifications that its implications for the legal order were not immediately apparent …. But is more obvious in the works of his followers …[26]

Walker describes Justice Michael Kirby as taking Justice Lionel Murphy to be 'his Australian exemplar of this approach',[27] namely that a judge should seek and implement the policy behind an Act of Parliament, rather than confining the Act's construction to its actual words.[28] Walker describes the activist judge as trying to enlarge the court's power at the expense of other institutions of government; and, he claims, at the expense of the people. He draws an analogy with totalitarian regimes that stretch the law to meet the forensic situation.[29] Conflating 'judicial activism', 'sociological jurisprudence' and 'legal realism' seems unwarranted. 'Judicial activism' might reasonably be said to be involved in any application of a method of constitutional and legal interpretation that seeks to discern the original meaning of the words being construed, as that meaning is revealed in the intentions of those who created the constitutional provision or other law in question.[30]

Any claim that Stone was a 'legal realist' is difficult to reconcile with the claim that he was a 'sociological jurisprudent', given the ongoing disputes between proponents of these two broad schools. This claim therefore can be challenged due to significant differences in approach by the two broad schools.[31] In Justice Kirby, Walker claims 'the judge is told not to shrink from being a sociologist'.[32] As presented by Walker, a judge is scolded for persisting in the mechanistic application of legal principles. A judge is exhorted to have confidence in his or her ability to reform the law.[33] However, Justice Kirby might more accurately be described as

---

[25] Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 162.
[26] Ibid 175–6.
[27] Ibid 176.
[28] Ibid. Cf Stone, *Precedent and Law* (n 1) 53 on the *Acts Interpretation Act 1901* (Cth) s 15AA(1) requiring that, in statutory interpretation, 'a construction that would promote the purpose or object' of an Act (even if not expressed in the Act) be preferred to one that would not promote that purpose or object.
[29] Geoffrey de Q Walker (n 25) 176.
[30] Gary L McDowell, 'Original Intent' in Kermit L Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (Oxford University Press, 2nd ed, 2005) 711.
[31] Eg, Karl N Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) *Harvard Law Review* 1222 (description of Pound as a man caught in traditional precepts of a passing age).
[32] Geoffrey de Q Walker (n 25) 176.
[33] Ibid 175–7.

opposed to those who sought to obfuscate value judgements through a contrived fiction of mechanistically applying the law. He did not refuse to apply 'unfair' legal rules where it was sufficiently clear that any such result was required for legal reasons.[34] He was a deep traditionalist who was grounded with faith in maintaining the status quo in so far as that status quo pertained to the actual structure of legal institutions, as exemplified by the faith extending to include even the monarchy as the apex of Australia's legislative, executive and judicial branches of government.[35]

Walker's view of the established approach to adjudication is that judges should apply, and not create, the law. Common law rules were not invented by the judge; instead, they were identified by the judge as appropriate to be applied to resolve the case at issue. A judge is someone whose training and experience has given him or her a special skill in eliciting facts in identifying the legal principles at work in the particular transaction; and in selecting the correct one to apply to the facts. The principles or rules that the judge applies are found in custom and practice, or in prior decisions where they have been identified or articulated. The court's decisions are not retroactive even when dealing with new situations.[36]

There has to be adjudication under statute, with the traditional approach emphasising how the courts are independent of the executive and the legislature. The courts therefore have an essential part in the application of statutes; they are an intermediary between government and people; they bring independent and time-tested values to bear on the actions of legislature and executive; they receive evidence of the facts; and they apply what they see as the correct construction of the statute or regulation. On this basis, the courts make a determination that is authoritative, affecting all persons administering the statute. The courts are a mediating influence between the executive and the legislature on the one hand, and the citizen on the other.[37]

B *Stone's Critique of Legal Positivism*

Even positivists acknowledge that judges have to create law in certain circumstances. When a purported rule is inadequate to decide a particular case, a judge's creativity must be exercised only within recognised institutional legal constraints.[38] For Stone, those institutional constraints extend beyond what traditionally has been considered 'lawyer's law'. The institutional legal constraints include within their ambit consideration of the social and other

---

[34] Eg, in *Ostrowski v Palmer* (2004) 281 CLR 493; [2014] HCA 30 (16 June 2004) where Kirby J joined with Gleeson CJ in handing down a joint judgement that if a person is alleged to have committed an offence, it is both necessary and sufficient for the prosecution to prove the elements of the offence, and it is irrelevant to the question of guilt that the accused person was not aware that those elements constituted an offence. This point also is illustrated by dicta in *Kuwait Airways Corporation v Iraqi Airways Company & Ors* [2002] UKHL 19; [2002] 2 AC 883, [195] per Lord Scott of Foscote (although courts may refuse to give effect to odious or barbarous foreign legislation, the existence of the legislation may nevertheless have to be recognised as a fact).

[35] Eg, AJ Brown, *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011); Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009).

[36] Geoffrey de Q Walker (n 25) 162–3.

[37] Ibid 170–1; cf comment in n 28 above.

[38] Krygier (n 5) 37.

sciences, and of philosophy, when such considerations become evident as necessary to resolve the case. The institutional constraints recognised by Stone therefore extend jurisprudence's potential for applying law as a social process and resolving cases by resorting to other disciplines of relevance to the law.[39] Walker provides a similar critique in respect of the application of legal positivism beyond its confines of formal legal validity:

> The growth of the common law is seen not as a process resulting from the application of pre-existing principles, but as the cumulative result of individual, conscious decisions by judges to make new law by drawing on standards located outside the legal system.[40]

Stone came to influence increasing numbers of Australian judges and lawyers.[41] His impact included his identification, as being dominant in the ordinary course of judicial decision-making, of such categories as indeterminate reference and considerable leeway for choice. The manner in which the *ratio decidendi* of a case could be found, extended or restricted provided judges with substantial leeway. The considerable leeway of choice that Stone identified was never to be totally open-ended. He did not support the tyranny of judicial whim, but always emphasised the importance of the rule of law. Any suggestion that Stone ever favoured unbounded judicial creativity would be a total misrepresentation of his legal theories.[42] All jurisprudence emphasises the importance of the rule of law.[43]

A general feature of jurisprudence is an emphasis on the importance of the rule of law. The various schools within jurisprudence differ as to what the rule of law involves and how to progress study into its various aspects. Jurisprudence involves the study into the science or theory of law. It asks: is the law there to present a science of the just and the unjust? It delves into the philosophical aspect of the knowledge of the law, fostering studies into the historical development of law and comparative legal systems. It aims at discovering the principles regulating the development of legal systems, studying the origin of legal institutions with a view to explaining the conditions of their existence and development. Jurisprudence is the scientific synthesis of the essential principles of law.[44]

A central feature of Stone's works and of a broad range of legal philosophers is that the real risk to the rule of law occurs by disguising normative assessments behind a veneer of mechanistic legalism. Any such disguise thereby can exclude any capacity to contest those normative assessments within the framework of judicial adjudication. Questions of theory

---

[39] Upendra Baxi, 'Revisiting Social Dimensions of Law and Justice in a Post-Human Era' in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010) 69; Alan C Hutchinson, 'The Province of Jurisprudence (Really) Redetermined' in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010) 87.
[40] Geoffrey de Q Walker (n 25) 142.
[41] Kirby (n 7).
[42] Ibid.
[43] Cf Lord Lloyd of Hampstead and MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Stevens & Sons, 5th ed, 1985) 952 (Marx's theory of law and state might be described crudely as an economic theory).
[44] Summary of 'jurisprudence' adapted from PG Osborne, *A Concise Law Dictionary* (Sweet & Maxwell, 5th ed, 1964) 143.

constantly spring up in legal practice.[45] Stone's central innovation was to demonstrate comprehensively that some creativity in the process was desirable, as well as being inevitable and inescapable. The judgements of the High Court of Australia in more recent decades must be understood in the context of the impact of Stone's work on the judiciary and the legal profession.[46]

Stone drew back from making a definite case for any particular normative jurisprudence, and from advocating even the jurisprudence of who has been described as 'his revered mentor' Roscoe Pound.[47] Stone systematised a comprehensive description of the law as an adjustment of conflicting interests. He analysed these interests in their 'individual' and 'social' dimensions.[48] He described how the roles of the law, legal order, judges and administrators operated as instruments of social control. Nowhere is there found in Stone's work a definite prescription of his endorsing a particular normative jurisprudence or a settled account of what the role of judges ought to be. At best, there are normative conclusions drawn by inference that may be ascribed to the indirect influence of Stone's very evident sympathy for Pound's sociological jurisprudence. While specific, these conclusions were no more than suggestions relating to particular areas of law.[49]

Nicholas Aroney describes Stone's appeal to the 'rationality' of categorisations as 'an ambiguous claim which, on at least one reading, is reducible simply to the proposition that a conscious adjustment of the conflicting interests at stake will enable the courts to avoid perpetuating appeals to the various "categories of illusory reference"'.[50] This contention is that the law would not become more rational only by avoiding self-deceptive appeals to the illusory categories of legal formalism. A first step for the law to become more 'rational' is that 'such a balancing act will yield definite, logical and most importantly *just* conclusions'.[51] Beyond that, Stone did not seem to provide a firm offer of any particular normative jurisprudence.[52]

Stone established a general hypothesis that the common law has been able to sustain a perpetual process of change despite an appearance that all movement in the common law is controlled by the principle of authority and the rule of precedent. The appearance of adherence to precedent is fostered by the seeming stability and continuity in the great body of authoritative materials, especially the law reports as the literary sources of new decisions. Stone identified

---

[45] Lloyd and Freeman (n 43) 5, citing as an example *Oppenheimer v Cattermole* [1976] AC 249 (a Jewish man who was born in Germany but was stripped of German nationality by German racial laws during the 1930s and 1940s and had since become a naturalised British subject was unable to claim dual nationality, which would have entitled him for exemption from UK tax on his post-Second World War German pension).
[46] Kirby (n 7).
[47] Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases' (2008) 31(1) *University of New South Wales Law Journal* 107, 109–10.
[48] Stone, *The Province and Function of Law* (n 1); Stone, *Social Dimensions of Law and Justice* (n 1); Julius Stone, *Law and the Social Sciences: The Second Half Century* (University of Minnesota Press, 1966).
[49] Aroney (n 47) 109–10.
[50] Ibid.
[51] Ibid (emphasis in original).
[52] Eg, in Stone, *The Province and Function of Law* (n 1); Stone, *Human Law and Human Justice* (n 1); Stone, *Social Dimensions of Law and Justice* (n 1); Stone, *Law and the Social Sciences* (n 48).

the elements that produce leeways of choice for later judges to use these authoritative materials to base their new decisions.[53]

Stone maintained that the syllogistic reasoning commonly used by judges to reach their conclusions are barren. Logic has no existential or value reference; conclusions that are ostensibly reached by logic are in fact not determined by logic. Each such conclusion inevitably has to be reached through the premise chosen by the judge as his or her starting point. This choice typically is made by the judge either from more than one available legal proposition from which he or she could determine the starting point, or from similar starting points.[54]

