the sydney law review

contents

SPECIAL ISSUE
Teaching and Scholarship

addresses
Academics, Practitioners and Judges
*The Hon Justice RP Austin*
463

On Writing Dangerously
*Fleur Johns*
473

articles
The *Idea* of the University and the Contemporary Legal Academy
*Margaret Thornton*
481

‘We’re All Socio-Legal Now?’ Legal Education, Scholarship and the ‘Global Knowledge Economy’ — Reflections on the UK Experience
*Richard Collier*
503

Changing Legal Education: Rhetoric, Reality, and Prospects for the Future
*Mary Keyes & Richard Johnstone*
537

Legal Research, the Law Schools and the Profession
*Jeremy Webber*
565

Power-Knowledge in Australian Legal Education: Corporatism’s Reign
*Nickolas James*
587

before the high court
On Technology Locks and the Proper Scope of Digital Copyright Laws — Sony in the High Court
*Kim Weatherall*
613

cases and comments
*Purvis v NSW: Behaviour, Disability and the Meaning of Direct Discrimination*
*Samantha Edwards*
639
EDITORIAL BOARD

Patrick Parkinson (Editor)
Emma Armson
Mary Crock (Co-Editor)
Saul Fridman
Fleur Johns
Les McCrimmon
Jenni Millbank

STUDENT EDITORIAL COMMITTEE
Charlotte Ahearne
Juliet Curtin
Rebecca Dunn
Lucinda Flanagan
Karen Mok
Brendan Smith
Stephen Brancatisano
Edwina Dunn
Carol Elliott
Louise Martin
Kelly Ngo
Ryan Thorne

Coordinator of the Review: Joanna Howse

Contributions and correspondence should be addressed to:
The Editor
Sydney Law Review
Sydney University Law School
173–175 Phillip Street
SYDNEY NSW 2000
AUSTRALIA
Fax +61 2 9351 0200
Email slr@law.usyd.edu.au or, joanna@law.usyd.edu.au

The Sydney Law Review is a refereed journal.

The Sydney Law Review
Online http://www.law.usyd.edu.au/~slr

Text of Before the High Court Special Issue Feature page
Article and Case Note synopses Indices for Volume 14 onwards
Text of Style Guide Back Issue Order Form
INTRODUCTION TO SPECIAL ISSUE

At the annual dinner of the Sydney Law Review in 2002, Professor Michael Tilbury reflected in his address on the contribution that Law Reviews make to the dissemination of legal ideas.¹ In this special issue we expand the inquiry to look more generally at both the teaching of law and at the broader impact and interactions of the legal academy. The issue contains a combination of commissioned articles and pieces contributed in response to a call for papers. The process of choosing and refining the articles was such that all were submitted to a refereeing process.

The themes of the issue are set at the start with two addresses. In the first, Robert Austin reflects on the interactions between the legal academy, the teaching of the law and the legal profession. The author is particularly well qualified to comment, with long experience teaching law and a career that has spanned the academy, practice as a solicitor and judicial appointment. Fleur Johns then reflects on her own transition from student to legal academic, examining the power of ideas and the role of the teacher as agent of change.

In the first of the articles, Margaret Thornton examines the impact that social and political trends are having on the teaching of law. She argues that many of the traditional values associated with universities as places of open inquiry and intellectual freedom are threatened by the rise of economic rationalism. In an age driven by the ‘market imperative’, where notions of efficiency and economic worth are seen as central to all academic endeavour, she posits that the teaching of law is becoming increasingly doctrinal and technocratic in its approach. Thornton warns that the trend must be recognised within its legal theoretical context because of the practical and political significance of the paradigmatic shift that is occurring. She notes that a reversion to an understanding of law as a positivist body of rules that can be taught (and learned in rote) places at risk many of the conceptual advances made by the critical legal scholars. At risk, she says, is the very idea of university.

Writing from the perspective of an English legal academic, Richard Collier confirms the ascendancy in England of law teachers as technicians and conveyors of rule-content. Collier agrees with Thornton’s assertion that many aspects of the modern academy work against the encouragement of critical legal thinking. This lament is continued in the article by Mary Keyes and Richard Johnstone where the focus is on the teaching of law. These authors explore at classroom level the way in which the move to commercialism affects both the delivery of lectures and the way in which legal norms are understood and absorbed by students. They note the move across the teaching institutions towards semester- rather than year-long courses; towards the delivery of course in intensive formats. Students who have to work to support their studies are seen to favour ‘efficient’ educative formats, while the institutions see economic value in pushing more students through at a faster rate. Law teaching, Keyes and Johnstone argue, has been seen traditionally as a

‘cheap’ enterprise because of the assumption that teaching will take place in large groups. As Nickolas James argues in his contribution, such choices of modalities for delivery of the ‘service’ of legal education are not value-neutral. James uses Foucauldian analysis to posit that the corporatism that characterises many modern law schools is an expression of power that both creates and maintains (conservative) societal hierarchies.

The remaining contribution to this special issue comes in the form of a very personal reflection by a former Dean of Sydney Law School, Jeremy Webber. Webber uses his observations of academics at this school to explore the relationship between the legal academy and two branches of the legal profession: the bar and the bench. Webber examines the nature of the perceived gulf between the theorists and the practitioners, arguing that there is often greater symbiosis between these areas than is acknowledged in the public discourse.

PATRICK PARKINSON
MARY CROCK
October 2004
When he invited me to speak to you tonight, Professor Shearer suggested that I might consider Professor Michael Tilbury’s address 2002’s dinner, now published in *The Sydney Law Review*. Professor Tilbury’s remarks are thought provoking and go to the heart of the endeavour that brings us together tonight. As you will recall, he tackled the question, why do we have law reviews? That, he said, is a minor query in the broader search for the raison d’etre of legal scholarship generally. Using as his point of departure Professor Fred Rodell’s famous 1936 journal article, ‘Goodbye to Law Reviews’, Professor Tilbury argued that general academic law reviews have an important function in the institution, maintenance and promotion of a culture that values scholarly writing in law. He said that the scholarly law review is worth preserving ‘if we accept (as I do) that the object of such reviews is to publish writing on and about law that augments the general body of human knowledge, thereby adding to our understanding of law’s operation in the world — an understanding that may assist in the solution of real, even everyday, legal problems.’

As Professor Shearer correctly anticipated, Professor Tilbury’s address has stimulated me to think again about the nature of legal scholarship in my fields of discourse. The thoughts I will convey to you are merely some personal reflections on subjects explored much more fully and competently by many others. I have taken this self-indulgent approach because I am now able to approach the topic from three perspectives.

I have been lucky enough to have three careers in the law, in my life so far — as a legal academic, a commercial solicitor, and a judge. My academic career has been my main enterprise. I began teaching at Sydney Law School, part-time in 1969, the year after I graduated, and took up a full-time academic position in October 1970. When I resigned my full-time position in 1990 to become a commercial solicitor, the Law School invited me to continue teaching in the Master of Laws degree program and gave me the title of Visiting Professor. When I was appointed to my judicial position in 1998, the Chief Justice agreed to my maintaining my teaching role. I have continued to teach in and co-ordinate my two LLM subjects, with wonderful contributions from some generous-spirited and highly able legal practitioners, up to the present time. So I have been teaching and researching in law at the University of Sydney, continuously apart from breaks for sabbatical leave and the like, for 34 years.
The focus of my teaching, and also my research, has been in company law and equity, the fields in which I held my chair. This has placed me at the grubby practical end of the legal academic spectrum, and has led to a sense of insecurity, which (I believe) is shared by many legal academics today. Over my 34 years of post-graduate experience, I have had to reflect often on the relationship between legal academic scholarship, high-level legal practice and judging in a superior court, from the perspectives given to me by my three careers.

Legal scholarship in fields such as jurisprudence, criminology, international law or comparative law has a function and purpose that is self-evident. Reflection about the province and function of law, the causes and effects of, and ways of dealing with crime, the role of law in the resolution of international disputes, and the insights that can be gained by understanding and comparing different national solutions to legal problems, are not only fundamentally important enterprises. They are enterprises to be undertaken principally within an academic institution. Those who do that work ‘belong’ to the community of scholars whose ranks include philosophers, anthropologists, psychologists, sociologists, political scientists, economists and historians. They are occasionally heard to say (quite wrongly, in my experience) that their work is insufficiently appreciated by the legal profession and the wider community, but their security within the academic community is enviable.

In comparison with those subjects, the academic pursuit of company law and equity necessarily involves exposition and analysis of legal principles, activities that some might regard as having a questionable claim to scholarly status. Even Professor Tilbury, who takes a catholic approach to the province of legal scholarship, draws a contrast between ‘scholarly’ and ‘trade’ material. In the eyes of some academics other than him (including, in my experience as a head of department, many of the non-lawyers on promotions committees), any expository and analytical writing on, say, company law, that might be useful to judges and legal practitioners is likely to be discounted as merely ‘trade’ material.

In October 1984, wrestling with my insecurity and claiming to have arrived at an island of assurance, I delivered a seminar paper at Sydney Law School on the nature of the academic enterprise in such fields as company law and equity, formidably entitled ‘The Academic Function in Law’. Permit me to summarise it fairly extensively, since the paper was never published.

I sought to identify the core activity of my academic professional life, putting aside the incidental functions of teaching, administration, learning and public service. Under the subheading ‘Practice, Theory and the Academic Function’, I contended that although academic scholarly output may be a by-product of a judgment or legal advice by a barrister or solicitor, the work of judges and legal practitioners, even at the highest level, should not be described as wholly or even primarily scholarship of the academic kind. I suggested that the academic lawyer has a focus of relevance, which is different from the judge’s and the practitioner’s, and that this focus of relevance is an essential ingredient of the academic enterprise.
I said that the practitioner’s task is to marshal all legitimate arguments which are relevant to the goal of advancing his or her client’s case (litigious or otherwise). Therefore the scope of the inquiry is determined by the facts of the client’s problem. The practitioner need not necessarily fit that problem into any broader structural fabric. The broader fabric is relevant only to the extent that the practitioner can extract from it some implications, which will help the client. I once heard Hutley JA describe barristers as ‘mercenary soldiers’, and that nicely summarises the point.

I expressed the belief that Australian judges operate within very similar constraints, though they have a discretion to venture further afield. I took Millett v Regent as an illustration. One of the issues in that case was whether acts of repair to and improvement of a house could be taken into account by the court in determining whether there were sufficient acts of part performance of an oral contract for the disposition of interest in land. The repairs and improvements were not required or even authorised by the oral contract. The purchasers were authorised to take possession and they did so, carrying out the repairs and improvements afterwards. Hutley JA took the view that the repairs and improvements could be taken into account because they were done “in the execution of” the oral contract. Glass JA disagreed, saying that only acts required or authorised by the oral contract could be considered. Obviously this difference of opinion went to an important issue regarding the shape and development of the law of part performance. Any academic commentator on the case would be expected to present a point of view on this matter. But the High Court avoided the issue entirely. They held that the act of taking possession, because authorised by the contract, was a sufficient act of part performance; it was unnecessary for the court to determine the broader issue and they declined to do so.

My point was that the court in its judicial capacity was not required to go beyond what was strictly relevant to decide the instant case. Had the court chosen to embark on an explanation of the broader legal doctrinal question, that part of the judicial work product might qualify for the description ‘academic legal scholarship’. But I suggested that the case-focused activities of solicitors, barristers and judges do not merit that title.