Stone identified the semantic fertility of language as intensifying this effect of the barrenness of language in which the authoritative legal materials are expressed. Words are durable symbols. Words systematically produce choices between different meanings. These choices arise according to the context in which words are used and also according to movements in time and place. All may vary with each later judge. Each later judge successively must ask: what is the meaning of the language in the precedents he or she is asked to apply?[55]

Stone identified categories of illusory reference as endemic and ever-recurring in the authoritative legal materials. There are certain patterned features of legal materials that mean language found in legal contexts signal that leeways exist for choice by courts. Within those leeways, courts could choose which one or ones they are to use as a basis of decision. It is rare for either logic or law or language to compel a court to reach only one correct decision.[56]

According to Stone, these features could be found sometimes in a single word or a phrase or a distinction used in formulating legal propositions. The legal propositions could be detailed rules, or they could be more abstractly stated principles. The word or phrase could be one referring to lay notions such as 'reasonableness', but could also be one referring to technical legal notions such as 'trust', 'quasi-contract' or 'estoppel'. Any relations *between* legal propositions, by way, for example, of a distinction or overlap, would also give rise to leeways of choice. Even if separately each proposition might appear to leave no or minimal leeway of choice, leeways would still arise from their coexistence or interaction.[57]

What Stone's writings convey irresistibly is how the law must inevitably respond to the pressure of social and cultural change inherently requiring courts, particularly appellate courts, to embark on a careful balancing act as the normative prescription. Many Australian judges through much of the second half of the twentieth century formulated and applied balancing tests for the resolution of their cases. Their judgements cannot be separated from the influence

[53] Stone, *Precedent and Law* (n 1) 61.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid 61–2.

of Stone. Many areas of the common law of Australia, and Australian constitutional law, have been shaped by the jurisprudence of Stone in this way.[58]

C *Stone's Critique of Sociological Jurisprudence*

Stone applied the same kind of critical approach to the sociological jurisprudence of Pound's school as he did to the declaratory theory in respect of the application of precedent to common law appellate decision-making. Stone described Pound's proposals as generalising an approach based on a familiar thought that the law should correspond with human demands in a given society at a given time. Stone described how Pound's approach drew out and suggested a process by which an approximation of this desired state of affairs may be attained. Stone pointed out that serious proposals for law reform reflecting opinions as to the 'soundness' of rules and as to their 'policy' are based on similar mental processes. According to Stone, it was the commonplaceness of Pound's thinking that made it important to eliminate vagueness and caprice, in so far as any such elimination would be possible. Stone's criticism of Pound's proposals centred on their being subject to difficulties that inevitably prevented them from producing a foolproof, mechanically operating value solution.[59]

Stone identified Pound's approach as one that involved bringing law into harmony with the conditions of the time. However, there had been retrogressive 'civilisations' that had moved from higher to lower levels. A process of bringing earlier law into harmony with a later 'civilisation' could be a process of degradation of the law from a higher level of harmony to that of harmony with a lower civilisation. Such a retrograde step might be considered to involve a 'betterment' in one sense of the law being in harmony with 'civilisation'. However, it would not be a betterment in the sense of more effectively maintaining, furthering and transmitting human powers to the betterment of humanity. This retrograde outcome should readily be seen given the difficulty involved by the ambiguity of the term 'civilisation'. Civilisation may mean the civilisation that is here and now. It may mean that which is about to be perceptibly emerging from present trends. It may mean some ultimate ideal of civilisation. Pound seemed to have abandoned any attempt to qualify any de facto civilisation by reference to an ultimate ideal civilisation. Pound would say, according to Stone, that to admit any notion of an ultimate civilisation would be to introduce by the back door the problem of absolute values, which Pound believed he had ejected through the front door.[60]

What Stone identified as perhaps even more decisive of Pound's attitude was the consideration that any attempt by the law to pull in the opposite direction to which society was moving was anyhow doomed to failure; and that the wise legislator would not do anything in vain. Stone noted that one who would test law by its conformity with the demands of a given civilisation at a given time had to recognise that the law would forever be a handmaid of society. The law

[58] Aroney (n 47) 109–10.
[59] Eg, in Stone, *The Province and Function of Law* (n 1) 362.
[60] Eg, ibid 362–3.

then would have no absolute ends that it would constantly be seeking to advance, and no minimum standard of ideals.[61]

Stone pointed out that the approach adopted by Pound focusing on harmony between the law and the civilisation where it is to be applied might eliminate any element of value judgement of claims. A claim is valid by the fact that it is made, and the end of law is to give effect, where and to the extent possible, to the claim. However, according to Stone, what follows inevitably from Pound's approach involves the inevitable judgement of what the *preponderant* mass of claims would presuppose. Conversely, what inevitably also would be involved is the judgement as to what claims may be ignored because of this preponderance.[62] Stone's crucial point was: 'This cannot be made without the intervention of a value-judgment drawn from outside the whole body of *de facto* claims.'[63]

A value judgement similarly has to be drawn, Stone pointed out, in the application of any relevant criterion to a particular case. There is a stage at which the element of cryptic evaluation could rarely be completely absent. Pound's school requires that, in a concrete controversy, conflicting interests are to be ascertained and referred to their place in generalised form in a systemic scheme of interests that the applicable civilisation has to secure. There then has to be a choice as to which of the conflicting interests is to be secured at the expense of the others, and to what extent. This choice is then to depend upon which solution would do least injury to the scheme of interests as a whole. There is a converse angle in this regard: the choice also would depend upon which solution would most effectuate the scheme of interests as a whole. Stone described these words 'most' and 'least' as 'a veritable hornets' nest'.[64]

Stone asked: do these words 'most' and 'least' point to a counting of heads? Or do these words point rather to a greater inherent significance of some parts of the scheme of interests? Here again, Stone pointed out, the whole problem of absolute values creeps in. Something more has to be involved than simply an arithmetical computation of each side of the ledger of the number of human beings affected, multiplied by the number of interests of each, even when these are precisely ascertainable. Stone concluded: 'Here, again, therefore, the value-judgments of judge and legislator extraneous to the jural postulates and the scheme of interests must operate in the apparently objective decision.'[65]

A law-maker's answer to what is justice is not dictated by compulsions that exempt the law-maker from the responsibility of choice.[66]

---

[61] Eg, ibid 363.
[62] Eg, ibid 363–4.
[63] Ibid 364.
[64] Ibid.
[65] Ibid.
[66] Ibid 376.

IV LAW'S DYNAMIC NATURE SUBSTANTIATES STONE'S CRITIQUES

The question of what law is has persisted. Many various answers have been given; even lawyers can differ.[67] Law is not exhausted by any category of rules. Its attitude is constructive aiming, in its interpretive spirit, to lay down what commitments are required in a changing society for the best route to a better future. Law is how we are united in community; while grounded in the past, it is for the community we aim to have.[68] It includes the accepted practices common to the entire society on the basis of which communication, exchange and social activities generally are conducted. It does not have to be promulgated by a centralised government that stands apart from other social groups.

It can include customs made up of implicit standards of conduct; these standards are tacit, although often precise, guidelines for how individuals should act.[69] Islamic law distinguishes the areas of custom and religious laws from sovereign and administrative discretion.[70] Custom performed the major role in the development of Roman law; 'legislation played a very minor role'.[71] Customs may be instituted to safeguard Jewish law. A custom can override a legal precedent, and must be treated with the same gravity as all areas of Jewish law. The development, delineation and identification of customs in Jewish law is inherently dynamic;[72] particular customs or usages can vary between trades, professions and localities.[73] According to Stone, the diversity of rules and opinions that Jewish law contains make it 'the least monolithic system of law known to legal scholars'.[74]

V CONCLUSION

Stone pointed out that natural scientists recognise that both wave theory and corpuscular theory are to be used to interpret phenomena of light, and both physical-chemical and psychological theories for those of the mind. The jurisprudential study of law should likewise benefit from all theories, such as those of ethical and sociological concern.[75] Stone's approach to scholarship may best be exemplified by the motto: 'It is not for thee to finish the task; neither art thou free to desist from it.'[76]

---

[67] Hart (n 21) 1.
[68] Ronald Dworkin, *Law's Empire* (Fontana Press, 1986) 413.
[69] Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press, 1976) 48–58.
[70] Ibid. See also Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society, rev ed, 1991) xv (Stone is cited describing jurisprudence as 'a chaos of approaches to a chaos of topics, chaotically delimited').
[71] JAC Thomas, *Textbook of Roman Law* (North-Holland Publishing, 1976) 4–5.
[72] Rabbi Moshe Walter, *The Making of a Minhag: The Laws and Parameters of Jewish Customs* (Feldheim Publishers, 2018) 1–2.
[73] David M Walker (n 19) 328.
[74] Julius Stone, 'Leeways of Choice, Natural Law and Justice in Jewish Legal Ordering' (1988) 7 *The Jewish Law Annual* 210, 221.
[75] Stone, *Legal System and Lawyers' Reasonings* (n 1) 122.
[76] Blackshield (n 4) 7.

Philosophy arises from an unusually obstinate attempt to arrive at real knowledge. What passes for knowledge tends to be vague and self-contradictory. Philosophy consists in becoming aware of these defects, to substitute an amended tentative kind of knowledge:[77]

> A rule is properly formulated if it does its work in the context in which it was meant for. Our error is to ask for perfect and complete rules.[78]

This philosophical approach was taken by Stone in his teaching of law. There remains an element of indeterminacy in the physical world that cannot be explained solely in terms of predictable deterministic laws: natural science is not mechanistic; induction does not lead to the inference of rigid causal laws; there are good scientific reasons why in any physical event there remains an element of indeterminacy; the dogma of determinism has been destroyed by modern physics; verification is not always possible; all scientific theories (or laws) are to degrees tentative and provisional and liable to at least partial refutation in the future; and the achievement of progress with research and its application in respect of the natural sciences is not completely value-free.[79] An analogy can be drawn between Stone's approach in jurisprudence and Einstein's approach in physics: 'Newton's theory … represents the gravitational field in a seemingly complete way … I do not doubt that the day will come when that description, too, will have to yield to another one'.[80]

[77] Bertrand Russell, *An Outline of Philosophy* (Unwin, 1970) 1–2.
[78] David Pole, *The Later Philosophy of Wittgenstein* (University of London Press, 1958) 33.
[79] Lloyd and Freeman (n 43) 8–9.
[80] Albert Einstein, 'Letter to Felix Klein' (4 March 1917), quoted in Abraham Pais, *'Subtle Is the Lord …': The Science and Life of Albert Einstein* (Oxford University Press, 1982) 325.

TEACHING TECHNOLOGY INTO THE LAW CURRICULUM

*Aaron Timoshanko and Caroline Lydia Hart**

ABSTRACT

The role technology plays in the legal profession is growing. It is, therefore, incumbent on legal educators to prepare law students for a profession that leverages current and emerging technologies, while mitigating potential risks. A desktop analysis was performed on all technology-focused courses offered at Australian and New Zealand law schools and at the top five universities in the United States and the United Kingdom to identify common themes and characteristics. The authors then share their experiences teaching a technology-focused course at a small regional university. The aim of this article is to stimulate greater discussion about how universities teach technology into the law curriculum, not whether such a course is needed.

* Dr Aaron Timoshanko is a Lecturer in the School of Law and Justice at the University of Southern Queensland, <https://orcid.org/0000-0002-4910-6100>. Associate Professor Dr Caroline Hart is Associate Head of School in the School of Law and Justice, University of Southern Queensland, <https://orcid.org/0000-0001-5752-5543>. The authors would like to thank the anonymous reviewers for their constructive feedback, which improved the final version of this article. The authors gratefully acknowledge Mr James Hevers's assistance in updating the dataset. Any errors or omissions, however, remain the sole responsibility of the authors.

I INTRODUCTION

Technology (specifically, information technology) is influencing and will continue to influence legal practice.[1] According to the *Future of Law and Innovation in the Profession* report, published by the New South Wales Law Society in 2017, 'technology is already transforming the delivery of legal services … of a magnitude that could take many by surprise'.[2] In response, many Australian law schools offer courses designed to prepare law students for the opportunities and challenges technology poses for legal practice. In Part II, this article begins with a summary of the literature on the growing role of technology in the legal profession and the role law schools can play to ease its disruptive effects. Part III summarises the findings of a desktop review of the technology-focused courses ('TFCs') offered in Australian law schools. This review reveals the types of TFCs universities are offering (undergraduate vs postgraduate, core vs elective, etc) and the key technologies they are discussing. Part IV reports on the TFCs offered in New Zealand and the top five law schools in the United States and the United Kingdom, before comparing these findings with the TFCs offered in Australia. This analysis exposes some uncertainty regarding the role of technology in the legal profession and its potential effect on graduate employability. In Part V, the authors share their experiences and reflections in delivering a TFC at a regional university for the first time, including assessment design. This section will be of interest to academics who currently teach a TFC or hope to do so in the future.

II LITERATURE REVIEW

It is unclear whether new and emerging technologies will disrupt the legal profession to the extent some are predicting.[3] Some are concerned this group of technologies, collectively referred to as LegalTech or LawTech,[4] has the potential to reduce job opportunities for graduate lawyers, which have traditionally involved 'time-consuming, repetitive tasks requiring relatively low levels of skills and experience'.[5] What is clear is that some law firms are readily embracing technology in order to offer alternative billing practices (for example, fixed billing), improve efficiencies to remain cost competitive, or otherwise address client demand. To

---

[1] See Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2nd ed, 2017) 3 ('*Tomorrow's Lawyers*'), who claims that the '"more-for-less" challenge, liberalization, and technology' are the three drivers of change in the legal market.

[2] Law Society of New South Wales, *The Future of Law and Innovation in the Profession* (2017) 31 <https://www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf>.

[3] See especially Susskind, *Tomorrow's Lawyers* (n 1); Richard Susskind, *The End of Lawyers: Rethinking the Nature of Legal Services* (Oxford University Press, 2008); Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Clarendon Press, 1996); Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019). Cf Dana Remus and Frank Levy, 'Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law' (2017) 30(3) *Georgetown Journal of Legal Ethics* 501.

[4] Legal technology (or LegalTech or LawTech) 'employs information and communications technology tools to enable legal service providers to enhance productivity and deliver greater value to clients': Law Society of Singapore and Ministry of Law Singapore, *Legal Technology in Singapore: 2018 Survey of Legal Practitioners* (Singapore Academy of Law, 2018).

[5] Lyria Bennett Moses, 'The Need for Lawyers' in KE Lindgren, François Kunc and Michael Coper (eds), *The Future of Australian Legal Education: A Collection* (Thomson Reuters Professional Australia, 2018) 355, 365.

provide one example, blockchain (distributed ledger technology) is heralded as a 'game-changer' within many corporate sectors.[6] In response, several top law firms in Australia are incorporating knowledge of blockchain into their legal practice areas to support clients who are wanting to leverage the benefits of blockchain.[7]

Much has been written about the need for law schools to prepare students for the use of technologies in legal practice,[8] including criticism that 'legal education has not kept pace with the IT revolution in law practice'.[9] While law students may use technology heavily in their personal lives, there is limited capability to transfer these skills into legal practice. As such, there is growing recognition that law schools have been slow to educate students for the technology demands of modern legal practice.[10] This article finds law schools in Australia and overseas are responding to this gap by offering courses examining the impact of technology in specific areas of the law, with some law schools offering specific courses on technology in legal practice.

III TECHNOLOGY-FOCUSED COURSES IN AUSTRALIAN LAW SCHOOLS

A search of all Australian law schools' websites was performed by the authors between November 2019 and March 2020 to identify TFCs, including undergraduate and postgraduate

---

[6] Fred Hawke and Nina Krys, 'Blockchain: A Catalyst for New Approaches in Insurance', *Clayton Utz* (Blog Post, 1 March 2018) <https://www.claytonutz.com/knowledge/2018/march/blockchain-a-catalyst-for-new-approaches-in-insurance>; Gavin Smith et al, *Blockchain Reaction: Understanding the Opportunities and Navigating the Legal Frameworks of Distributed Ledger Technology and Blockchain* (Allens, September 2016) <https://www.allens.com.au/globalassets/pdfs/specials/blockchainreport.pdf>.

[7] 'Blockchain', *PiperAlderman* (Web Page, 2021) <https://piperalderman.com.au/services/blockchain>; 'FinTech', *PiperAlderman* (Web Page, 2021) <https://piperalderman.com.au/services/banking-finance/fintech>; 'Blockchain and Distributed Ledger Technology', *Herbert Smith Freehills* (Web Page, 6 August 2018) <https://www.herbertsmithfreehills.com/our-expertise/services/blockchain-and-distributed-ledger-technology>; Hawke and Krys (n 6); Allens Linklaters, 'Allens Releases Landmark Report on Blockchain' (Media Release, 20 June 2016) <https://www.allens.com.au/insights-news/news/2016/06/allens-releases-landmark-report-on-blockchain>.

[8] Pearl Goldman, 'Legal Education and Technology II: An Annotated Bibliography' (2009) 100 *Law Library Journal* 415, in which the author documents the 'scholarship examining the impact of technology on law schools and legal education between 1970 and 2001', although this annotated bibliography goes beyond that to 2008; Neal Feigenson, Richard K Sherwin and Christina O Spiesel, 'Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law' (2006) 12(2) *Boston University Journal of Science and Technology Law* 227, which discusses how legal education must change in order to prepare students for a new world of digital and visual law practice. Describing their own pedagogic toolkit for visual literacy skills, the authors explain how they combine and modify aspects of traditional doctrinal and clinical teaching methods and use classroom focus groups to explore the relationship between words and pictures.

[9] Kenneth J Hirsh and Wayne Miller, 'Law School Education in the 21st Century: Adding Information Technology Instruction to the Curriculum' (2003) 12(3) *William & Mary Bill of Rights Journal* 873; Luke R Nottage and Makoto Ibusuki, 'IT and Transformations in Legal Practice and Education in Japan and Australia' (2002) 4 *University of Technology Sydney Law Review* 31; William BT Mock, 'Informing Law Curricula: Modifying First-Year Courses to Reflect the Information Revolution' (2001) 51(4) *Journal of Legal Education* 554.

[10] Dan Hunter, 'The Death of the Legal Profession and the Future of Law' (2020) 43(4) *University of New South Wales Law Journal* 1199. On the enduring nature of these concerns, see the earlier Natalie Cuffe, 'Law Student's Experiences of Information and Information Technology: Implications for Legal Information Literacy Curriculum Development' in Peter L Jeffery (ed), *AARE 2002 Conference Papers* (Australian Association for Research in Education, 2002) 1 <http://www.aare.edu.au/02pap/cuf02169.htm>.

courses (for example, Master's and Juris Doctor courses).[11] To qualify as a TFC, the course title had to contain one or more of the following keywords: 'technology' (or 'technologies'), 'tech', 'coding', 'code', 'disruption', 'innovation' (or 'innovative'), 'cyber', 'digital', 'artificial intelligence', 'robot', 'app' (or 'apps'), 'eLaw', 'internet', 'future', 'social media', 'blockchain' or 'information'.[12] These keywords were selected after a small pilot survey demonstrated their utility in capturing as many technology-related courses as possible.

The authors then coded the exported course descriptions in NVivo 12 for Mac (version 12.6.0, 1999–2019) for content analysis based on the frequency of terms or phrases appearing in the course descriptions to uncover common themes.[13]

The current analysis makes no judgement about the use of particular terms in the course descriptions,[14] nor does this analysis examine whether these terms reflect the actual content of the course. Furthermore, this analysis does not assess whether the course adequately prepares students for the opportunities and challenges technology poses to legal practice. Instead, this desktop analysis of law school websites seeks to quantify the prevalence of TFCs, categorise the TFCs according to their enrolment characteristics and identify common themes. The authors acknowledge that the presence of keywords in course titles is an imperfect technique for identifying TFCs.[15] However, due to the limited search functionality on most university websites, this was the only option for a desktop review of course offerings. Despite these limitations, the results nevertheless provide some useful insights into the perceived need to teach technology into the law curriculum.

---

[11] Wherever possible, the authors entered the keywords in the course search field on the university websites. In most instances, however, a manual review of the course titles was required. Non-law courses or interdisciplinary studies were excluded. Courses within MBA programs run by law schools were also excluded. A course had to be coded as a law course or otherwise offered by the law school/faculty. Courses described as 'papers' or 'reading groups' were included where successful completion of summative assessment is required to successfully complete the course. Courses that had nothing to do with technology but included one or more of these words or phrases were excluded from analysis.

[12] Three courses were included for analysis, although no keyword was contained in the course title: 'LLB250 Law, Privacy and Data Ethics', *QUT* (Web Page, 14 May 2021) <https://www.qut.edu.au/study/unit?unitCode=LLB250>; 'LLB251 Law and Design Thinking', *QUT* (Web Page, 14 May 2021) <https://www.qut.edu.au/study/unit?unitCode=LLB251>; and 'Data Privacy and Security', *QUT Online* (Web Page) <https://online.qut.edu.au/unit/data-privacy-and-security>. These courses were included because they form a program of study for either a Minor in Law, Technology and Innovation or a Graduate Certificate in Data and New Technology Law, both of which contain one or more keywords in the program title.

[13] This is referred to as manifest content using a frequency-based coding system: William Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson Education, 7th ed, 2014) 374. The authors trialled the development of codes (or 'nodes' in Nvivo) using this methodology in a small pilot study involving all law schools in Queensland, the Group of Eight and the Regional Universities Network. The authors refined the preliminary codes and applied them to the whole dataset.

[14] Eg, the vagueness of the term 'artificial intelligence'.

[15] It is acknowledged that some courses may have a technology focus but not include one of the keywords in the course title. For instance, a contract law course with a module on blockchain will not be captured using this methodology unless the course title contains 'blockchain'. The search functionality on most university websites does not permit text searching within course descriptions. To avoid excluding these law schools and to provide the most comprehensive list of TFCs in Australia, the keyword search was limited to course titles, which were searchable on all university websites.