While the academic lawyer’s horizons might appear by comparison to be unbounded, I suggested that the academic’s task is really quite specific. Academics of the common law, when addressing decided cases, have the function of assessing the judicial results of litigation, to place them within the existing pattern, or to revise the pattern. The task has static and dynamic elements. Hutley JA once said to me (perhaps at the same party!) that academics are ‘the guardians of the common law’, and that again is a useful summation, provided one remembers that one of the guardian’s tasks is to encourage his or her charge to grow up. Academics in fields governed by legislation have the task of remorselessly exposing its inadequacies and proposing improvements.

---

5 Regent v Millet (1976) 133 CLR 679.
But there are other broader, and socially more important roles. Academics frequently undertake to explore the process of law making and the theoretical basis of the legal system, and its interface with economics, politics, sociology and other disciplines, to expose how the law works in society and to consider on a rational basis how it may be improved.

Endeavours of all these kinds have in common the element of placing the products of our legislative, judicial and practitioner colleagues, and the academics and practitioners of other disciplines, within a wider pattern, with a focus on the identification and evaluation of the pattern. In this way, law becomes for academic lawyers a cultural phenomenon rather than simply a process of dispute resolution. The academic does not, qua academic, marshal arguments to advance a particular factual case.

This reasoning implies that the academic function in law is in no way dependent on the practical utility of the product. It is likely that part of the output of a legal academic in company law or equity will be useful in practice, particularly for those practitioners whose work is in the ‘higher reaches’ of legal professional practice. But essentially it does not matter whether that is so, provided the functions I have outlined are performed. Indeed, as Professor Tilbury observed, recent United States literature has been engaged with the phenomenon that very little of the work product of the national law schools of that country, dominated by the economic analysis of law, has any direct practical utility for the courts and the profession. Importantly, as the US experience shows, there are levels of inquiry for academics which are bound to take them far beyond the practitioner’s concerns. Some areas of legal inquiry are necessarily and properly ‘impractical’ from a practitioner’s point of view.

My experience in my second and third careers has led me to a better understanding of the day-to-day interface between academic law and the practice of law, and of the kinds of academic work most likely to be useful to judges and practitioners. The conclusions I have been able to draw from my later experience are not the ones I would have expected to draw when I addressed the problem in 1984. I would like to share this experience with you, without in any way derogating from the fundamental proposition, that academic law has its own justification that does not depend upon its practical utility for judges and practitioners.

My practice as a commercial solicitor was focused almost entirely on transactions and events involving large corporations. While I continued my teaching, research and writing, my main enterprise was to steer corporate clients through the legal thicket towards their commercial objectives. There was no need to justify this activity, whose purpose was self-evident. There was no sense of insecurity. I adopted, of necessity, a utilitarian approach to relevant legal scholarship, except during the limited part of my working week when I could slip again into my comfortable academic cardigan. I found, however, that there was a certain kind of legal academic writing that was of great assistance.
Interestingly, I was not much assisted by expository or even analytical writing. I was forced in my daily role to be completely abreast of the relevant legal materials, and to think about them long and hard, in their practical application. The practical application helped me to understand how the legal principles worked, and ultimately to gain a better understanding of the scope and the impact of legal rules than had been possible through pure academic reflection. While I paid attention to expository and analytical writing, I used it principally to make sure that there were no gaps in my perception of the legal landscape.

What proved to be more important was the academic writing on regulatory policy. On more occasions than I had expected when I was a legal academic, commercial solicitors involved in the structuring and execution of large commercial transactions are required to deal with regulators such as the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Foreign Investments Review Board. It is necessary to invite such bodies to exercise their discretions in circumstances that are anything but standard or routine. The principal issue for the regulators is to ascertain the policy parameters of the problem. Where, on novel issues, is policy to be found? In my experience, the policy debate in these areas is conducted primarily in the academic literature of law, economics and finance. Work in those fields is a resource of great value to the practitioner.

My third career, as a judge, has some equally unexpected facets to it. The function of a judge hearing cases at first instance is well understood, although there is ‘insecurity’ of another kind for a judge at first instance at the bottom of the judicial hierarchy of the superior courts. It is widely assumed that there is not much opportunity to contribute to the development of law by decision-making at first instance, and the really interesting work is therefore reserved to those who have the opportunity to do so, the judges of the Court of Appeal and of the High Court. And the neophyte who might begin a judicial career believing that there will be an opportunity to right every social wrong that comes before the court will promptly encounter ferocious disapproval.

Heydon J’s excoriation of ‘judicial activism’, in his celebrated Quadrant article,6 warrants (and is no doubt receiving) close consideration by all judges. The paper is a passionate assault on a general approach to judging which his Honour abhors. His Honour says he employs the expression ‘judicial activism’ to mean using judicial power for a purpose other than that for which it was granted, or to serve some function other than what is necessary for the decision of the particular dispute between the parties. The remainder of the article indicates that he has a number of rather more specific vices in mind.

The ‘judicial activism’ criticised by Heydon J, and compared unfavourably with Sir Owen Dixon’s ‘strict and complete legalism’, has the following elements:

---

using judicial office to further a political, moral or social program;

(2) attempting to right every social wrong, and to achieve some form of immortality in doing so, in order to become a ‘hero judge’;

(3) deliberately altering the law, by freely questioning and changing the common law and re-writing legislation to conform to the judicial worldview, and more generally by ‘the conscious making of new law by radical judicial destruction of the old’; and

(4) dealing with issues which, although raised in argument, are not issues which it is necessary for the specific outcome of the case to deal with, or (even worse) dealing with unnecessary issues which have not been raised.

Not surprisingly, his Honour saw Murphy J as a prominent exemplar of judicial activism. Murphy J once famously sneered at the doctrine of precedent as one ‘eminently suitable for a nation overwhelmingly populated by sheep’, and claimed that as judges make the law, they are entitled to bring it up to date, not by stealth and by small degrees, but openly and to the extent they consider necessary.7

Perhaps more controversially, Heydon J regards Sir Anthony Mason as a judicial activist whose views are to be denounced and whose judicial conduct in the application of those views deplored. He quotes the following observation by Mason CJ:

The ever present danger is that “strict and complete legalism” will be a cloak for undisclosed and unidentified policy values … As judges who are unaware of the original underlying values subsequently apply that precedent in accordance with the doctrine of stare decisis, those hidden values are reproduced in the new judgment even though the community values may have changed.8

In his paper, Heydon J does not single out Kirby J for special treatment, although the reader is left in no doubt that the views and conduct of Kirby J would be seen as an obvious illustration of judicial activism. In this morning’s Sydney Morning Herald, there is an extract of Kirby J’s First Hamlyn Lecture, to be given next week at the University of Exeter.9 The topic of the address is judicial activism. Kirby J sets out to defend it.

Kirby J attacks Sir Owen Dixon’s approach, arguing that the world of ‘strict and complete legalism’ is now neither possible nor desirable:

It is the world of Brigadoon, a place of smoke and mists that never existed as portrayed, except in metaphor and imagination. If we could re-create it now, it would be a cruel place of indifference to the fact that judges have choices, that

---

7 Id at 16.
8 Id at 21.
such choices are inherent in the common law system itself and that, giving a
meaning to uncertain words and phrases, rules and principles is the daily work
that judges actually do.

To return to Dixon’s “excessive legalism” would be to take a journey back into a
world of deception, where judges pretended to a mechanical function whilst
knowing, when they stopped to think about it, that it is inevitable that they play a
creative role in making law. Today there is room for legitimate differences over
the occasions and scope of creativity proper to judges. But to return to “strict and
complete legalism” of the judge-as-mechanic is not the way to go. The judges and
lawyers of the common law need to engage intellectually with this issue. Unless
they do so, the gains of the past 20 years could be lost.

Judging only from the published extract of Kirby J’s paper, it seems to me that his
Honour does not adequately distinguish between Sir Owen Dixon’s approach and
the ‘simplistic notion’ or ‘noble lie’ that judges merely declare and apply the law.
Sir Owen Dixon did not subscribe to the latter view. He recognised that the law
changes through the application of proper judicial techniques. Heydon J makes the
point with force:

The mockery to which Sir Owen Dixon’s enlightened critics, on and off the
bench, have subjected him obscures an essential truth. He did not think that the
common law was frozen and immobile, fashionable though it is to attribute this
caricature of a view to him. He contemplated change in the law as entirely
legitimate. When new cases arose, existing principles could be extended to deal
with them, or limited if their application to the new cases was unsatisfactory. As
business or technical conditions changed, the law could be moulded to meet them.
As inconveniences came to light, they could be overcome by modifications.

The changes could be affected by analogical reasoning, or incremental growth in
existing rules, or a rational extension of existing rules to new instances not
foreseen when the existing rule was first developed. Particular rules might be
modified by the detection of more general principles underlying them or more
rigorous reformulation of some traditional concept. In Sir Owen Dixon’s lifetime
there were numerous judicial changes to private law, particularly the law of tort.
He participated in many of them.10

As far as I can tell, Heydon J’s propositions (1) to (3) were not intended to apply
to any of the judges of the Equity Division of the Supreme Court of New South
Wales. I would be amazed if any of us would ever contemplate, in our wildest
imaginings, conduct of the kind described in those propositions — albeit, I am
sure, that my colleagues generally share the personal qualities of the ‘soigne,
fastidious, civilised, cultured and cultivated patricians’11 who are the members of
the progressive judiciary. I find it a little surprising that proposition (4) appears in
the list. Deciding an issue that has been fully argued, that (as it turns out) is not
strictly necessary for the court’s decision, seems to me a more venial transgression.
Indeed, I believe, with great respect, that there are occasionally circumstances

10 Heydon, above n5 at 12.
11 Id at 21.
where it is right to do so — for example, where a technical question arises in a case in a specialist list, and it is unlikely to arise again soon for determination, and the issue is one upon which the profession needs judicial guidance. But that is by the way.

It is evident from our judgments that the judges of the Equity Division approach the law much in the manner described by Sir Owen Dixon. But there is one aspect of Heydon J’s analysis that does not completely accord with my own experience or, I suggest, the approach and practices of my colleagues in the Division. His Honour says in his paper that there are relatively few areas where a trial court can legitimately make new law. Clearly the possibilities of doing so are wider in an intermediate appellate court, and wider still in the High Court, as his Honour acknowledges. But judges at first instance are not infrequently invited to decide questions of law. Normally (though certainly not always), when a point of law arises, plausible arguments are advanced in favour of the competing contentions, such that it may fairly be inferred that the existing law provides no definitive answer. The judge must decide the issue if it is squarely before the court. In doing so, he or she will apply the techniques of strict and complete legalism, but in a manner that inevitably develops the law. This is because decisions at first instance have some value as precedents, although obviously not bearing the weight of appellate decisions.

Importantly for present purposes, the judge at first instance reaches a decision on the basis that it is final. That is in fact likely to be the case, at any rate in the court in which I sit. For example, in the nine months to 30 September 2003, I published 53 reserved judgments. Many of them, probably too many, have already been reported. I estimate that a point of law would have arisen for determination in at least half of them. The ratio may be a little higher for me than other judges of the Equity Division, to the extent that (with Barrett J) I administer the Corporations List, in which nuggety legal points often arise for determination, perhaps more often than in the General List. As far as I am aware (and this would be typical in the Division) appeals have been launched in no more than half a dozen of these cases. And so, unless the legal proposition that I have decided comes under challenge in another case, my decision will stand as the law on the subject.