One hundred and forty courses were identified in 31 law schools across 38 universities offering undergraduate or postgraduate qualifications in law. One hundred and twenty-one of the 140 courses were offered in 2020 in 27 law schools. As seen in Table 1, TFCs are not evenly distributed among law schools. Six law schools (University of New South Wales, La Trobe, Australian National University, University of Melbourne, Queensland University of Technology and Western Sydney University) offered over half of all TFCs in 2020. Twenty universities offered one or no TFC in 2020.

Table 1: Australian universities offering TFCs within their law schools in 2020

Law school	TFC offered in 2020	TFC not offered in 2020
University of New South Wales	11	0
La Trobe University	10	1
Australian National University	9	1
University of Melbourne	9	4
Queensland University of Technology	8	1
Western Sydney University	8	0
University of Sydney	8	0
RMIT University	7	0
Monash University	7	0
Bond University	6	1
University of Technology, Sydney	6	0
University of Canberra	5	0
University of New England	4	3
Flinders University	3	0
University of Newcastle	3	0
University of Queensland	3	1
University of the Sunshine Coast	2	0
Macquarie University	2	0
University of Western Australia	2	0
Australian Catholic University	1	0
Deakin University	1	0
James Cook University	1	0
Murdoch University	1	0
Central Queensland University	1	1
Swinburne University of Technology	1	0
Charles Sturt University	1	0
University of Tasmania	1	1
Federation University Australia	0	0
Charles Darwin University	0	0
Curtin University	0	0
Edith Cowan University	0	0
Griffith University	0	1
University of Notre Dame	0	0
Southern Cross University	0	2

University of Southern Queensland	0	1
University of South Australia	0	0
University of Adelaide	0	1
University of Wollongong	0	0
Victoria University	0	0

This high concentration of TFCs in some law schools suggests that these schools may have made a strategic decision to embed technology into the law curriculum, indicating its perceived importance. This observation is not to suggest that other law schools do not consider technology to be important. Other factors may explain why more Australian law schools do not offer TFCs. It is possible, for example, that a law school has decided to embed technology perspectives across the compulsory curriculum, rather than offer a TFC. The cost of delivering TFCs may also be a barrier, especially if the course uses proprietary software.[16]

The University of New England and Flinders University are the only law schools that require undergraduate law students to complete a TFC.[17] The Queensland University of Technology, Bond University and RMIT offer a minor, graduate certificate or postgraduate specialisation,[18] which requires the completion of specific TFCs. At the Master's level, the Master of Laws in Enterprise Governance at Bond University requires the successful completion of 'LAWS77-591: IT Law, Privacy and Cyber-Security' and the Juris Doctor at RMIT requires completion of 'Law and Technology' and 'Innovative Justice'.[19]

The fact that most law schools (except Flinders University and the University of New England) do not require students enrolled in a Bachelor of Laws (LLB) to complete a TFC appears to contradict the perceived importance of technology in the law curriculum previously identified. Again, it may be that some law schools have embedded technology perspectives across the compulsory curriculum. Alternatively, there may be other pressures that make the introduction

[16] These costs include licence fees or the time and effort associated with securing funding to cover the licence fees. It may be that law schools who do not offer a TFC, or only offer a TFC biannually, lack sufficient resources.

[17] 'Technology and the Law (LAW499)', *University of New England* (Web Page) <https://my.une.edu.au/courses/units/LAW499>; 'Topics: INNO1100 Legal Innovation and Creative Thinking: Recognising Opportunities in the Legal Sector', *Students at Flinders University* (Web Page, 2020) <https://www.flinders.edu.au/webapps/stusys/index.cfm/topic/main?numb=1100&subj=INNO&year=2020&fees=Y>; 'Topics: LLAW3301 Law in a Digital Age', *Students at Flinders University* (Web Page, 2020) <https://www.flinders.edu.au/webapps/stusys/index.cfm/topic/main?numb=3301&subj=LLAW&year=2020&fees=Y>.

[18] 'Law and Justice: Graduate Certificate in Data and New Technology Law', *QUT Online* (Web Page) <https://online.qut.edu.au/online-courses/law-justice/graduate-certificate-in-data-and-new-technology-law>; 'Bachelor of Laws (Honours)', *QUT* (Web Page, 27 August 2021) <https://www.qut.edu.au/courses/bachelor-of-laws-honours>; 'Law Specialisations (Postgraduate): Legal Transformation (JD only)', *Bond University* (Web Page, 2021) <https://bond.edu.au/subjects/current-law-specialisations-postgraduate#legal-innovation-techology>; 'Online Graduate Certificate in Emerging Technologies and Law', *RMIT University* (Web Page, 2021) <https://www.rmit.edu.au/study-with-us/levels-of-study/online/online-graduate-certificate-in-emerging-technologies-and-law>.

[19] 'LAWS77-591: IT Law, Privacy and Cyber-Security', *Bond University* (Web Page, 2021) <https://bond.edu.au/subject/laws77-591-it-law-privacy-and-cyber-security>; 'Masters by Coursework: Juris Doctor', *RMIT University* (Web Page, 2021) <https://www.rmit.edu.au/study-with-us/levels-of-study/postgraduate-study/masters-by-coursework/juris-doctor-mc161/mc161p14auscy>.

of a new compulsory or core course not feasible. In support, it is noteworthy that the majority of TFCs are offered as postgraduate courses (see Table 2).

Postgraduate programs offer greater flexibility compared to undergraduate qualifications in law. For example, the Master of Laws (LLM) does not need to be accredited as a practice pathway for admission. It may also be true that postgraduates are more receptive to further study in legal technology. This could be to give themselves a competitive edge over other graduates seeking employment in the legal sector. Or, graduates in traditional legal roles are encountering the opportunities and challenges posed by technology and seek to better understand its implications for the legal profession. The findings from this analysis indicate that most law schools will continue to offer TFCs at the postgraduate level.

Table 2: Technology-focused courses by program level

Course level	TFC offered in 2020	TFC not offered in 2020
Undergraduate	46	10
Postgraduate	75	9

Beyond these enrolment details, two key observations emerged from the thematic analysis of the TFCs. Both observations revealed a sense of uncertainty — uncertainty in the types of technology that may disrupt the legal profession and uncertainty regarding the impact technology will have on graduate employment. Both are discussed in turn.

A *Key Technologies*

Based on the course descriptions of TFCs, a list of key technologies perceived to be most significant for society and the legal profession emerges.[20] As Table 3 highlights, law schools are preparing students to embrace not only existing technologies but also emerging technologies.

Table 3: Types of technologies in the course descriptions of technology-focused law courses in Australia

Technology	TFC offered in 2020	TFC not offered in 2020	Total
Internet	23	7	30
Artificial intelligence	24	3	27
Machine learning	18	2	20
Automation	14	1	15
Blockchain	14	1	15
Smart contracts	11	1	12

[20] Based on the data available it is not possible to identify what, if any, enquiries or consultations course coordinators made in deciding which technologies are expected to be the most significant for society and the legal profession. This raises an interesting question as to whether the legal academy is well placed to make this determination and, if not, who else ought to be consulted? However, the answers to these questions are beyond the scope of this article.

Expert systems	9	0	9
Social media	9	0	9
Robotics	7	1	8
Data analytics	7	0	7
Cloud computing	5	1	6
Smart technology	5	0	5
Internet of Things	3	1	4
Natural language processing	3	0	3
Peer-to-peer	2	1	3
Prediction	2	0	2
Technology-assisted review	2	0	2
Drones	1	0	1
Practice management software	1	0	1

At one end of the spectrum, TFCs are considering the impacts of the internet, automation (such as document assembly), expert systems (the logic framework behind many chatbots), social media, robotics, data analytics and cloud computing. These technologies are already ubiquitous in society. At the other end of the spectrum, TFCs are considering the impact of artificial intelligence, machine learning, blockchain and smart contracts — technologies that exist but are not yet commercially available, readily adopted or applied in legal practice.

This dichotomy between existing and emerging technologies is reflected in the course descriptions, with some courses upskilling students for the technology they will likely encounter in legal practice. Other courses take a more abstract or theoretical approach to technology, considering the potential consequences of technologies that are yet to be demonstrated in the legal profession. Both approaches have merit and explain why some law schools offer multiple TFCs.

B *Future of the Legal Profession*

Within the 140 TFCs offered in Australian law schools, few are dedicated to the impacts of technology on the legal profession. The authors identified technology-focused legal practice courses ('TFLPC') based on the aims or scope in the course description. Of the 140 TFCs identified, 25 courses are TFLPCs, equating to 17.8%. Other significant categories of TFCs include information technology law courses (59 courses or 42.1%) and intellectual property courses (10 courses or 7.1%).

Examining the TFLPCs in more detail, it is possible to gain some insight into how the impact of technology on the legal profession is perceived. Within the course descriptions of the TFLPCs, technological change is described as involving 'disruption' (10 courses), 'innovation' (six courses) and rapid or fast change (four courses). Eight TFLPCs (28.5%) involve some degree of industry partnership — with a law firm, technology provider or not-for-profit — while 25% of TFLPCs involve the use of software or development of a chatbot or app. In one instance (the University of Melbourne's 'Law Apps' course), this partnership explicitly aligns

the course with one technology provider, Neota Logic.[21] In 12 courses (42.8%), skills development (for example, decision-making, coding, design thinking) is one of the explicit goals.

Perhaps unsurprisingly, the TFLPCs analysis uncovers a degree of uncertainty in future employment prospects of graduate lawyers. Six TFLPCs (21%) explicitly aim to improve students' employment prospects within the legal profession. This aim frequently equates to training law students in LegalTech and other skills not traditionally associated with the practice of law. The implication is that LegalTech threatens to reduce graduate employment opportunities in the legal profession by taking away work that could otherwise be performed by a law graduate, and remaining positions will more likely go to applicants who know how to use the technology. As stated earlier, it is yet to be seen whether this threat is actual or not.[22] If the threat is not overstated, this may see the number of law schools offering TFLPCs increase as students come to view law schools without a TFLPC as unconcerned with graduate employability.[23]

Having scanned Australian law schools to better understand which TFCs are currently or have previously been offered, this article now examines what other select law schools are offering overseas. The findings from overseas highlight that Australian law schools are not alone in identifying the need to better equip law graduates for the impacts of technology in law.

IV OVERSEAS LAW SCHOOLS

The authors employed the same methodology to perform a content analysis of course descriptions for select law schools in the US and the UK. All New Zealand law schools were also included for analysis, as there are only six law schools in New Zealand. The authors selected the top five ranked law schools in the US and UK based on the Times Higher Education's World University Rankings 2020.[24]

Table 4: US, UK and New Zealand law schools offering TFCs and TFLPCs in 2020 and previously

Jurisdiction	Law school	World ranking	TFCs offered in 2020	TFCs not offered in 2020	TFLPCs offered in 2020	TFLPCs not offered in 2020
US	Stanford University	1	12	0	1	0
US	Berkeley	6	12	2	0	0
UK	University of Edinburgh	18	11	4	1	0
US	New York University	9	10	0	0	0

[21] 'Law Apps (LAWS90033)', *The University of Melbourne* (Web Page, 18 December 2020) <https://handbook.unimelb.edu.au/2020/subjects/laws90033/print>.
[22] But see Susskind, *Tomorrow's Lawyers* (n 1) ch 13.
[23] Of course, if a student is not intending to go into legal practice the lack of a TFLPC may be an advantage, especially if the TFLPC is a core course.
[24] 'World University Rankings 2020 by Subject: Law', *Times Higher Education: World University Rankings* (Web Page) <https://www.timeshighereducation.com/world-university-rankings/2020/subject-ranking/law#! >.