It follows that, without subscribing to any form of judicial activism, a judge at first instance in a superior court in Australia may be asked to determine uncertain points of law fairly often, and will need to obtain such assistance as is available. Occasionally, but infrequently, there will be competing lines of authority. More often, the question will be whether to distinguish a proposition formulated in the course of solving an arguably different problem. Sometimes, not as infrequently as one might imagine, new problems arise for decision because of legislative change, or because developing commercial activity tests the scope of a law or the principle upon which it is based.

In my experience over the last five years, such as it is, I have noticed that some kinds of academic work are distinctly more helpful than others. Mere exposition
of a line of cases is, as you would expect, less helpful than analysis. Professor Tilbury aptly cites Lord Goff’s observation that a crumb of analysis is worth more than a loaf of opinion. But even good analytical work tends to be superseded by counsel’s submissions, which are likely to adopt what is pertinent from the academic analysis.

I find that three kinds of academic work are particularly useful. The first is academic work that places the issue for determination in its wider social and economic context. One can see, again and again, the influence of such work in the important judgments of appellate courts. A recent and enlightening example is the judgment of Spigelman CJ in Deputy Commissioner of Taxation v Clark relating to the liability of a wife to indemnify the Commissioner, after she had agreed at her husband’s request to become a director of his carpentry company, and signed papers ‘with a pen in one hand and a frying pan in the other’. The judgment of the Chief Justice is an excellent example of the way in which legal academic literature may be used to advantage in judgment writing. His Honour took into account, for example, the responses in academic literature to an earlier decision in which a ‘sleeping director’ was held not to be liable for the company’s insolvent trading, and referred more generally to the academic literature on ‘sexually transmitted debt’.

The second kind of academic work takes up a categorically new legal development, and explores its implications and outworkings. This is particularly helpful for the judge who is required to make a decision in the new area. The judge must always beware of making a determination which may have unforeseen consequences. Rigorous academic literature will assist to identify the pitfalls.

There are many examples. One that is currently on my mind is the introduction by statute, in the Trade Practices Act and then in the corporations legislation, of civil penalty provisions for statutory contravention. A trial of a civil penalty case might be said to have some of the features of a criminal trial, although essentially a civil proceeding. The outcome may be an order that the defendant pay a pecuniary penalty, or compensation, or that a defendant be disqualified for a time from managing a corporation. Arguably, the latter is a ‘punitive’ aspect.

A recurring theme for courts, in hearing civil penalty proceedings, is whether special rules are needed, and special protections should be afforded, with respect to matters of procedure and evidence. Professor C R Williams has considered one aspect of this, whether it is necessary to develop an intermediate standard of proof between the normal civil standard and the criminal. Some other aspects of the problem have been explored by Mr Tom Middleton.

---

12 Tilbury, above n 1 at 29.
14 Id at 348.
15 Id at 344.
Thirdly, I value academic writing that brings into focus legal developments in other countries, particularly the United Kingdom, Canada, New Zealand and the United States, countries whose judicial experience is most likely to be helpful to judges here. The pressure of judicial work is such that we cannot keep abreast of overseas academic developments in all of the areas in which we are required to make decisions. As Heydon J notes in his paper, the English common law had a dominant influence on the Australian common law at the time of the Dixon Court. The continuing utility of some parts of English law in this country is qualified by the United Kingdom’s entry into the European Community in 1972, and subsequently the increasing influence of European Union law. More obviously, the utility to us of United States and Canadian law is qualified by various factors including the absence here of a Bill of Rights and the associated jurisprudence. Nevertheless judicial and academic developments in some fields, including most of equity and important parts of company law in those countries, are likely to be relevant here.

My impression is that, in the 40 years following the glory days of the Dixon Court, we have moved from a situation in which English law dominated Australian decisions, to one in which English cases are given much less significance than they deserve, and the case law in other countries is very seldom cited at first instance. I wonder if this is partly due to a form of insularity and parochialism within the bar (a characteristic demonstrated in Sydney, by the fact that so few barristers undertake postgraduate commercial courses at the Law School metres away from where they work, compared with the vast number of commercial solicitors who do so). Sometimes one observes a tendency for counsel to cite the most recent New South Wales case procured from the Internet, with no discernible regard for whether there is a better and more helpful precedent elsewhere.

It is appropriate for Australian law to develop as an independent body of principle. It has well and truly done so, over the last 40 years. My point is that its further development is likely to be assisted if relevant experience in these other countries is identified and taken into account. Australian academic literature will assist judges and counsel in this process. That is why the publication of Professor Charles Rickett’s paper,19 which pays attention to the burgeoning overseas and especially English scholarship and case law in equity, is so important.

Thank you for giving me the opportunity to offer these few remarks. I know what I have said does not do justice to the subject. I agree with Professor Tilbury’s endorsement of the role performed by Australian law reviews, and the special role of the *Sydney Law Review* as one of the most venerable. It is a pleasure to have the opportunity to support this important work and to do so on the auspicious occasion of our Law Review’s 50th anniversary.

---

On Writing Dangerously*

FLEUR JOHNS†

I was very honoured by the invitation to speak today and I would like to thank the conference organisers for putting together such a tremendous event and for including me in it. However, I must say that it struck me at the time of the invitation that my consecration as knowledge-bearer — and therefore a legitimate choice for keynote speaker — was dependent on a rather arbitrary confluence of events. Once again, the contingency of educational hierarchy seems particularly acute to me at this moment.

I stand before you bearing promise of an intellectual ‘key’ — that instrument which keynote speakers rightfully proffer. Just a few short months ago, however, I would have been sitting among you, weighed down with locks the keys to which eluded me.1 Now, having passed through the ceremony of doctoral endowment, I am supposedly imbued with authority. My unopened locks are safely hidden. A new title is smoothing my way.

So, riding awkwardly on the crisp coat tails of said title, I will broach the theme of this conference — ‘Law in a Changing World’. There it is — the conference slogan. It beckons us, ‘come on, come on; get with the program’. It taunts us: ‘the presses are running and obsolescence looms’. It rallies us, ‘things, people and ideas are on the move; there is so much to be done’.

This slogan has been doing the same to others, it seems. Books flourish beneath this title: Human Rights in a Changing World by Antonio Cassese; Comparative Law in a Changing World by Peter de Cruz; Islamic Family Law in a Changing World by Abdullahi An-Na’im; International Arbitration in a Changing World by Albert Jan van den Berg.2

Symposia and conferences are being convened under the same generous rubric: National Security Law in a Changing World (in Washington DC, the United States in December 2000); European Culture in a Changing World (in Aberystwyth, Wales in July 2002); Woman in the Changing World (in St Petersburg, Russia in October 2002); Legal Information in a Changing World (in Cape Town, South Africa in September 2003); and American Citizenship in a Changing World (in Dublin, Ohio).3

---

* An edited version of the keynote address delivered at the 5th Annual Postgraduate Research Conference of the University of Sydney Faculty of Law on 31 October 2003.
† Lecturer, Law Faculty, University of Sydney.
1 The speaker was awarded a Doctorate of Juridical Science (SJD) from Harvard University in June 2003.
Indeed, the prior century abounds with reflections along similar lines. In 1910, Woodrow Wilson appealed to the American Bar Association to ‘look what legal questions are to be settled — how stupendous they are, how far-reaching’. ‘Some radical changes we must make in our law and practice’, he continued. ‘Some reconstructions we must push forward which a new age and new circumstances impose upon us’. 4 The year 1939 saw the publication of historian CH McIlwain’s celebrated text Constitutionalism and the Changing World. 5 In 1958, lead articles in both the Washington and Lee Law Review and the Indiana Law Journal speculated as to ‘The Role of the Lawyer in a Changing World’. 6 In 1964, Sir Zelman Cowen delivered the Rosenthal Lecture at the Northwestern University School of Law in Chicago, speaking to the title ‘The British Commonwealth of Nations in a Changing World: Law, Politics and Prospects’. 7 The 1970s produced books such as The United Nations in a Changing World by Leland Goodrich. 8 The trail continues.

The only thing unchanging, it seems, is a prevailing preoccupation with the prospects of law in a changing world.

Everywhere one looks, law is struggling to catch the quicksilver of surrounding change. Everywhere one looks, scholars and students of law are struggling to catch a whisper of the yet unthought or yet unwritten and so to secure their timeliness. How lumbering we are made to feel in the process. Consider the role in which our discipline is cast — law in a changing world. The changing world is all around us and yet we are not of or up to this world. Law is the toddler lunging at bubbles and grasping for words. Lawyers are in and out at the same time: central and yet strangely beside the point.

So the idea of law in a changing world seems, at first, to imbue law with inflexibility and inertia. Yet law too has the mercurial quality that we so readily attribute to the world. Think of rights. Think of the tone of an assertion of right in — its definitive, stake-in-the-sand quality: ‘Afghan women have a right to education’. Think, then, of what questions might follow from such an assertion. Do Afghan women also have a ‘right’ to challenge liberal, humanist educational


5 C H McIlwain, Constitutionalism and the Changing World (1939).


norms such that their educational transformation might permit them to become something other than right-bearing, educated Afghan women? Moreover, do Afghan women have a ‘right’ to challenge their classification as such — to dissolve themselves into polyvalent constituencies defiant of the unity and sufficient of terms such as ‘Afghan’, ‘Muslim’ and ‘Woman’? Rights-related claims and questions have a tendency to proliferate and deviate. Rights bite back.

Perhaps legal scholars’ persistent preoccupation with law in a changing world manifests an intuitive appreciation of the errant instability of our legal understandings? Perhaps, moreover, this instability extends beyond the difficulty of maintaining laws’ correlation to something that we call the Real World?

One might just as well have called this conference ‘the world in a changing law’. Each time that we produce law to match the world, we produce world to match the law, and vice versa. To assert that Afghan women have a right to education is to posit the necessity of ‘rebuilding’ Afghanistan by reference to a legalist, humanist, procedural and secular calibration of what is right and good, in which the pre- eminent experience of freedom is to be the experience of self-completing choice. ‘That’s ok’, you might say, ‘I’m prepared to stand up for that’. Yet wouldn’t ‘standing up’ for such a proposition also logically require one to stand up for the possibility that the variable constituencies that we label Afghan women might opt for some other world? Can we be sure that we would wish to support every outcome that the procedural assurance of a ‘right to education’ might yield? Here we confront the age-old realisation that a ‘right’ is also a proscription or, as Thomas Hobbes would have had it, a divestiture of right.9 Rights demand that those in whom they are vested refrain from undermining the authority of the right-granting regime. Our righting is also a wronging, demanding endless reconsideration, accommodation, regulation and opposition. Law in a changing world melts readily into a slippery, perilous morass of law/world.

Yet in the midst of all this changefulness, let us not forget law for a changing world. Let us not forget the propensity for this slippery morass to congeal into the normative. Let us not lose sight of our desire for it to do so. Let us, in the words of Wendy Brown and Janet Halley, ‘acknowledge[e] the rawness and fury of [the] will to power’ embedded in our conscious and unconscious efforts to sculpt this morass in one or other direction.10 Let us remember the excitement, urgency and passion with which that earlier assertion can resonate: ‘Afghan women have a right to education’!

It is this thrill which so often enlivens research work in law — the sense of law rushing to the aid of one or other constituency amid hazardous, shifting conditions. Afghans and others need us to try to figure out the role of law in a transition to democracy! The music industry needs us to try to reconcile the claims of musical creators, music audiences and those engaged in the business of selling music! Disenfranchised sectors of Australian society need us to try to rid judicial

interpretation of the evils of legalism or formalism … and so on and so forth. Students and scholars of law rally from all sides to meet appeals of this sort. Legal scholarship seems to thrive on identifying and addressing the most pressing of problems. In this problem-solving mode, law appears to be changing both with and for the changing world.

At this point, let’s take stock. So far, I have made four points concerning the task of thinking about law in a changing world. First, I reflected upon the arbitrariness of my addressing you here as a supposed bearer of learning on this topic, thanks only to the ritual formality of a graduation ceremony. Secondly, I remarked upon the curious hold that the idea of law in a changing world seems to have maintained upon legal scholars of this and the prior century. Thirdly, I drew the first and second points together by positing some intuitive realisation, on the part of legal scholars, that changefulness is not merely a property of the world ‘out there’ to which law must respond. Rather, instability is also acknowledged as a property of law and legal authority. Fourthly, I recalled the remedial, corrective impulses with which legal research so often confronts this sense of insecurity in the law/world dynamic.

Let me draw together, now, the first and fourth of these points — the contingency of educational hierarchy and the problem-solving fixations of contemporary legal research and scholarship. For the postgraduate student, the irresolution of the former seems frequently to compound an inclination towards the latter. The sense of pressure that contemplation of the ‘changing world’ tends to evoke in legal faculties is redoubled by the economic and institutional precariousness that postgraduate students are compelled to endure. Notwithstanding the fact that postgraduate education remains a province of the middle and upper-middle classes, the submissions of student representative bodies to the Senate Community Affairs References Committee Inquiry into Poverty in Australia attest to the economic hardship and isolation that many students experience.11 Institutionally, postgraduate students tend to occupy a nether world between the status of an academic and the status of a student; between permanent employment and unemployment; between the hauteur of the select few and the humility of the run-of-the-mill examinee.

For those navigating this precarious path here at the University of Sydney, our Faculty offers the following guidance. We request that those applying to undertake a research degree present a detailed research proposal outlining, among other things, a ‘rationale for the research and a statement of why it is significant’.12 Exactly how the ‘significance’ of a research proposal and the legitimacy of its ‘rationale’ are to be assessed in this context is not clear. The research orientation

11 See, for example, Melbourne University Student Union, ‘Submission to the Senate Inquiry into Poverty in Australia’, paper submitted to the Senate Community Affairs References Committee Inquiry into Poverty and Financial Hardship, March 2003; Southern Cross University Student Representative Council, ‘Submission into [sic] the Senate Inquiry into Poverty’, paper submitted to the Senate Community Affairs References Committee Inquiry into Poverty and Financial Hardship, March 2003.

of faculty members making the assessment (including the prospective supervisor) will inevitably inform this evaluation. Faculty members’ ideas about research will in turn be influenced by the hearing of those authorities that fund, publish or otherwise promote particular types of legal research — the Australian Research Council (ARC), for example.

By identifying ‘areas of national priority’ for research funding, the ARC fosters an orientation towards measurable outcomes that correlate to current thinking about gaps and flaws in Australia’s knowledge base.13 The role of the legal researcher, according to this conception, is to scan the ground of available legal knowledge and identify holes to be filled, obstacles to be toppled, or tools to be adapted to new purposes. At each stage, the endeavour is to be referable to a ‘rationale’ of utility or effectiveness to one or other constituency. It will be all the better if that constituency is depicted in expansive terms and includes persons outside the academy — those who are envisaged to comprise, or to have a closer affinity with, the ‘Real World’.

To ‘get ahead’ in the unsteady hierarchical environment of tertiary education, postgraduate students and faculty alike are encouraged to orient their research towards problem-solving, gap-filling and outcome-delivery, largely for the nominal benefit of constituencies external to their educational setting. The invitation to reflect upon law in a changing world may be read in support of this tendency. ‘Law in a changing world’ might be understood, as I suggested a moment ago, to cast law as a relatively static, complete and pivotal body of knowledge. It must, according to this reading, perpetually be adapted, rationalised, extended and updated in order to fit the problems, questions and scenarios thrown up by the changing world. This would depict law less as an infant, as I suggested earlier, than as one of Darwin’s finches.14

I want to suggest, however, that there are ‘rationales’ — perhaps even ‘significant’ rationales — for formulating and assessing legal research other than by reference to such a progress-oriented, evolutionary, functional calibration of ‘significance’. My intuition is that, to the extent that legal research in Australia exhibits a problem-fixation, this problem-fixation is itself deeply problematic. Moreover, the problematic aspects of this problem-fixation are not amenable to the sort of corrective strategies that problem-fixation is inclined to foster.

My principal concerns are threefold.

First, to direct research towards solving the problems of an extra-academic, extra-legal constituency is to orient that research — and those undertaking it — away from asking questions of the institutions, practices, ideas and people that produce legal knowledge, including the legal academy. This, in turn, encourages acceptance of the particular allocation of symbolic, social and economic capital that is effected and reproduced through tertiary education.

Pierre Bourdieu’s painstaking studies of academic forms of classification in France demonstrate that the pedagogical practice of elite educational institutions may be read as an elaborate ‘rite of institution’ that confers ‘a seemingly rational justification [upon] the ceremonies of consecration through which societies claiming to be rational produce their nobility’. 15 Notions of meritocracy as drivers of academic success, the ‘ideology of “public service”’ and the ‘worship of productivity’ all combine, Bourdieu argues persuasively, ‘to inspire in … new leaders the most absolute certainty in their legitimacy’ as wielders (or minions supporting the wielding) of social, political, economic and symbolic power. 16 Obviously, these rather sweeping statements call for further elaboration and substantiation — both of which Bourdieu’s scholarship amply provides. 17 I do not have the time to do justice to that scholarship here today. My point at this moment is simply to highlight that an orientation towards urgently delivering intellectual services to the ‘Real World’ — imagined as external to the university — discourages reflexive inquiry along these lines. As such, it encourages students and teachers alike to extend to others the experiences and relationships that were presented to them as ‘normal’ over the course of their education — including highly sublimated forms of domination.

My second concern as to the preoccupation of legal scholarship with pragmatic problem-solving is that this sensibility cultivates and reinforces a particular dynamic in relations between law and change, between legal research and legal practice, between the academy and the profession, and between legal ‘experts’ and non-legal ‘lay persons’. More often than not, this is a relation of hierarchy or distinction, operating at a variety of levels. Consider, for example, the authority with which political commentary in a newspaper is invested by the inclusion of that italicised text at the end of the article identifying the article’s author as a legal academic. Modes of research that imagine legal researchers as producers responding to the changing needs of a consuming world or public tend to downplay the mutually constitutive and interdependent character of the former (producers’) claims to authority and competence and the latter (consumers’) articulation of needs and desires.

A problem-solving, service-delivery orientation disregards, as well, the fact that life as a lawyer is always imbricated in, say, life as a lover, a voter, a neighbour, a friend, a colleague, a member of the middle class, a sometime musician and a size 12. The particular way in which a person undertakes legal research will both arise from and contribute to the interplay between these various social roles or practices and their combined social, economic and political effects. Law is both an incident of and a stake in the processes of classification by which we seek to divide and rank the world and its tangible and intangible resources. To envisage legal research as entirely reactive is to configure those divisions and rankings as pre-existing and to seek to produce legal knowledge in the service of their reproduction.

15 Pierre Bourdieu, The State Nobility (Lauretta C Clough trans, 1996) at 73.
16 Id at 335.
The third and final concern that I wish to foreground today, is the extent to which the Real World problem-solving mode of legal research tends to focus attention on state-managed or otherwise institutionalised processes of change and decision. This is the case notwithstanding the fact that, in many cases, the research in question purports to be attuned to forms of power and organisation that don’t correlate to the boundaries or formalities of the nation state. A conviction is nonetheless widely cultivated in Australian legal scholarship that John Howard, George Bush, Amanda Vanstone, Geoff Clark, One Nation, the WTO or someone or other is really the problem with which legal scholars must come to grips. An audience member with this inclination might have seized upon my earlier reference to the ARC, concluding: ‘Ah, so if only we could reform the ARC, we might correct this problem …’.

Such an approach leaves uninterrogated the many euphemized or vernacular ways in which symbolic and other forms of social power are produced, allocated and retained in, through and by law. As a result, there are certain rules and practices that tend to fall repeatedly into the background of issue areas identified for legal scholarly scrutiny — rules of private law, rules of zoning, rules of etiquette, academic merit, speech and fashion, for example.

Law in a changing world might, however, be read as an invitation to engage with these problematic aspects of the problem-solving orientation in legal research. The theme ‘law in a changing world’ might be understood in terms of immersion and complicity, rather than in terms of detachment and reactivity. The questions that we ask of the changing world from the legal perspective might be posed to or of that legal perspective at the same time. This brings me to the title of this talk: ‘On Writing Dangerously’.

What is, or can be, dangerous about legal research and writing? The sense of economic and institutional imperilment, which many postgraduate students experience, represents one element of danger. Yet in an environment that values subservience to utility, a further risk may be taken by refusing to mimic that gesture of genuflection. The risk here is embodied not only in the prospect of institutional alienation, but also in the act of putting the destination, purpose — or rationale — of one’s research in question. The danger of which I am speaking is that involved in lingering with the problem rather than pressing forward to appease the alleged need for a solution. Here, let me quote Wendy Brown and Janet Halley once more, this time at greater length:

In the insistence that all political intellectual work must be directly addressed to suffering and its potential redress, there is a radical foreclosure of the very intellectual range and reach which is opened and pursued by critique … Critique potentially reinvigorates politics by describing problems and constraints anew, by attending to what is hidden, disavowed, or implicit, and by discerning or inventing new possibilities within it. But critique can do this only to the extent that it is unbridled from the terms of the political problem that animate it … [C]ritique cannot bear fruit if…seamless reconciliation of political and intellectual life is demanded, if we bestow the power of foreclosure on the questions Where is all this going? What are the political implications? What is to be done?18

---

18 Brown & Halley, above n10 at 33.
To the extent that institutions insist upon postgraduate research knowing — or claiming to know — what is to be done, those institutions (my own included) demand the sort of foreclosure that Brown and Halley decry. It is risky to resist this foreclosure. Yet there are many, many ways in which such resistance might fruitfully and pleasurably be enacted. One might follow one’s intuitions and impulses in the course of research, for example, rather than adhering strictly to the linearity of logic or progress. One might focus one’s attention backwards or sideways, rather than forwards — probing rumours of the past and the present, rather than endless narratives of potential. One might engage in the hard work of doubting or questioning the normal and the natural, upending the similarly arduous task of believing in these. One might turn a critical eye not to that which seems most flawed and unjust, but to that which seems most unarguably righteous. These are all invitations to engage in writing cut adrift from knowing that one is in the right — writing that is dangerous for that very reason.

Here my appointed task is to come full circle and deliver the key to knowledge that I supposedly bear. Haven’t I have beaten around the bush in getting here? I have remarked upon the arbitrariness of the anointed crossover between knowledge consumer and knowledge delivery-person — between key-holder and lock-bearer. I have noted the remarkable endurance of legal preoccupations with the ‘changing world’. I have suggested that legal scholars nevertheless recognise volatility as a property of legal authority, in messy combination with that which we perceive as the world external to law. Finally, I drew these various observations into an argument against the pre-eminence of problem solving in legal research and writing. I argued for resistance to demands for outcome-delivery. I raised three concerns with a consumer-satisfaction approach to legal inquiry. I contended that this approach discourages reflexive interrogation; that it reproduces a particular relationship of distance and distinction between legal experts and non-legal laypersons, or between the academy and the profession; and, finally, that it tends to affirm the centrality of the state and disregard the relevance of background rules. I lauded the possibilities for writing dangerously against such an approach.