US	Duke University	6	5	7	1	2
US	University of Chicago	5	4	0	0	0
UK	London School of Economics	8	4	0	0	0
NZ	University of Waikato	N/A	4	0	0	0
US	Yale University	3	3	0	0	0
NZ	Victoria University of Wellington	N/A	3	0	0	0
UK	University College London	14	2	0	0	0
NZ	University of Otago	N/A	2	0	0	0
NZ	University of Auckland	N/A	1	0	0	0
NZ	University of Canterbury	N/A	1	0	0	0
UK	University of Cambridge	2	0	0	0	0
UK	University of Oxford	4	0	0	0	0
NZ	Auckland University of Technology	N/A	0	0	0	0

The results in Table 4 reveal similar results to those found in the analysis of Australian law schools. Of the 17 law schools analysed in the US, UK and New Zealand, 14 law schools (82.3%) offered a TFC in 2020. In Australia, 71% of law schools offered a TFC in 2020. While the percentage of overseas law schools offering a TFC is higher than in Australia, the vast majority of law schools across all jurisdictions were offering TFCs in 2020. Another similarity in the results is that TFCs among overseas law schools are not evenly distributed but concentrated, like in Australia. Across all jurisdictions studied, few law schools offer many TFCs, while the majority of law schools offer one or a small number of TFCs — often the same course offered in both the undergraduate and postgraduate programs. Across the 14 US, UK and New Zealand law schools offering a TFC in 2020, 74 courses were identified. Most of these courses are IT law courses (44 courses or 59.4%). Five courses are intellectual property courses (6.7%) and four TFCs each are in the fields of criminal law and community legal practice (5.4% each).

One point of difference between the overseas and Australian jurisdictions is the frequency of TFLPCs. Overseas, only five TFCs focus on legal practice (5.74%). This number is significantly lower than in Australia, where 17.8% of TFCs are TFLPCs. The comparatively small sample size (only the top five law schools in the US and UK) and differences between the jurisdictions (for example, law is a postgraduate degree in the US and more US law schools offer TFCs on specific issues of cybersecurity, cyberwarfare and national security) means that direct comparisons with Australia are problematic. Nevertheless, it is interesting to note that among the top five law schools in the US and UK and all New Zealand law schools, so few universities offer TFLPCs.

A possible interpretation of this finding may relate to the challenges posed by staffing, rather than the perceived need or merits of offering TFLPCs. The most considerable obstacle to a greater proliferation of TFLPCs in Australia and overseas may be a lack of academic staff interest or expertise in teaching such a course.[25] It may be that law societies, law student associations and even LegalTech providers may need to highlight the importance of preparing students for a disrupted legal profession. The present analysis provides some empirical evidence of the student interest in technology and law, to which many universities are responding. However, fewer law schools in Australia and overseas are offering courses focused on the impacts of technology within the legal profession — the very profession that is undergoing considerable change and where many students hope to find employment after graduation. The effects emerging technologies are having and will continue to have on the legal profession is an area in need of scholarship, which may encourage legal academics to research and teach in this field. The authors' reflections below on teaching a TFLPC for the first time in 2019 will hopefully stimulate further interest.

V LEGAL TECHNOLOGY AND PRACTICE COURSE

'Law, Technology & Your Future' ('LAW3481')[26] was developed by Dr Aaron Timoshanko, Mr Angus Murray and Mr Richard Gifford ('teaching team') at the University of Southern Queensland ('USQ'). The inspiration and strategic direction in developing LAW3481 came from Associate Professor Caroline Hart and from discussions at the General Counsel, Compliance and Risk Forums 2016 and 2018, convened by Clyde & Co and Hinshaw & Culbertson.[27] LAW3481 was offered online and on-campus at Springfield, Queensland in Semester 2, 2019. The delivery mode was face-to-face, which was complemented with online communication, learning resources and assessment. Live streaming (via Zoom) and recordings of all lectures and presentations provided synchronous and asynchronous options for enrolled students.

The focus of LAW3481 was on the changes occurring within the legal profession, including developments in LegalTech, the growth in multi-disciplinary partnerships, incorporated legal practices, and the commoditisation and outsourcing of legal work. The primary aim of LAW3481 was to instil in students the knowledge and skills required to evaluate new technologies and opportunities critically. The course did not attempt to teach future lawyers

[25] The challenges associated with staffing may be exacerbated by the formal requirements that must be met to be appointed as an instructor — eg, the TEQSA requirements in Australia — or by a lack of funding for casual staff.
[26] The course was originally named 'Emerging Legal Technologies and Practice'.
[27] Now the 'General Counsel & Compliance Strategy Forum brings together the finest thought leaders and solution providers in a two-day compliance and counsel networking event which promises to inspire debate through our world-class engagement platforms and ultimately broaden your expertise to add real value and insight back into the organisation you represent': 'Home', *General Counsel and Compliance Strategy Forum* (Web Page, 2021) <https://www.gcandcompliancestrategyforum.com>. The Forum was attended by Associate Professor Caroline Hart.

how to code, unlike some TFCs, but sought to impart an open yet 'hype-resistant' mindset towards technology and changes in the legal profession.[28]

In familiarising students with key developments in LegalTech, the teaching team invited LegalTech providers to showcase their products, including two practice management software providers, two chatbot/decision-tree providers and one provider of e-Discovery services. Early in the course's development, the teaching team decided not to focus on one type of technology or technology provider, in order to reduce any perception of bias and promote balance among established and start-up technology companies.[29] It was also a strategic decision to encourage students to embrace disruptive thinking and be adaptable in a dynamic legal environment.

The course covered nine topics over 13 weeks. After an introduction to the impacts and opportunities technology presents to the legal profession, judiciary and clients, the course provided an overview and critical analysis of some existing LegalTech. This analysis involved getting hands-on with some software, so students could gain experience and familiarity with some of the products available at the time.[30]

Examining the regulatory environment, including ethics, privacy and cybersecurity, was a significant component of the course. Some of these issues were raised during an in-class panel discussion, hosted by Mr Angus Murray and featuring Ms Chantal McNaught from LEAP, Mr Steve Tyndall from NextLegal, Mr Warwick Walsh from Lawcadia, Mr David Bowles from the Queensland Law Society and Ms Jess Caire from PEXA. The panel session was recorded in the USQ studio and is now available on YouTube.[31] This panel discussion exposed students to a range of perspectives from legal practitioners, former practitioners and developers of technology solutions on the regulation and ethical implications of technology in legal practice.

LAW3481 also examined the disruption that alternative business structures (for example, multi-disciplinary partnerships, incorporated legal practices) pose to the legal profession, discussed project management and collaboration in the provision of legal services, and reviewed the judicial use of technology in Australia and overseas. Finally, the course

---

[28] By 'hype-resistant' the authors refer to a mindset that is resistant to the excitement surrounding new technological developments and that critically evaluates claims made in marketing the product or service.

[29] The authors acknowledge that incorporating technology providers raises potential ethical issues, including the payment of licence fees and the ownership of student intellectual property. All technology providers offered trial or student licences for no fee. The ownership of intellectual property was also mitigated as students followed the directions of an instructor in developing a basic understanding of the technology. No assessment items or projects were tied to any technology. The self-interest of technology providers was also acknowledged and ameliorated by inviting alternative/competitor products. In this regard, the students' experience was not unlike attending a showcase or conference run by the Australian Legal Technology Association, which was discussed with students.

[30] Inviting LegalTech providers to showcase their products to law students also provided some valuable opportunities for students to learn about alternative career pathways in law. More than one guest presenter discussed their journey through law school and legal practice before encountering a difficulty, issue or problem that they saw the opportunity to solve through technology. This discussion offered law students a first-hand account of entrepreneurialism.

[31] Aaron Timoshanko, 'Emerging Legal Technologies and Practice Panel Session' (YouTube, 6 September 2019) <https://www.youtube.com/watch?v=pTOl118ahCA>.

considered the jurisprudence of technology and an overview of current legal research methodologies.

A *Assessment*

The assessment for LAW3481 consisted of four items. An online quiz, worth 10% of students' overall grade, assessed students' understanding of the fundamental principles before the course moved to more advanced concepts. The next two assessment items prepared students for the major assessment, a project proposal. The second assessment (worth 20% of students' overall grade) was a SWOT (strengths-weaknesses-opportunities-threats) analysis for a technology solution within a legal practice with legal and non-legal disciplines. Students could pick any technology solution they were interested in, whether the solution already existed or was an idea they would like to explore in a semi-structured way throughout the course. The third assessment required students to peer review another student's SWOT analysis for 10% of their overall grade. The peer review task required students to answer four questions about the SWOT analysis they received:

(a) Do you consider this proposal viable?

(b) Are there any immediate ethical issues with the proposal?

(c) Would you invest in this product/service?

(d) Do you have any additional comments regarding how the proposal could be refined?

This assessment promoted critical thinking (of their peer's and their own proposal) and evidenced their understanding and application of the regulatory and ethical framework applicable to lawyers. The peer review was de-identified and given to the author of the SWOT analysis so that their technology solution and the subsequent project proposal would benefit from another's perspective, in addition to the marker's feedback.

The major assessment was a project proposal, which accounted for 60% of the students' final grade in the course. Students could base their project proposal on the same technology solution they examined in their SWOT analysis or choose an entirely new technology solution. Such flexibility was necessary in case the technology solution proposed in a student's SWOT analysis, which had undergone peer review, was not viable or otherwise problematic. The project proposal was structured as a letter of proposal[32] — a format that contains the most relevant components of a formal business proposal but is more concise. Within the letter of proposal, students had to address nine questions, including the financial viability of the technology solution, the scope of work and the key personnel required for implementation. Students were encouraged to collaborate on the technology solution proposed, but the letter of proposal had to be the students' independent work.

[32] For a discussion and an example of a letter proposal, see Tom Sant, *Persuasive Business Proposals: Writing to Win More Customers, Clients, and Contracts* (AMACOM, 3rd ed, 2012) ch 11.

B *Experiences and Reflections*

Student enrolments in LAW3481 were surprisingly low (nine students) given the apparent student interest at other law schools, if the proliferation of TFCs in Australian law schools is an indication of student interest. Most electives at USQ, generally, have 20 to 30 student enrolments. Several factors may explain the low student enrolments. Some attribution is due to this being a new course, so there is consequentially a lack of 'word of mouth' among previous students. Furthermore, the course specifications were only available to students after the commencement of Semester 1 that year, meaning students who planned their enrolment at the beginning of the year were unlikely to learn about this new course available in Semester 2. Nevertheless, low enrolments in LAW3481 may expose the need for law schools and individual academics to communicate the important role that technology will play in the professional lives of law graduates, whether or not they are in traditional legal roles. While some students are highly technologically literate, TFLPCs like LAW3481 are not just about improving students' technological literacy. TFLPCs aim to equip students with the ability to evaluate and assess the benefits, limitations and costs associated with deploying new technologies within legal practice. In fact, without proper precautions, a high degree of comfort or familiarity with technology associated with high levels of technological literacy may result in complacency or overlooking some of the risks associated with new technologies. For example, the reflexive acceptance of terms of service that is so common could have significant consequences in a law firm. Even existing and relatively benign technologies, such as email, have dramatically changed the practice of law by facilitating offshoring and outsourcing of legal work. Students must understand the forces driving these changes, so they are not caught off-guard as the legal profession continues to evolve to meet new and existing challenges.

Students enrolled in LAW3481 were enthusiastic and engaged in the lectures, tutorials and course materials, with several students exceeding the teaching team's expectations in the assessment. The students' enthusiasm was reflected in their final grades, with 32% receiving a high distinction or an 'A'. The anonymous student evaluations of teaching ('SET') were also overwhelmingly positive. Four of the nine enrolled students participated in the SET. Students reported high levels of satisfaction with the course and there was widespread agreement that the assessment tasks contributed to their learning. These findings suggest that TFLPCs like LAW3481 are well received by students and make a valuable contribution to students' educational experience at university.

VI CONCLUSION

Technology is increasingly impacting specific areas of law and the practice of law generally. Law firms are already exploring and adopting technologies into their practices, as are their clients. Many law schools are responding to this changing environment to improve graduate employability but also to engage students in deeper discussions about new ways of creating legal relationships.

A key theme to emerge from this research is uncertainty. The desktop analysis revealed a degree of uncertainty regarding the future impacts of technology within the legal profession. Some TFCs that upskill students based on existing technologies are uncertain (or unconvinced) about emerging technologies that have the potential to disrupt legal practice. Other TFCs prepare students for a disrupted profession based, in part, on emerging or future technologies, of which the anticipated benefits or threats are uncertain.

The uncertainty about the role of technology in the legal profession is unsurprising. Society stands at the precipice of potentially significant technological advances (quantum computing, artificial general intelligence), which can dramatically change the course of human history, including the legal sector. In the meantime, new applications of existing technologies, such as machine learning and blockchain, will emerge in law. Whether the existing or emerging technologies deliver what is promised (or something else) or join the list of other technologies that were oversold on the 'hype cycle' is yet to be seen. No one expects law academics to predict the future, so the challenge for law schools is how to best prepare students in the face of such uncertainty. One approach is to offer a TFLPC, not unlike LAW3481, that focuses on developing an open and inquisitive mindset towards new technology, while also transferring the knowledge and skills that new lawyers need to examine such technology critically. This is not the only approach. We hope this article contributes to a broader discussion about how universities teach technology into the law curriculum, not whether such a course is needed.

Our desktop analysis suggests that TFCs will be a regular elective offered at Australian law schools, especially at the postgraduate level, for the foreseeable future. Further research is required to uncover why some law schools are prioritising technology more than others; is it a lack of funding, a lack of appropriate staffing or something else? Further qualitative research, ideally with the Deans or Heads of the law schools, may also uncover why more TFCs are not core courses.

At the very edges of this article, questions emerge regarding the place of technology potentially being referenced in the Priestley 11 (the 11 compulsory subject areas required for admission as a legal practitioner), and the need for a more cohesive and coordinated approach charted by leaders within the academy. These questions go to the very heart of what society and employers expect from law schools. Is the role of law schools (and universities more generally) to produce job-ready graduates? Or, are law schools responsible for doctrinal knowledge, with technological competency the responsibility of firms and other training providers? We leave these questions for future scholarship. Until then, academics within many law schools will need to champion TFCs to ensure all graduates are prepared to face the challenges and opportunities technology poses in the legal profession.

LEGAL SCHOLARSHIP: A ROLE IN RECONCILING DIFFERING VIEWS ABOUT A BANKRUPTCY TRUSTEE'S CONDUCT?

*Mary Wyburn**

ABSTRACT

A Full Federal Court judgement contained stinging criticism of the conduct of a registered trustee in bankruptcy. The Inspector-General in Bankruptcy subsequently issued a show-cause notice to the trustee. After deciding the response was not satisfactory, a disciplinary committee was convened under the *Bankruptcy Act 1966* (Cth). The committee's decision was that the trustee should continue to be registered and no further action be taken. This article explores the role of legal scholarship in this context and the demands of the current academic research environment that discourage a legal academic from pursuing such scholarship.

* Senior Lecturer, University of Sydney Business School.

I INTRODUCTION

Legal academic scholarship is currently exploring an increasing range of legal issues from an expanding variety of perspectives. At the same time, it appears that university research policies and practices are leading to its retreat from one of its significant roles — as a bridge between the courts on the one side and the many stakeholders with an interest in court decisions on the other. This article explores this issue generally, and then discusses a case study that both illustrates an instance where legal academic scholarship could have played this important role, and reflects some of the reasons why a legal academic would be reluctant to take it on.

II CURRENT ENVIRONMENT OF LEGAL SCHOLARSHIP

In earlier times, it was usual to see legal academics writing about case law in industry journals as well as academic journals. It was not uncommon for some legal academics to use the opportunity to develop an article from its original state as a brief case note, through to a more detailed industry journal article and, finally, to a full-fledged academic journal article. At the same time, it was also usual to see legal academics as members of professional and/or industry associations, with some taking up leadership positions in these organisations. Such connections would have enabled legal academic scholars to communicate their ideas and expertise more directly with the professions and industry.

The current environment for legal academic scholarship is very different. There are significant demands and constraints placed on legal academics. University research output is now highly regulated under a national research evaluation framework (Excellence in Research for Australia ['ERA']) administered by the Australian Research Council.[1] Universities must also undertake research income information-gathering exercises as part of the national Higher Education Research Data Collection framework.[2]

Universities now often adopt policies setting minimum research outputs. Many university faculties prescribe lists of journals they will recognise for research reporting, promotion, and workload allocation purposes. Journals within the prescribed lists are often ranked for these same purposes. Academic articles in non-prescribed list journals do not count and the writing of articles for lower-ranked journals on the prescribed list is discouraged. Academic and research organisations have also generated journal lists, some of which provide rankings for the listed journals. Examples of lists are the 2009 list compiled by the Council of Australian

---

[1] 'Excellence in Research for Australia', *Australian Research Council* (Web Page, 16 June 2021) <www.arc.gov.au/excellence-research-australia>. As noted in the latest STM report, '[t]here is clear evidence that research assessment exercises such at the REF (UK's Research Excellence Framework) or ERA (Excellence in Research for Australia) have changed researcher behaviour.' Rob Johnson, Anthony Watkinson and Michael Mabe, *The STM Report: An Overview of Scientific and Scholarly Publishing, 1968–2018* (Report, International Association of Scientific, Technical and Medical Publishers, 5th ed, October 2018) 67. See also Kathy Bowrey, 'Audit Culture: Why Law Journals Are Ranked and What Impact This Has on the Discipline of Law Today' (2013) 23(2) *Legal Education Review* 291.

[2] 'Home', *Department of Education, Skills and Employment* (Web Page) <www.dese.gov.au>; Bowrey (n 1) 308.

Law Deans,[3] the 2010 ERA list (a ranked list that was discontinued in 2011),[4] and the 2019 Australian Business Deans Council Journal Quality List.[5] Professional and industry journals often are not included in these lists, and where they are included are generally not ranked highly. The ranking and audit of journals has generated its own legal academic literature.[6]

More recently, the national research evaluation framework has included reference to 'engagement and impact'.[7] This has generated questions about what might count as engagement and impact for academic legal scholarship. One aspect of information-gathering on the impact of academic scholarship is citation metrics, that is, tracking the number of citations a journal article receives (for example, Google Scholar, Scopus, Clarivate).[8] These systems have been used to help evaluate the impact of academic journal articles. However, the systems for gathering such metrics have generally not included many Australian law journals.[9]

These developments in the ranking of journals have resulted in a narrowing of the range of law journals in which an academic can publish to ensure acceptable scholarship output. Legal academics are under pressure to submit their work to a shorter list of higher-ranked journals, and must tailor their scholarship to the particular topics and approaches favoured by these journals. For instance, there appears to be a growing tendency for some law journals to preference articles that adopt a theoretical or empirical methodology, and a preference against those characterised by some as descriptive articles where legal cases are central.[10]

The above discussion has concentrated on journal articles because they remain the main currency for the recognition of academic scholarship. Social networks and online blogs provide other means to communicate academic scholarship. However, their standing in the academic research environment has yet to be established.[11]

Other developments in the general academic scholarship environment also have an impact on the nature of legal academic scholarship. With the widespread use of text matching software

---

[3] Kathy Bowrey, *A Report into Methodologies Underpinning Australian Law Journal Rankings* (Report, Council of Australian Law Deans, February 2016) 31.
[4] Bowrey, 'Audit Culture' (n 1) 307. Although out of date, the list is '*still today* widely used within Australian law schools': Kimberlee Weatherall and Rebecca Giblin, 'Inoculating Law Schools against Bad Metrics' in Kathy Bowrey (ed), *Feminist Perspectives on Law, Law Schools and Law Reform* (The Federation Press, 2021) 196 (emphasis in original).
[5] 'ABDC Journal Quality List', *Australian Business Deans Council* (Web Page) <https://abdc.edu.au/research/abdc-journal-quality-list>.
[6] See, eg, Bowrey, 'Audit Culture' (n 1); Ian Murray and Natalie Skead, 'Who Publishes Where?: Who Publishes in Australia's Top Law Journals and Which Australians Publish in Top Global Law Journals' (2020) 47(2) *University of Western Australia Law Review* 220.
[7] Australian Research Council, *Engagement and Impact Assessment 2018–19: National Report* (Report, 2019) <https://dataportal.arc.gov.au/EI/NationalReport/2018>.
[8] Johnson, Watkinson and Mabe (n 1) 64–9.
[9] Bowrey, *A Report into Methodologies* (n 3) 5.
[10] Chief Justice Susan Kiefel, in an address to the Australian Legal Academy, notes the potential diversion of legal scholarship away from such areas. 'Today there are pressures on the academy which may have the effect of limiting the kind of research and writing which is useful to judges and professional lawyers. Funding may divert academic resources away from doctrinal law': Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (Patron's Address, Australian Academy of Law, 31 October 2019).
[11] Johnson, Watkinson and Mabe (n 1) 9.