Yet alas, writing dangerously in one or other of the ways that I have hinted is no skeleton key to success. Indeed, it may be just the opposite — hence the danger. As you already know, ours is lonely work, punctuated by sharp spasms of despair and exhilaration, camaraderie and doubt. Yet the occasional paroxysm of insight is, strangely enough, worth the risk. It is the risk as well as the reward. For the moment, I have spoken and you have, generously, listened. Here, at the end of it all, there remain locks to be tackled, risks to be taken. For that, I will hand back to you and take my turn in the audience. For you are key-makers too.
The Idea of the University and the Contemporary Legal Academy†

MARGARET THORNTON*  

Abstract

In light of the contemporary moves to transform the Australian university by subjecting it to the values of the market, the traditional idea of the university is in jeopardy. Freedom to teach, the unity of teaching and research, and academic self-governance are key factors associated with this idea. With its primarily professional and vocational focus, law has tended to be somewhat more ambivalent than the humanities about the freedoms associated with teaching and the pursuit of knowledge. Nevertheless, a liberal legal education is an ideal to which law schools have aspired over the last two or three decades. This article argues that, after a brief flirtation with a more humanistic legal education, the market is causing a swing back to a technocratic and doctrinal approach. The article draws on key proponents of the ‘idea of the university’, namely, Newman, Humboldt and Jaspers to consider what light these theorists might shed on the dilemma posed by the market imperative. It is suggested that a disregard for the presuppositions of the market could be disastrous for the future of the university law school.

† Earlier versions of this paper were presented at the Australian Law Teachers Association Conference, Griffith University, Brisbane, 6–9 July 2003; and the Australian Society of Legal Philosophy and Julius Stone Institute of Jurisprudence Annual Conference, University of Sydney, 18–20 July 2003. I acknowledge the financial support of the Australian Research Council (Discovery Grant), which enabled interviews to be conducted with a range of academics, including Deans and/or former Deans, in all Australian public university law schools. Warm thanks are extended to Jan Doust for assisting with the conduct of interviews and to Gabrielle Simm for research assistance.

* Professor of Law and Legal Studies, La Trobe University, Melbourne.
1. The New Knowledge Economy

Within a contemporary neo-liberal setting, knowledge is the revolutionary trading commodity. As Lyotard observed, it has replaced land, raw materials and cheap labour in the struggle for power between nation states.1 This understanding of the role of knowledge has become a global phenomenon as nation states everywhere seek to enhance their competitiveness on the world stage. Moreover, knowledge itself has been transformed. It is no longer stable, finite or predictable, but unruly and fluid. ‘New knowledge’ is shaped by informatics, postmodern scepticism and fickle mood swings, according to the dictates of the market.

The university is not only a primary site of the production of new knowledge, but also of new knowledge workers.2 Accordingly, it is expected to play a key role in the process of transforming society and ensuring acceptance of the discourse of the market, which has been described as the ‘metanarrative of our time’.3 The law discipline is central to this process of transformation, as it is expected to train ever increasing numbers of legal technocrats to serve the new knowledge economy. For example, an entire generation of contract lawyers is required to effect the privatisation of public goods and the facilitation of market activities — globally as well as locally. Law is also charged with safeguarding the valuable intellectual property interests that are generated by new knowledge.

Comporting with the neo-liberal imperative to privatise public goods and promote competition, a university degree itself has become a commodity like any other to be sold within the contemporary marketised environment. Law carries with it the added attractions of prestige, high student entry scores and relatively cheap provider costs, based on one of the highest student-staff ratios of any discipline.4

Generally speaking, universities are responding to the new knowledge challenge with alacrity. They are compromising, if not overtly forsaking, the traditional values associated with collegiality, public good and the disinterested pursuit of learning in favour of a constellation of values associated with...

---

entrepreneurialism and the market. The eagerness of universities to become market players is largely attributable to the funding crisis besetting Australian higher education. The paradox is that at the very moment the state placed pressure on universities to increase their student intake, the per capita funding of higher education places was curtailed. Universities responded by taking in more students — and an endless spiral was set in motion.

The commodification of education tends to deflect attention away from the academic substance of what is taught. Because the market embrace has caused students to become ‘customers’ primarily interested in purchasing a product, preferably with a known ‘brand name’, they have become more interested in credentialism than the quality of the education they receive. To appeal to this new incarnation of the student-customer, as well as to maximise efficiency in accordance with the dictates of the market, law courses are being truncated. Hence, two-year, rather than three-year, graduate law degrees are now to be found, for example. There has also been a reversion to stand-alone law degrees, despite the proliferation of combined degrees presently on offer at Australian law schools. Only a decade ago, a stand-alone, or ‘straight’, LLB was considered inappropriate for school-leavers. Such courses tend to focus on basic doctrine, for there is no time for anything else; the social is deemed to belong elsewhere. The approach revives the thought-to-be dormant positivistic myth that law is autonomous and disconnected from the social forces that animate it. Reflection and critique are inevitably sacrificed in the minimalist approach to credentialism.

Areas of law that are believed to facilitate market interests, such as corporations, business, trade practices, competition, international trade, intellectual property and taxation law, taught from a technocratic and applied perspective, are currently favoured within the curriculum. Although we are told, somewhat apologetically, that there is no longer time or space for critical or even contextual knowledge, the technocratic and applied approach operates to induce a kind of intellectual myopia. It is a somewhat sinister coincidence that the critical space has contracted at the very moment that big business has become more ruthless and ethically questionable. It would also seem that the voices of women, Aboriginal people and Others, which have only recently disturbed the benchmark

---

5 McInnis & Marginson, id at 13–19.
6 In order to bypass decisions made by some universities that undergraduate domestic students should not be charged full fees, Melbourne University Private’s JD (Juris Doctor) offers a two-year degree for graduates, Monash University Law School a two-year LLM, and Deakin University Law School a two-year LLB. Other universities are planning two-year programs, badged as ‘postgraduate’, to enable full fees to be charged. In the UK, the academic course for graduates, the Common Professional Exam (CPE), is only one year in duration. For details, see the Law Society for England and Wales website <http://www.lawsociety.org.uk/home.law> (20 July 2004).
8 McInnis & Marginson, above n4 at 158.
masculinity associated with dominant social interests, and formerly occluded by legal positivist knowledge, are being silenced once more.9

Furthermore, I suggest that the pedagogical practices now in vogue operate to legitimise the technocratic approach to the curriculum and the evisceration of a critical space that comports with the market message. Block teaching vividly illustrates the point. This concentrated mode of delivery entails offering a subject over one or two weeks, usually in the summer or winter break, both to allow students to accelerate their programme and to attract full-fee students from other institutions. Visiting academics, including overseas ‘stars’, may be engaged to enhance the marketability of subjects. Although originally designed for coursework Masters students in full-time employment,10 such modules may now be ‘double-badged’ to serve LLB students — in the name of efficiency. It is perhaps unsurprising that undergraduates sigh that after having completed a block module of six to eight hours of classes per day for four or five days, their minds are in a whirl. Needless to say, they have had precious little time to read anything.

Despite the undeniable sacrifice in quality, the lowest common denominator approach to credentialism suits today’s undergraduates, many of whom are compelled to work virtually full time in order to support themselves, as well as minimise their ballooning higher education debts. Furthermore, an increasing proportion of students choose to work in routine positions in law-related employment, in the hope of quick-starting their careers.

The ultimate in efficient delivery, euphemistically dubbed ‘flexible learning’, entails replacing lecturers with computers. While we may not have yet moved to accepting one on-line torts lecturer for the entire common law world — preferably from a North American Ivy League university — such a possibility may not be far off. On-line courses underscore the imperative in favour of conformity that is induced by competition policy. Furthermore, while ticking a box or pressing a computer button in response to a multiple-choice question can provide the ‘right’ answers, the technology tends to glide over the multifaceted and conflictual ethical problems posed by the market turn.11

---


10 Johnstone & Vignaendra, above n7 at 189–90.

11 This is not to deny the valuable experimental work presently being undertaken with computer-based assessment. See, for example, Michael Lambiris, ‘Using Computer-based Tests for Continuing and Final Assessment of Students Studying Law Subjects’, paper presented at the Australasian Law Teachers Association (ALTA) Conference, Charles Darwin University, 8–11 July 2004.
2. Towards a Liberal Law School

The liberal law school does not have a precise denotation, but encompasses a profusion of perspectives, theoretical positions and critical methods that transcend a narrow, rules-oriented pedagogy. Rather than rote learning, the focus is on learning for understanding, with regard to the \textit{ought}, not just the \textit{is}, of law. Given the diverse roles that lawyers play in a globalised world, they need to be \textit{educated}… not simply trained as technicians of law. Reason, logical thinking and effective communication, all valuable skills for the legal practitioner, are enhanced by a liberal education, which encourages students to think for themselves. Perhaps Newman best summed up the meaning of liberal as a \textit{‘habit of mind … which lasts through life, of which the attributes are, freedom, equitableness, calmness, moderation, and wisdom’}. This \textit{‘habit of mind’}, it was believed, when transposed to a legal context, would enable the law graduate to respond appropriately to all manner of changed circumstances.

Knowledge, education and credentialism have become highly desirable in the information age, but treating them as tradable commodities has profound repercussions for universities and legal education. The glimmerings of a critical legal pedagogy in Australian law schools in the 1970s and 1980s coincided with the flowering of social liberalism and a concern for remedying social injustice. Although no single pedagogical model predominated, and the extent and manner of critique remain contentious, there was general agreement that a purely technocratic approach was no longer considered to be appropriate preparation for dealing with the complexities of late 20th century society. The influential Pearce Committee Report of 1987 did not advocate the development of a liberal law school as such, but recommended that attention be paid to theoretical and critical perspectives and, at the very least, law be taught in its social context. As a result, widespread effort was put into modernising the curriculum and devising a more interactive pedagogy. The passive ingestion of doctrinal legal knowledge through large lectures was consciously rejected in favour of small-group teaching and independent learning, along the lines already developed by the law schools at

\begin{itemize}
  \item For a discussion of the values associated with the liberal law school, see Anthony Bradney, \textit{Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century} (2003).
  \item Johnstone & Vignaendra, above n7 at 2, locate the genesis of the liberal model of legal education in the 1980s, but Monash, UNSW and Macquarie universities consciously set out a decade before to establish law schools that transcended the ‘trade school’ model.
  \item Johnstone & Vignaendra, above n7 at 296 ff.
\end{itemize}
the University of New South Wales and Macquarie University. While doctrinal exegesis certainly did not disappear, for it remained the dominant approach, it was supplemented and enriched by a plurality of interdisciplinary and theoretical perspectives. The academic orientation was boosted by the recruitment of highly qualified academics with a commitment to legal scholarship; law teachers were no longer full-time practitioners who were part-time lecturers.19

Despite these propitious beginnings, the idea of the liberal law school barely had a chance to crystallise before legal education was shaken by the whirlwind of change induced by the market embrace. Given the propensity of law to mirror political trends, it is perhaps unsurprising that a depoliticised and positivistic legal pedagogy is once again being viewed as desirable, as the political pendulum swings from social liberalism to neo-liberalism. When we are informed that the economy is ‘booming’, it is best not to dwell too closely on the effect of ruthless corporate interests in relation to individuals and communities, particularly in the Third World. The market metanarrative effectively suppresses counter-discourses. Hence, it is no coincidence that the teaching of critical, theoretical and social justice perspectives within the core curriculum is contracting within law schools everywhere. Optional subjects that reflect the values of social liberalism may also now be dismissed as passé.20 It is market-based and applied knowledge that is depicted as voguish and desirable. The change in orientation is not necessarily effected consciously or systematically, as it is insidious and takes place at multiple sites. In addition to the effect of government-funding policies and the legal labour market, there has been a general decline in faith in public institutions,21 as well as a corresponding augmentation of the values associated with private good and the pursuit of individualism underpinning the conservative political swing.