(for example, Turnitin) by universities and publishers, there is increased sensitivity about issues such as self-plagiarism.[12] In the past, it was not unusual to see an academic writing about a particular issue in several different contexts, communicating to different audiences (for example, academic, professional and industry). Nowadays, care must be taken to acknowledge all the earlier references to avoid a charge that the material is merely a recycling of the same content. In a similar vein, with much closer scrutiny and more regulated reporting of research outputs by universities, the use of the same dataset by researchers may come under criticism as an act of improper 'salami slicing' of the data — that is, slicing the same dataset to generate multiple articles rather than a single research output.[13] A legal academic researcher examining case law in a particular area and, for example, discussing cases when they first occur and then later writing about those same cases on appeal may fall foul of these processes. In this legal academic environment, outside a funded research project, there is little or no time to engage with the legal profession, with other professions such as accounting, or with industry, even if this type of contribution could help to maintain or enhance an academic's position, which, generally, it does not or its influence is minimal.

III CASE STUDY: BANKRUPTCY AND REGISTERED TRUSTEES

This section looks at an area of bankruptcy law that in the past would have attracted academic scholarship useful to the various stakeholders in this context. It is used as a case study to highlight some of the reasons why legal academics would be unlikely to address the issues in a way that would provide an important bridge between the courts and those stakeholders.[14] In this example, after a Full Federal Court judgement was highly critical of the conduct of a registered trustee in bankruptcy, a disciplinary committee was convened under the *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*'). Despite the Court's criticism of the registered trustee's conduct being the main reason why the committee was convened, the committee decided no action would be taken against the registered trustee. How could the committee arrive at a decision so very different from the Court? Surely legal academic scholarship has a role in reconciling apparently conflicting views of the proper conduct of a bankruptcy trustee. However, increasingly there are factors that might dissuade a legal academic from pursuing this role.

A *Context*

To understand what was involved in the litigation, it is necessary to provide some brief background information to explain its context. Under the Australian bankruptcy regime, a

[12] Patrick M Scanlon, 'Song from Myself: An Anatomy of Self-Plagiarism' (2007) *Plagiary: Cross-Disciplinary Studies in Plagiarism, Fabrication, and Falsification* 57; Mary Wyburn, 'The Confusion in Defining Plagiarism in Legal Education and Legal Practice in Australia' (2009) 7(1) *Journal of Commonwealth Law and Legal Education* 37, 42–3.
[13] Scanlon (n 12) 59.
[14] See also the view of judges on academic scholarship: Chief Justice Susan Kiefel (n 10); former Chief Justice Robert French, 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87 *Australian Law Journal* 96; Justice Sarah Derrington, 'What Is the Value of the Legal Academy and to Whom? (Keynote Speech, 2021 ALAA Conference, 5 July 2021).

bankrupt's estate is administered either by the Australian Financial Security Authority ('AFSA') (a Federal Government agency) or by a registered trustee. A registered trustee is registered under the *Bankruptcy Act*. To obtain registration, an applicant must have accounting qualifications, undertake some external administration studies, have relevant experience in insolvency work in the past five years and have the capacity to perform the functions and duties of a registered trustee.[15] There are 199 registered trustees in bankruptcy.[16]

A trustee's registration may be cancelled or suspended in various circumstances.[17] The Inspector-General in Bankruptcy, the chief executive of AFSA, has certain powers to suspend or cancel the registration.[18] Among the procedures under which the Inspector-General may exercise these powers is giving a show-cause notice ('SCN') to the trustee under the *Bankruptcy Act* sch 2 'Insolvency Practice Schedule (Bankruptcy)' ('IPSB') s 40-40.[19] After not receiving a response or not being satisfied with the response, the Inspector-General may refer the matter to a disciplinary committee under s 40-50. The committee, convened under s 40-45, comprises the Inspector-General, a member appointed by the prescribed body (that is, the Australian Restructuring Insolvency and Turnaround Association),[20] and a member appointed by the Minister (Attorney-General). The committee must decide on any action to be taken and provide a report to the Inspector-General.[21] The Inspector-General must give effect to the decision.[22] The decision is appealable to the Administrative Appeals Tribunal.[23]

B *Background to the Litigation*

The background to the dispute before the Full Federal Court is complex, and will be outlined here in a general fashion only. The main parties involved in the matter were the bankrupt, Mr Young ('B'), his former spouse, Mrs Young ('Y'), B's de facto partner, Ms Smith ('S'), and the trustee of B's bankrupt estate ('T').

In 2013, Y obtained judgement against B in the amount of AUD2,828,000 (AUD2,663,000 relating to family law proceedings and AUD165,000 in damages in common law proceedings for tortious conduct [owed by B and his company]).[24] In a preliminary step before bringing a creditor's petition against B, Y had attempted to serve a bankruptcy notice on B from June 2014. It was eventually served on 3 September. However, B had become bankrupt on 2

[15] *Insolvency Practice Rules (Bankruptcy) 2016* (Cth) s 20-1 ('IPRB').
[16] Australian Financial Security Authority, *Personal Insolvency Compliance Report 2019–20* (Report, 2020) 7.
[17] *Bankruptcy Act 1966* (Cth) sch 2 'Insolvency Practice Schedule (Bankruptcy)' div 40 sub-divs C, D ('IPSB').
[18] IPSB ss 40-25, 40-30.
[19] Among the grounds for the SCN is IPSB s 40-40(1)(l)(i) — 'the trustee has failed to carry out adequately and properly … the duties of a trustee'.
[20] IPRB s 50-10.
[21] IPSB ss 40-55, 40-60.
[22] IPSB s 40-65.
[23] IPSB s 96-1.
[24] *Young v Thomson (Trustee), in the matter of Young (Bankrupt) (No 2)* [2017] FCA 8, [17].

September, when he presented a debtor's petition and T was appointed trustee of B's bankrupt estate.[25]

At this point, the main asset in B's bankrupt estate was a half interest in an apartment in Pyrmont, New South Wales, purchased (for over AUD4.5 million) by B and S as joint tenants in 2007.[26] In 2011, B and S had commenced litigation against Brookfield Multiplex ('Brookfield claim'), the builder of the Pyrmont property, in respect of claimed defects and resultant damage to the apartment.[27] On 31 July 2014, B executed a power of attorney in favour of S, and on 7 August 2014, S, acting under the power of attorney from B, transferred B's half interest in the apartment to herself.[28] The consideration of AUD1.8 million for the transfer was 'never paid'.[29]

With a large debt due her from B's now bankrupt estate and in the absence of T taking action, Y took the main role in a range of litigation directed at undoing the transfer of the half interest in the apartment. This included obtaining freezing orders restraining B and S from dealing with the property until further order, and bringing successful proceedings against B and S under the *Conveyancing Act 1919* (NSW) s 37A (transfer of property to defeat creditors).[30] Unfortunately, the freezing orders were not noted on the title to the property at the time. S, in breach of the freezing orders, granted a mortgage over the apartment to Westpac Banking Corporation ('Westpac'), to secure a loan to a company that used the funds to purchase a hotel. Westpac was joined in the s 37A proceedings. Y later brought proceedings against S for contempt of the Court orders restraining S from dealing with the property.[31] Y also obtained leave to intervene in Family Court proceedings commenced by S, in which S was seeking an adjustment of property rights between S and T as trustee of B's bankrupt estate. The contested pool of assets in this matter was estimated at over AUD11 million.[32] Despite having been unable to work since 2006 and in receipt of social security benefits, Y was able to pursue this litigation because her solicitor and barristers had been willing to act on the basis that fees incurred would only be determined and payable when Y received a dividend from B's bankrupt estate. Y was the primary creditor in the estate.

T, as trustee of B's bankrupt estate, pursued some investigations and recoveries of assets for the benefit of the estate. These included an unsuccessful application to wind up a company that was trustee for the Young and Smith family trusts, and a successful settlement with the Australian Tax Office in respect of claimed preferential payments.[33] However, T did not give consent to Y bringing the s 37A proceedings against B and S, which meant Y had to obtain court leave (*Bankruptcy Act* s 58(3)). T was later joined in the s 37A proceedings. T agreed to

---

[25] *Young v Smith* [2015] NSWSC 400 [26].
[26] *Young v Thomson (Trustee), in the matter of Young (Bankrupt) (No 2)* [2017] FCA 8, [19].
[27] Ibid [21].
[28] Ibid [22].
[29] *Young v Smith* [2015] NSWSC 400 [22].
[30] Ibid.
[31] *Young v Smith* [2016] NSWSC 1051.
[32] *Young v Thomson (formerly trustee of the property of Young)* [2017] FCAFC 140 [54].
[33] Ibid [54], [74].

join the Brookfield claim as co-plaintiff with S, after S covenanted to indemnify T against the costs of the action.[34]

C *The Federal Court Proceedings*

The matter that ultimately came before the Federal Court concerned Y questioning T's conduct in entering a litigation funding agreement with Ironbark Funding Red Pty Ltd ('Ironbark') in September 2016. The agreement related to funding matters including the application to wind up the trustee company, the Family Court proceedings commenced by S, and the Brookfield claim. Under the agreement, Ironbark was to provide T with up to AUD253,900 to fund the litigation and general expenses of the trustee, and assume liability for adverse costs orders. Ironbark's fee, after reimbursement of its outlays, was 35% of the net proceeds recovered and these proceeds were to include the half share in the Pyrmont property recovered by Y's litigation. In October 2016, Y obtained orders restraining T from incurring costs under the funding agreement, other than in respect of the Family Court and winding up proceedings, until the date of the hearing in the main proceedings.

In the Federal Court, Y sought orders under the *Bankruptcy Act* s 178, setting aside the litigation funding agreement between T and Ironbark or, alternatively, an inquiry under s 179 into T's conduct, seeking, among other orders, orders removing T from office and setting aside the funding agreement. Y later joined Ironbark in the proceedings. Y argued that T was in breach of the *Bankruptcy Act* s 19(1)(j) (duty to administer the bankrupt estate 'as efficiently as possible by avoiding unnecessary expense'). Y had litigated her rights against B and then against B and S, the result of which was B's half interest in the apartment being brought back into the bankrupt estate (subject to the rights of the secured creditor, Westpac). Y was the principal unsecured creditor in B's bankruptcy (judgement debt plus interest now amounted to AUD3,016,264.39) and she was concerned about the reduction in the value of the assets in B's bankruptcy resulting from the entry by T into the litigation funding agreement. The Court noted that T had been hospitalised for 'most of August and September 2016'.[35]

This article does not explore in detail the arguments of the parties in the proceedings, but rather it discusses the outcome of the litigation and the role of legal academic scholarship in this context.

At first instance, Y was unsuccessful in her application against T.[36] The trial judge was of the view that, without funding to conduct the litigation and with neither T (T having conducted the administration unfunded for two years) nor any of the bankrupt's creditors willing to provide the necessary funding, it was appropriate for T to obtain commercial funding.[37] The Court accepted T's evidence as to the funding agreement being on commercial terms in the absence of contrary evidence being brought by Y. It commented that some of the correspondence from

[34] Ibid [16].
[35] *Young v Thomson (Trustee), in the matter of Young (Bankrupt) (No 2)* [2017] FCA 8, [65].
[36] Ibid.
[37] Ibid [111].

Y's solicitor to T 'intruded into the role of the trustee'.[38] The Court found that, except in relation to the funding agreement, there was 'no material cause for criticism' of T's reporting to creditors.[39] The Court accepted that T 'can fairly be criticised for the limited information she provided to creditors in relation to the funding agreement and its implications for the return to creditors'.[40] It criticised T's failure to recognise Y's interest, as the major unsecured creditor, in the funding agreement and the brief timeframe for a response to be made by Y when T sought responses from creditors to the agreement. The Court recognised this failure as being a significant factor in Y bring the proceedings but considered this aspect of the case could be dealt with in the determination of any application for costs.

When Y appealed the matter, the Full Federal Court came to a very different conclusion about T's conduct. By this time, T had ceased to be trustee of the bankrupt estate. A new trustee had been appointed to B's estate, having taken over the administration from the Official Trustee.[41] At the time of the appeal the Brookfield proceedings had yet to be finalised.

The Appeal Court was critical of T's conduct in a number of respects. T had failed to take the benefit of the freezing orders obtained by Y to protect the bankrupt estate. It was critical of the notices sent by T to creditors about the need to seek litigation funding and T's intention to enter the litigation funding agreement. The Appeal Court found T had breached her duties under the *Bankruptcy Act* ss 19(1)(d), (j) and (k) and her fiduciary duty 'to take an informed view' of whether or not to exercise her discretion to enter the funding agreement.[42] T had 'acted irresponsibly' in entering the agreement in circumstances where T had a 'conflict of interest and duty'.[43] T had incurred significant liabilities in litigation without seeking directions from either the creditors (s 177(1)) or the Court (s 134(4)). In the Court's view, 'the terms and consequences of the funding agreement were manifestly detrimental to the creditors and to the estate as a whole and were not the product of reasoned or careful consideration to the standard of a prudent businessperson'.[44] The decision to enter the litigation funding agreement on the terms negotiated with Ironbark was 'commercially unsound', 'without any reasonable regard for, or genuine consideration of, the interests of the creditors', in particular Y as 'virtually the only substantial creditor'.[45] T entered an agreement 'that had the effect, as she knew, of squandering 35% of the, or the major, net assets of the estate'.[46] The Court inferred from what it found to be T's lack of understanding of the issues in the Brookfield claim, that T 'has little interest or knowledge of the position of the estate generally'.[47] T's failure to undertake a title

[38] Ibid [117].
[39] Ibid.
[40] Ibid.
[41] *Young v Thomson (formerly trustee of the property of Young)* [2017] FCAFC 140 [1].
[42] Ibid [118].
[43] Ibid.
[44] Ibid [128].
[45] Ibid [139]–[140].
[46] Ibid [140].
[47] Ibid [147].

search of the Pyrmont property between her appointment and her discovery of the Westpac mortgage showed T's 'inattention and supinely negligent approach to her duties'.[48]

The Court ordered the funding agreement be set aside under the *Bankruptcy Act* s 178, provided Y undertook to reimburse Ironbark for moneys already expended by Ironbark under the agreement. T and Ironbark were ordered to pay Y's costs of the proceedings, but T was to bear the costs personally and was not to have any right of indemnity from the bankrupt estate for her liability to Y or her own costs. In relation to the application under s 179, the Court considered that, had T remained as trustee of the estate, it would have ordered her removal as trustee; her conduct 'fell short of the high standard expected of a trustee'.[49] In the circumstances, the Court would have ordinarily ordered an inquiry into her conduct and 'her justification for the significant financial burden' she appeared to have 'imposed on the estate', but the Court did not want to increase the financial burden on the estate.[50] Instead, its response was to require T to apply to the Court to pass her accounts for the administration of the estate.

D *Committee Decision*

AFSA responded to the Court's criticism of the registered trustee. An SCN was issued to T in relation to the bankrupt estate of B. The notice relied 'almost exclusively' on the Full Federal Court judgement.[51] It referred to T's failure to adequately and properly carry out the duties of a trustee (IPSB s 40-40(1)(l)) and failure to comply with a standard prescribed for the purposes of IPSB s 40-40(1)(p). The standard applicable at the time of the conduct under review was *Bankruptcy Regulations 1996* (Cth) ('*Bankruptcy Regulations*') sch 4A 'Performance Standards for Trustees'. The particular grounds and standards were *Bankruptcy Act* ss 19(1)(f), (j) and (k), *Bankruptcy Regulations* standards 2.3, 2.7(1) and 4.3, and the common law. T's response to the SCN was not found to be satisfactory by the Inspector-General and the matter was referred to a disciplinary committee.

In light of the Full Federal Court's strident criticism of T's conduct, it is somewhat surprising that the committee decided T should continue to be registered as a trustee and there should be no suspension, restriction on appointments, public admonishment or reprimand, or condition imposed.[52] It did, however, recommend AFSA 'strongly consider' conducting an annual review of up to five of T's files during the next two years, and that T demonstrate she had met the continuing professional development requirement at each of these annual reviews.[53] In reaching its decision, the committee relied upon the two judgements, its interviews with T, and 'relevant documents' from T's estate file for B.[54]

---

[48] Ibid.
[49] Ibid [152].
[50] Ibid [153].
[51] *Report of the Committee Convened Pursuant to Schedule 2, Section 40-45 of the Bankruptcy Act 1966 to Make a Decision about Ms Louise Thomson, a Registered Trustee* (Committee Report, 5 April 2018) 2.
[52] Ibid 1.
[53] Ibid.
[54] Ibid 4.

Contrary to the findings of the Full Federal Court, the committee considered T did take reasonable steps to protect the property of the bankrupt estate (was not in breach of s 19(f) or standard 4.3). The committee did not consider T's entry into the funding agreement a breach of duty under ss 19(j) or (k), nor did it find there was a conflict of interest within standard 2.3. The committee considered T's reporting to creditors was 'adequate' as required by standard 2.7(1).[55] T was considered to have breached the standard by providing too little time for creditors to respond to the notice about the funding agreement, but no alternative funding arrangement would have resulted even if further time had been given. In relation to the common law duty, the committee considered T had properly relied on the advice of her lawyers, her experience and specialist knowledge in relation to the administration of the estate and in particular the Brookfield claim.[56] The committee was not convinced entry into the funding agreement was a conflict of interest on the grounds that T would benefit from her remuneration being paid, because this was not seen as 'the sort of mischief that the professional standards seek to address'.[57]

The committee noted that it had not been provided with material suggesting any concerns with the administration by T of other bankrupt estates. It said that it took into account T's response to the SCN and demeanour at the interviews. These had suggested to the committee that T had 'taken to heart the criticism of the Full Court, while contending that in the main the various actions she took were defensible'.[58] It noted T was now the subject of a Full Federal Court judgement containing severe criticisms of her actions in the administration of B's estate and that a costs order had been imposed on her personally. The committee also noted that it was not aware of any action being brought against T by any professional association to which she belonged. The committee acknowledged the referral to it of the matter was on the public record (AFSA's Register of Trustees) and the referral had been commented on by online media. The committee decided that the Inspector-General publish a media release to explain the reasoning of the committee.

IV A ROLE FOR LEGAL ACADEMIC SCHOLARSHIP?

There is no doubt there would have been a wide potential audience for any legal academic discussion of the issues raised in the litigation and the decision of the disciplinary committee. Those interested most directly would be Y, the principal creditor in B's bankruptcy, who had taken a leading role in the recovery of property for the benefit of the bankrupt estate, and the solicitors and barristers who had acted for Y and who looked to the bankrupt estate distribution for payment. Also directly interested would be the litigation funder party to the agreement with T. More generally, the interested parties would include the insolvency profession, its legal advisors and litigation funders, the professional accounting organisations whose membership includes insolvency practitioners, the regulator (AFSA), the Minister (Attorney-General) and

[55] Ibid 5.
[56] Ibid 6.
[57] Ibid 12.
[58] Ibid 18.

the Attorney-General's Department. In the context of increased scrutiny of the insolvency profession in recent years and insolvency reforms intended in part to shore up public confidence in insolvency external administrations, the matter would also be of interest to the general public.

There would have been several issues of interest to these various stakeholders, including what this decision means for the day-to-day practice of insolvency practitioners, for the Department and for the Minister, whether there are matters that may need to be addressed or addressed in more detail in the standards established under IPSB s 40-40(4) and IPRB div 43, and whether the regulator, AFSA, should revise the information and advice it provides for insolvency practitioners, including in its Practice Directions and Practice Statements.

The courts at first instance and on appeal were not disagreeing about the relevant case authorities to apply in relation to the duties of a registered trustee in bankruptcy. They disagreed about how those authorities were to be applied in the circumstances. There was no suggestion of the need for legislative change. The disciplinary committee was a group with special expertise in bankruptcy practice. Its considerations included interviews with the trustee conducted on two occasions, documents comprising the trustee's response to the SCN, and further documents including 'relevant documents' from the estate file.[59] It came to a very different conclusion to that of the Full Federal Court.

There are a number of reasons why a legal academic might choose not to explore the many issues raised in these circumstances. One of these is the nature of the articles most likely to be published by journals ranked highly in the current legal academic environment.[60] As discussed earlier, there are clear expectations around the journals to which a legal academic should be directing their research and the type of research those journals will more likely publish. Insights into this case study, although important to the many stakeholders involved, would not appear to have the elements necessary to make it attractive to the types of journals legal academics are meant to target. While the above case study will not be viewed as important in terms of precedent or theory, it is an example of where academic scholarship has the opportunity to operate as a bridge between the courts and the wider range of stakeholders, exploring why there could be such a disjuncture between the findings of the courts and the decision of the disciplinary committee in relation to the registered trustee's conduct.

---

[59] Ibid 4, 5.

[60] There are other reasons why a legal academic may choose not to undertake research about a case study like this one. For instance, increasingly, the background of legal academics may mean they are less interested in, and less suited to, exploring the practical aspects of the operation of a particular legal area, where detailed knowledge of the topic is required. The Hon Justice Sarah Derrington, in her address to the 2021 ALAA Conference, refers to the Hon Judge Richard Posner's statement that (in the US context) legal academics 'now have higher degrees by research, become academics at a younger age (often without time in practice), increasingly come from other fields and therefore focus on specialised, interdisciplinary research'. Justice Derrington also refers to Chief Justice Kiefel's observation that 'an increasing number of legal academics have no practical legal experience'. See Justice Sarah Derrington (n 14).

V CONCLUSION

Legal academic scholarship is pursuing an increasing range of topics from a growing number of different perspectives. At the same time, the current research environment in universities is imposing many demands and limitations on legal academic scholars that affect the choices they make about where to direct their research outputs. One of the issues in this context is whether legal academic scholarship can maintain its role of a bridge between the courts and the many different stakeholders affected by the courts' judgements.

This article discussed a particular instance where academic legal scholarship could have played a significant role in communicating some of the reasons for conflicting views about the role of a registered trustee in administering a bankrupt estate. It then discussed some of the reasons why a legal academic would choose not to take up the role of communicating the issues to the various stakeholders involved. While legal academic scholarship may be viewed as boldly exploring new areas and new perspectives, this paper has argued that the demands and limitations of the current academic scholarship environment mean that, at the same time, there has been a rapid retreat from what has, up to now, been seen as one of its significant roles.