The way that law is now taught in many institutions indirectly favours a depoliticised pedagogy. So insidious is the change of direction, that academics are unlikely to demur because it appears to be economically rational. As a result of the phenomenon of ‘massification’, for example, small group teaching as the primary mode of instruction has become a luxury in all but the better-endowed institutions.22 In the past, the passivity of the lecture hall was moderated by tutorials or seminars designed to foster interaction, questioning and debate, but, as a cost-saving mechanism, tutorials may now be offered intermittently or abolished altogether, although some institutions have moved to on-line ‘chat rooms’ in lieu. Interviewees have referred to the adoption of a lowest common denominator approach as the large lecture method is once again favoured because of the pressure to transmit basic doctrine. Furthermore, it would appear that the majority

21 For example, Onora O’Neill, A Question of Trust, BBC Reith Lectures (2002).
22 The first generation universities, the ‘Sandstones’, are usually well positioned in the market because their longevity and location enable them to augment their income by charging full fees. There is a government limit of 25 per cent (35 per cent in 2005) as to the proportion of full-fee undergraduates a university may enrol, but no such restriction operates in the case of coursework Masters students.
of law students actually prefer lectures, because they assume that the knowledge they are receiving from a lecturer is more likely to be authoritative and examinable than the tentative opinions of their peers in discussion groups.\textsuperscript{23} This pressure from student-customers for the packaged delivery of finite knowledge also encourages the reversion to a positivistic approach with its assumption of ‘right’ answers.\textsuperscript{24}

Assessment has also changed to accommodate the vastly increased numbers of students. Reflective essays that foster research and critical engagement with troubling issues are no longer feasible; even the most dedicated academics have difficulty managing the marking loads. In addition to the correlative increase in ‘administrivia’ and pastoral care, academics are obliged to demonstrate their value to the university through research productivity. The relentless pressure to publish has influenced the reversion to examinations as the primary form of assessment, which also favours a focus on basic doctrinal knowledge. This form of assessment suits time-poor students, as well as academics. Reflective essays take too long to research, as well as assess; they cannot be subsumed into the neat portfolio of orthodox legal knowledge that the ‘customers’ prefer.

The idea of a liberal legal education demands interrogation of the knowledge purveyed, which necessarily involves far more than a set of technocratic rules. Those wishing to educate enlightened lawyers for the future have insisted that students continue to ask the imponderable questions as to the how, the why and the ought of law. However, the market embrace is causing Australian law schools to discourage such questioning.

3. \textbf{The Idea of the University}

According to Bill Readings, the university is in ruins,\textsuperscript{25} but this assertion prompts us to ask: what is the university and what is it for? What does it mean to evoke the well-known phrase — the \textit{idea} of the university — in the commodified and marketised context that I have described? According to Kant, an idea ‘is nothing other than a concept of perfection which is not yet found in experience’.\textsuperscript{26} So far as the university is concerned, this ‘concept of perfection’ has been traditionally associated with a community of scholars pursuing the life of the mind: thinking, reading, writing and engaging in debate, free of the pressure to demonstrate that everything must have use value \textit{vis-à-vis} the market. It would seem to be inevitable that this \textit{idea} becomes distorted when money is short and university managers have to make choices. Is it enough that universities continue to pay lip service to an idealised notion of liberal legal education, while accepting economic rationality as the primary driver?

\textsuperscript{23} Compare Johnstone & Vignaendra, above n7 at 304.
\textsuperscript{24} Oliver argues that pressures of the kind I have outlined were threatening the liberal law degree in Britain in the early 1990s. See Dawn Oliver, ‘Teaching and Learning Law: Pressures on the Liberal Law Degree’ in Birks, above n4 at 80.
\textsuperscript{25} Bill Readings, \textit{The University in Ruins} (1996).
Readings argues that there are three basic ideas associated with the modern university: reason, culture and excellence. Reason, influenced by Kant, involves the dispassionate pursuit of knowledge and philosophical reflection. Culture is the special role assigned to universities to unify, safeguard and transmit knowledge in the interests of the nation state. Reason and culture are linked by the third idea, the evaluative criterion of excellence. However, Readings argues that the idea of excellence has been rendered meaningless in the contemporary university because of the collapse of reason and culture. Central to Readings’ thesis that the university is in crisis is the view that it is no longer linked to the destiny of the nation state, which is declining in importance in a globalised world. The withering away of the vital relationship between the university and the nation state has seriously impacted upon liberal knowledge:

The current crisis of the University in the West proceeds from a fundamental shift in its social role and internal systems, one which means that the centrality of the traditional humanistic disciplines to the life of the University is no longer assured.

As Readings observes, even thinking does not count when the performative framework in which we now operate provides no box to be ticked. Scholarly activities are of value only if they can be linked to a quantifiable output. Hence, academics are required to establish their productivity through regular auditing of performance. Karl Jaspers reports that he published nothing for nine years after being appointed to a Chair because he was thinking through a major philosophical treatise:

Only the calmness of meditation in the unconstrained flow of the imagination allows those impulses to become effective without which all work becomes endless, non-essential, and empty.

Jaspers’ seeming lack of productivity could result in sanctions and possible redundancy in the contemporary Australian university, a fate likely to befall many other notable thinkers. In contrast, the publication of ‘endless, non-essential, and empty’ articles is more likely to secure the approval of university managers. Productivity is directed to the quantity, rather than the quality, of what is published. Provided that the articles appear in ‘refereed’ journals, one need enquire no further. Most notably, however, the primary focus of research is not on ‘outputs’ — the books and articles published — at all, but on ‘inputs’ — the grant income generated in order to conduct the research.

27 Readings, above n25 at 22ff.
28 Id at 3.
29 Id at 75.
31 The Australian system contrasts with the Research Assessment Exercise (RAE) that prevails in the UK <http://www.hero.ac.uk/rae/pubs> (31 July 2004) and the Academic Audit Unit recently developed in New Zealand <http://www.aau.ac.nz> (31 July 2004).
Within this skewed academic universe, applied research with direct market value is favoured. Hence, consultancies for, and linkages with, industry now attract financial rewards in the same way as more conventional basic research. The tailoring of the university research effort to private ‘end users’ underscores the way that market interests are being facilitated. However, no Australian university can afford to disregard the revised schema of research and publication because it is inextricably intertwined with income generation.

But, once again, one must ask, what does this courting of private interests mean for the idea of the university? Is only a pale reflection of the idea possible within the new public/private model? Is the idea of the university so malleable that it is a luxury that can now be pursued only by wealthy and prestigious institutions? The experience of some of the prominent United States universities, where private benefactions and hybrid funding models are well established, supports such a proposition. The University of Chicago, for example, regards itself as a model research university but acknowledges that its wealth has permitted it to subordinate economic to academic motivation.\(^\text{32}\) Chicago poses, but does not answer, the question as to what would happen to the university ideal if the money were no longer there to support the institution in the manner to which it has become accustomed.

Are less well endowed Australian public universities now compelled to defer to the constraints of the market in determining the character of their teaching and research? Together with top-down line management, which has replaced collegial norms in most institutions, the corporatised package is now likely to include cost-cutting measures, such as casualisation and loss of administrative support for teaching and research. In addition, academics are expected to re-invent themselves as entrepreneurs — raising money by offering short, offshore and on-line courses, as well as engaging in consultancies.

Let us turn to Humboldt, Newman and Jaspers see whether they can assist us, despite Readings’ scepticism. These theorists, like Readings, espouse a wider canvas than legal education, but the liberal law school takes its cue from the idea of the university. A brief summary of their main ideas will be presented and considered in the context of contemporary developments in legal education.

A. Wilhelm von Humboldt

The primary aim of the mediaeval universities was scholastic, which means that they focused on teaching, usually in a religious context. By the mid-18th century, universities in both England and Germany were in a state of decline, but the French revolution was an important catalyst for change. Humboldt emerges from among

the German Idealists as an iconic figure in the history of the modern university, for
he is credited with unifying teaching and research. Humboldt’s concept of
research strikes a chord with us because he recognised that knowledge is not a
stagnant variable, but has to be constantly revived by new knowledge. He
envisioned that research would be conducted by professors in conjunction with
their teaching role.

Humboldt was a civil servant for part of his life, becoming head of culture and
education within the Prussian Ministry of the Interior in 1809. Despite his official
position, his writings evince a sceptical view of the exercise of state power. Even
though the university was to be state-funded, and charged with safeguarding the
culture of the nation state, the freedom of the individual was to be maximised and
academic work itself protected from the distortions of direct government control.
Humboldt’s memorandum, which inspired the creation of the University of Berlin
in 1810, projected a university based on three formative principles: freedom of
teaching, unity of research and teaching, and academic self-governance. For
Humboldt, freedom was the keystone of education. I will elaborate upon these
principles shortly.

Humboldt is also credited with the initial use of the phrase ‘the idea of the
university’, by which he meant an ‘exemplary form of life, in which its members
share intersubjectively’. He believed in the full development and training of the
personality so as to encourage clear and original thinking. In this way, the
university played a fundamental role in the development of character — Bildung.

As law was one of the higher faculties, it belonged in the university, but this did
not include practical skills. Humboldt did not see what he considered to be
utilitarian, practical or artisan-like functions, such as drafting a brief, as the
preserve of the law faculty. He believed that this skill could be learned as an
apprentice, without the need to attend university at all. Like most other theorists
of the idea of the university, Humboldt accepted that professional legal knowledge
was marginal to the social mission of the university.

33 His inspirational role in the development of modern American education has been described as
a ‘patent academic myth’: see Roy Steven Turner, ‘Humboldt in North America? Reflections on
the Research University and its Historians’ in Rainer Christoph Schwinges, Humboldt International: Der Export des Deutschen Universitatsmodells im 19 und 20 Jahrhundert (2001)
at 289–312.
34 Marianne Cowan (trans & ed), An Anthology of Writings of Wilhelm von Humboldt, Vol X (1963) at 134.
36 Id at 51.
37 Jürgen Habermas, ‘The Idea of the University: Learning Processes’ in Shierry Weber Nicholsen
38 Charles E McClelland, State, Society, and University in Germany 1700–1914 (1980) at 132. The
higher or pre-professional upper faculties consisted of law, theology and medicine. Fichte,
another influential German idealist, sought to revolutionise German universities by placing the
‘lower’ arts faculty in the dominant position.
B. John Henry Newman

Newman’s *The Idea of a University*\(^3\) is frequently the starting point in the Anglo-Australian context for thinking about the university today.\(^4\) Newman’s treatise is more accessible than Humboldt’s fragmentary observations, even though it might be thought that a work produced for the gendered, elitist, colonial and Catholic Ireland of 150 years ago would have little to say to contemporary postcolonial, egalitarian and secular humanists wrestling with mass education. What strikes a chord with all those concerned about the direction presently being taken by universities is Newman’s emphasis on the love of knowledge for its own sake. Even as a theologian, Newman did not believe that knowledge should have a religious or moral cast. This is despite the fact that his idea of the university is connected to the church rather than the state. He believed in a concept of ‘universal knowledge’ — liberal knowledge informed by reason — and the role of the university as being purely intellectual.\(^5\) As a corollary, education was ‘an acquired illumination’\(^6\) — the *telos* of the good life.

Like Humboldt, Newman is primarily concerned with the cultivation of the intellect, not vocational training. He accepted that law belonged in a university, but it had to be informed by reason to justify its inclusion. Thus, while he recognised the significance of vocational training as an end in itself, he distinguished education as ‘higher work’. Committing rules to memory could not contribute to the development of the mind or the formation of character.\(^7\) Newman understood the unity of knowledge to encompass all kinds of knowledge, but it should not be limited to a particular kind of practical knowledge or skill. Newman understood that education could serve instrumental ends as well as being valuable in itself, but the liberal education he envisaged carried social benefits with it that could not be impeded by instrumentalism:

> If then a practical end must be assigned to a University course, I say it is that of training good members of society. Its art is the art of social life, and its end is fitness for the world. It neither confines its views to particular professions on the one hand, nor creates heroes or inspires genius on the other …. But a University training is the great ordinary means to a great but ordinary end; it aims at raising the intellectual tone of society, at cultivating the public mind, at purifying the national taste, at supplying true principles to popular enthusiasm and fixed aims to popular aspiration, at giving enlargement and sobriety to the ideas of the age, at facilitating the exercise of political power, and refining the intercourse of private life.\(^8\)


\(^5\) Newman, above n14 at ix.

\(^6\) Id at 105.

\(^7\) Ibid.

\(^8\) Newman, id at 154.
Despite Newman’s commitment to the cultivation of the intellect in ways that could challenge existing knowledge, his idea of the university did not include research, which he assigned to separate research institutes. Ker endeavours to explain away what became a source of reproach for Newman in the 20th Century, by arguing that too much has been made of Newman’s alleged hostility. Ker suggests that the essays have to be understood in their context as an argument for a teaching university, not against the inclusion of research.\footnote{Ker, ‘Newman’s Idea’, above n39 at 12–16.} Indeed, as a matter of logic, Newman’s emphasis on the originality of scholarship would seem to imply some element of research, albeit not necessarily of the formal, mono-disciplinary kind, which is what he seems to be disavowing.

C. Karl Jaspers

It was a piece by Habermas, also entitled ‘The Idea of the University’, that excited my interest in Jaspers, whom Habermas quotes as presciently observing:

> Either we will succeed in preserving the German university through a rebirth of its idea in the decision to create a new organizational form, or the university will end up in the functionalism of giant institutions for the training and development of specialized scientific and technical expertise.\footnote{The quote comes from the 1961 edition of Jasper’s book. See Habermas, above n37 at 100.}

Confusingly, Jaspers published not just one, but two books entitled The Idea of the University. The first, from which the above quotation derives, was published in 1923.\footnote{Karl Jaspers, Die Idee der Universität (1923). It was reprinted in 1945 and revised in 1961.} I relied on the second book, which was published in Germany in 1946.\footnote{Karl Jaspers, Die Idee der Universität (1946). (English translation: Karl Jaspers, The Idea of the University (ed Karl Deutsch, trans H A T Reiche & H F Vanderschmidt) (1960).} In his autobiographical essay, Jaspers explains that the 1946 essay retained the same sentiments as the 1923 essay but it was rewritten to suit the resurrection of the German university after the War.\footnote{Jaspers, ‘Philosophical Autobiography’, above n30 at 45.} It is notable that there is no reference in the second Idea to the functionalism Jaspers feared two decades earlier, but it was this allusion that I felt contained echoes of the modern state’s deployment of the university to develop the new knowledge economy within the contemporary world order.

For Jaspers, like Humboldt and Newman, the university is a community of scholars and students engaged in the task of seeking truth.\footnote{Jaspers, The Idea, above n48 at 19.} Unlike Newman, Jaspers believed that the pre-eminent role of truth made research the foremost concern of the university.\footnote{Jaspers, id at 21.} Jaspers regarded the linkage between teaching and research as fundamental to the idea of the university. These twin pillars of the academy — teaching and research — would be guided by philosophy, which Jaspers believed was the guardian of the idea of the university.
Jaspers presents a powerful argument for retention of the liberal law school. He did not advocate a separate institute for law, but argued that training should be indissolubly linked to general education and research. To cut one off from the other would cripple the university.\textsuperscript{52} If training is not informed by the broader philosophical values of the university, Jaspers believed the danger was that an autonomous discipline could lose sight of its own presuppositions. Thus, without a philosophical foundation, jurisprudence would sink into an abyss of total arbitrariness.\textsuperscript{53} It lapses from a concern with statute law into legal rationalisation of lawless brutality and licence.\textsuperscript{54}

Jaspers is all too conscious of the tensions and conflicts besetting universities because of their dependency on the state, even though they run themselves.\textsuperscript{55} While the state authorises that independence, he recognised that it can destroy the university if it so chooses.\textsuperscript{56} Jaspers is known to have taken an anti-Nazi stance, which led to him being dismissed from his Chair in 1937.\textsuperscript{57} He does not advert directly to this experience in \textit{The Idea}, but presents some salutary observations regarding how academics operate in degraded situations:

When approached with contempt, treated with disrespect, manoeuvred into situations which virtually impose unethical conduct, and exposed to academic politics in the most literal sense, professors, like the rest of mankind, will eventually respond in conformity with the worst expectations.\textsuperscript{58}

Furthermore, they will avert their gaze when colleagues are being treated unjustly in order to safeguard their own positions. Jaspers draws attention to the drawbacks of institutional life in difficult times, particularly the way power, jealousy and ambition operate to defeat the greater good. He also recognises the inherent corporatist tendency in favour of the second best:

Not only the university but all corporate bodies tend to maintain an unconscious solidarity against both the excellent and mediocre, prompted by such anti-intellectual motivations as fear of competition and jealousy. The excellent are instinctively excluded from fear of competition, just as the inferior are rejected out of concern for the prestige and influence of the university. The ‘competent’, the second-rate, are selected, people who are on the same intellectual level as oneself.\textsuperscript{59}

When the incompetent person occupies a leadership position, that person seeks to compensate for lack of ability by gratifying their power drives.\textsuperscript{60} Intellectual brilliance, unorthodox ideas or questioning of any kind, are not appreciated among

\begin{itemize}
\item Jaspers, id at 45.
\item Jaspers, id at 99.
\item Jaspers, id at 107.
\item Jaspers, id at 134.
\item Jaspers, id at 135.
\item Jaspers, id at 84.
\item Jaspers, id at 91.
\end{itemize}
the ‘managed’; docility, flattery and conformity are preferred. In a corporatised institution, the gift of preferment lies in the hands of managers, for ‘they are tempted by the feel of power, by the craving for recognition and gratitude’.61

Jaspers’ insights underscore the importance of retaining a space between the state and the university. He shows that freedom and independence influence not only the pursuit of truth in an academic sense, but all aspects of the culture of the university. This includes the vital question of who is appointed, particularly to leadership positions, and how the institution is run. Top-down managerialism, in conjunction with declining resources and the pressures induced by the market, contributes to the impoverishment of the traditional idea of the university and the common good.

4. Extrapolating from Humboldt, Newman and Jaspers

A. Freedom to Teach

Humboldt, Newman and Jaspers all agree that the pursuit of truth should not be constrained in any way; it goes to the very heart of the idea of the university. Truth, however, is no longer regarded as finite, unequivocal and attainable. Postmodernism has shaken society’s blind faith in truth by exposing the fact that it invariably possesses both an epistemological standpoint and a telos. Hence, within the contemporary context, ‘truth’ is likely to be tempered by the instrumentalism of the market; a body of autonomous knowledge is impossible.

Because law is a professional degree designed to equip lawyers for practice, law school academics have never possessed an unqualified freedom to teach. This manifestation of freedom has traditionally been associated with the Humanities, which is not constrained by specific professional and vocational requirements in the same way as the law discipline. The post-War period was nevertheless marked by a concerted endeavour to overcome the trade school image that dogged Australian law schools. The hope was that law would be accepted as a legitimate intellectual discipline within the university in the same way as a Humanity. Newman’s distinction between education and vocational training, and the implication that law-for-practice could not be subsumed within his concept of universal knowledge, strikes a raw nerve with the proponents of a liberal legal education. Newman is undoubtedly relying on the 19th century English distinction between the more philosophical branches of law that were taught at Oxbridge — Jurisprudence, Roman Law, and Legal History — and law for practice, which was taught in the Inns of Court.62 University law schools in the common law world were a phenomenon of the late 19th century, which sought to combine the scholarly and the practice elements. Striking the right balance between academic prescripts and the world of practice nevertheless remains a perennial challenge.63

---

61 Jaspers, id at 137.
62 Stevens notes rather wryly that it is now the jurisprudes, teachers of Roman law and legal historians who are marginalised. See Robert Stevens, ‘Legal Education in Context’ in Birks, above n4 at 89.
While there is a degree of choice at the margins, the ‘core’ legal curriculum is highly circumscribed by the ‘Priestley Eleven’, the eleven areas of knowledge specified for admission in all Australian jurisdictions, which take up as much as two-thirds of the curriculum in most law schools. Optional subjects allow more freedom but, even then, we see how contemporary pressures have had the effect of reining in this freedom, as students choose subjects which they believe will boost their chances in the labour market. These subjects tend to be related to the areas of business and property privileged by Priestley, including corporations law, trade practices, international trade and intellectual property. Thus, in order to make themselves more attractive to prospective employers, students have succumbed to the pressure of the market and allowed themselves to become intellectually docile. Even when they evince an interest in broader social issues, they worry about the way subjects appear on their transcripts. They wish to appear apolitical, not radical, in order to signify their willingness to facilitate the work of big business; nothing must jeopardise their chances of employment, preferably with a prestigious corporate law firm. Because of the comparatively low demand for the more reflective, philosophical, non-business subjects, it may then be deemed economically rational to cut them. In contrast, the Priestley-related electives are increasingly viewed by students as quasi-compulsory. The pressure to include more and more specific skills also underscores the orientation towards teaching law as it is, further displacing critique.

It may be seen, therefore, that freedom to teach, a central tenet of the idea of the university has become increasingly circumscribed, although fetters were imposed when law for practice was first taught within the university. The pressures induced by the legal profession and the market have accentuated the limited ambit of this sphere of freedom, not just via curricular offerings but via modes of flexible delivery, pedagogical practices and assessment. The powerful role played by student-customers within the new market paradigm clinches the fact that there is little space left for the traditional idea of freedom to teach and critique.

B. Unity of Teaching and Research

There is a similar caveat in respect of Humboldt’s second principle, which is endorsed by Jaspers: the unity of teaching and research. The positivist paradigm that has dominated legal education in the Anglo-Australian law school has been notoriously resistant to knowledge other than legal doctrinalism, apart from a handful of canonical legal theorists, such as Dicey. The idea of law as a self-

---


64 Johnstone & Vignaendra, above n7 at 91.

65 Interviewees in England and Canada, as well as Australia, all related how students were now more likely to shun courses that included ‘feminism’, ‘sexuality’, or even ‘critical’ in the title.

66 Johnstone & Vignaendra, above n7 at 112.
referential system has allowed a carapace to form around itself in order better to resist extraneous knowledge. This has not been entirely successful and, indeed, law could not retain its legitimacy without, in some way accommodating social change. Despite longing to be accepted as a liberal art, both the professional constraints and the positivistic orientation confirm that law always has an epistemological standpoint. This is not to say that history or philosophy lack dominant standpoints, or that those standpoints are not contested, but the self-referentialism of legal positivism, together with the ideological and professional role of law, have allowed it to resist incursions more effectively. As Duncanson points out, there are certain parameters within which a critique of law is acceptable that require deference to prevailing practices and institutions. Thus, while a body of vibrant interdisciplinary scholarship has emerged from the law discipline in recent years as a result of the impact of feminism, cross-culturalism, and a range of other critical perspectives, Johnstone and Vignaendra’s research found their impact to be minimal on the mainstream undergraduate law curriculum.

Law has a limited capacity to take on board new knowledge and incorporate it into teaching. Its favouring of technocratic knowledge serves an ideological purpose in obscuring the play of power beneath the surface in the struggle for substantive justice. I suggest that the dominance of the market, with its inevitable inequalities and exploitative practices, favours a technocratic approach and induces a resistance to critique. This can be seen clearly by the pressure brought to bear by student-customers to slough off social and critical knowledge and produce a bare-bones package of orthodox and uncontentious knowledge that can be easily imbibed and regurgitated in examinations. The movement away from research essays as a primary mode of assessment further disrupts the potential for the conjunction of teaching and research, as well as neutralising the possibility of critique.

C. Academic Self-Governance

Humboldt’s third formative principle: academic self-governance, is also a parlous and ambiguous concept in the contemporary university, not just in the law school. The Commonwealth Government as the major source of funding has always theoretically retained a high degree of control but, in practice, universities have been largely left alone to run their own affairs. The Dawkins’ reforms brought about an end to the binary system in higher education, according considerable

---

67 This resistance is clearly illustrated by Hart, who sought to draw a line between law and history, law and politics, and law and social values of all kinds, including law and morality. See H L A Hart, *The Concept of Law* (1961) esp at 253n.
69 For example, Stuart Macintyre & Anna Clark, *The History Wars* (2003).
70 Duncanson, ‘Legal Education’, above n16 at 61.
leeway to universities over what courses they offered (with the exception of Medicine). This dimension of freedom manifested itself in a dramatic increase in the number of law schools — from 12 to 28 between 1989 and 2001. While Dawkins signalled the beginning of a system of ostensible deregulation, the Commonwealth in fact not only retained significant power over universities through the funding of student places and research initiatives, but strengthened control through various regimes of audit and accountability.

Paralleling the new forms of governmental scrutiny, marked changes also occurred within the internal governance of universities. These changes were encouraged by the Commonwealth. The trend has been to move away from collegial decision-making, long the university norm, in favour of a top-down form of managerialism, in order to ensure that the teaching and research effort of universities comports with state interests. In the new corporatised university, the Vice-Chancellor has become its CEO, modelled on the private-for-profit corporation. He or she, but more commonly ‘he’, is surrounded by a group of deputy and pro-Vice-Chancellors, who form the upper echelon of a complex line management structure. The line of command fans downwards through layers of control that includes mega-deans, deans, heads of schools and departments, all responsible for the management of a unit, but with circumscribed authority because they are answerable up the line. The effect might be likened to one of subinfeudation, whereby all staff are bound through a web of reciprocal relations, secured through multiple regimes of audit and accountability. Within this feudalised structure, academic freedom and collegiality are inevitably constrained.

It is notable that the law discipline now tends to be located within the pyramidal base of the hierarchy. In the purported interests of rationalisation and efficiency, the trend has been to include law as a constituent within a multi-disciplinary faculty. Business and management have become law’s disciplinary associates, rather than humanities and social sciences. The law schools located in these new configurations have restricted autonomy. Even over matters of curriculum and pedagogy, they may be expected to conform to common templates that are less than ideal. Some law deans complain that they have to negotiate constantly with faculty executive deans over trivial matters. The absence of budgetary control is felt acutely, particularly when law schools are expected to cross-subsidise other faculty constituents. The issue of autonomy is likely to be most problematic within the ‘new’ universities, the former Colleges of Advanced Education, because collegial decision-making was never a recognised norm of CAE culture.

---

73 The 29th, at Edith Cowan University, is to commence in 2005.
74 Research productivity, teaching quality and performance on a range of indices are now regularly audited, which has become a phenomenon of our times. See Michael Power, *The Audit Society: Rituals of Verification* (1997).
75 Although not eventually passed, the National Governance Protocols, which required compliance in order to qualify for funding increases, illustrates the point. See Hon Dr Brendan Nelson, *Our Universities: Backing Australia’s Future* (Canberra: Commonwealth of Australia, 2003) at 15–16.
76 Johnstone & Vignaendra, above n7 at 54–56.
On the other hand, perhaps unsurprisingly, my research suggests that law schools that have been best able to resist amalgamation and continue as separate faculties retain a considerable degree of autonomy over their affairs. Even then, academics in these schools mutter about the increasing propensity of senior managers to hand down edicts, rather than engage in consultation. The over-administration of the contemporary law school inevitably stifles freedom and constricts creative intellectual life.77

The vulnerability of universities vis-à-vis the state is very apparent in Australia as funding regimes are being radically reshaped under the Nelson Reforms. The case of law is striking, as it is funded at the lowest rate.78 While the expectation is that universities will make up the shortfall through revenue-raising mechanisms, including fees, this reform could sound the death knell for vulnerable institutions lacking the advantages of tradition and location that serve to confer a market edge. The Government may not have set out deliberately to destroy particular universities but, as Jaspers recognised, a state possesses this power,79 and the imposition of a social Darwinist ‘survival of the fittest’ environment through policies of underfunding and competition, could indirectly exert that effect.

The central role of the university in safeguarding and transmitting a society’s culture is now passé. Today, a functional role of an altogether different kind has been assigned to universities, that is, to serve the state through the market. This role has been effectively secured through perpetual under-funding from the public purse in conjunction with regimes of audit and compliance, which require particular targets and levels of productivity to be met in order to qualify for parsimonious hand-outs.

Thus, it can be seen that the traditional idea of the university in no way comports with the contemporary Australian law school in terms of either freedom of teaching, unity of research and teaching or academic self-governance. While these principles, particularly freedom of teaching, and unity of research and teaching, have only ever had limited purchase in law schools, corporatisation has eviscerated them.

5. Conclusion: Reclaiming a Semblance of the Idea

Despite having argued that there is only a semblance of the traditional idea of the university still to be found in the contemporary law school, where the concepts of freedom and autonomy have always been constrained, I nevertheless suggest that

78 From 2005, the Government contribution for a full-time student has been set at $1,509. This represents the lowest disciplinary ranking on a 10–point scale. See Nelson, above n75 at 15. As a result, law students themselves will assume 84 per cent of the cost of their course, the highest of all disciplines. See Dorothy Illing, ‘Higher Fees Bring New World Order’ *The Australian* (28 July 2004) at 32.
Humboldt, Newman and Jasper’s observations can fruitfully illuminate our understanding of the corrosive effects of the commodification of legal education. In particular, a sound philosophical orientation is able to act as a buffer against the depredations of the market, whereas a purely technocratic approach to legal education can only effect a moral neutering of the law student. The question as to whether A or B win in a dispute has no significance beyond the fair application of the legal rules. Legal decision making is then in danger of falling into the ‘abyss of total arbitrariness’ against which Jaspers warned. The questionable ethics of multinationals go unremarked because the primary focus is on the technical rules of contract or how to avoid a regulatory regime in the interests of a corporate client.

Similarly, the market metanarrative permits economically rational justifications to be adduced in respect of legal education programmes designed primarily as revenue raising mechanisms. I have suggested that changed modes of course delivery and assessment, reduced administrative support and the casualisation of the workplace all operate to restrict interrogation of the knowledge purveyed. Judy Lancaster argued a decade ago that turning away from critique was a strategy designed to deflect attention from the increasing emphasis on training and material production. The wholesale embrace of neo-liberal policies has strengthened this trend.

I found Jaspers particularly pertinent in light of the contemporary dilemmas. He wrote at a time of great pressure from the German state to develop new forms of technical knowledge in its struggle to assert itself on the international stage. I have suggested that a parallel may cautiously be drawn in the way that the contemporary state has co-opted universities to produce new knowledge workers and promote the market, at the very moment it has starved them of funds. Universities have been forced to commodify their educational ‘products’, compete within a limited domestic market and make forays into the international market, all filled with traps for the unwary. Not only are there vast linguistic and cultural barriers in respect of offshore markets, there is something repugnant about a 21st century form of neo-colonialism in which we are going to teach them law — with all its Anglo-Australian biases, because a positivistic legal education seldom equips graduates to do anything else. What is more, if Masters degrees in areas such as international business law generate profits, the tendency is to plough those profits back into further market initiatives rather than use them to improve the


81 Lancaster, above n77 at 11.

82 Jaspers experienced at first hand the replacement of disfavoured teaching staff and students by the Nazis. Hartshorne, in his study of German universities 1933–37, notes that about one-fifth of teaching staff were lost or replaced, with a reduction of 30 per cent of students. See Edward Yarnall Hartshorne Jr, The German Universities and National Socialism (1937) at 72.
quality of the ‘product’ offered to non-English speaking international students.\textsuperscript{83} Neo-liberal indicators and the profit motive thereby effectively displace the social justice, as well as the intellectual, ends of higher education.\textsuperscript{84}

Jaspers also reminds us of the need to be sensitive as to how the market may operate to mask discrimination towards disfavoured scholars, including social theorists and legal philosophers, who do not willingly adapt to the new orthodoxy. They may suddenly find that their services are dispensable after a line manager has determined that their scholarship lacks use value; they may be compelled to leave if they are unable to attract research grants; or it may be determined that legal theory should no longer be taught because it is not sufficiently popular with the student-customers. Furthermore, the targeted staff may be unwilling or unable to reinvent themselves and accept deployment into teaching commercial law or other applied area. As Jaspers suggests, the harm of such an action is systemic, as well as individual, for an institution with a corporate mission unrelated to the idea of the university, quickly slides into mediocrity. We can already see signs of this occurring with the favouring of entrepreneurialism over scholarship as a criterion for selection, particularly in leadership positions.

The lessons from the theorists of the idea of the university should give us pause, as academics rush maniacally from one task to the next, promoting the self via productivity and performativity, but lack the time to reflect on what is happening around them, as one Emeritus Professor observed:

There is a strong pressure on people to meet certain performance criteria. This has in my view had an impact on collegiality because it means, or people think it means there’s less time for conversation … In my early years here, everyone came to morning tea and nearly everyone came to tea in the afternoon. We had a faculty room from the very outset for that purpose and it was an opportunity … to discuss both small and large issues … That very important manifestation of collegiality I think has long gone … One of the things has been this concern among young people, particularly those on fixed term contracts: ‘I’ve got to do this; I’ve got to write this; I’ve got to have this published; I’ve got to complete my higher degree, or else’\textsuperscript{85}

The absence of reflective space ensures that academics focus single-mindedly on promotion of the self in order to succeed within a competitive legal labour market. In this way, we all become complicit in eroding the collegiality and self-governance that Humboldt, Newman and Jaspers recognised as central to the idea of the university. Simultaneously, we also become complicit in promoting and maintaining the market culture.


\textsuperscript{84} Compare Arthurs, above n4 at 50.

\textsuperscript{85} Interview conducted in 2003.
To revert to teaching black letter law or skills for practice, in a primarily instrumental sense, is to transmit something approximating what Jaspers called ‘frozen knowledge’. That knowledge may change formally in terms of doctrine, but it requires no real research input, and anyone with basic qualifications can teach it — the law school generalist or the casual teacher. While many law teachers will flinch at the frozen description and claim that the positivist paradigm no longer prevails, the evidence suggests that the market, with the aid of nutshells and cribs, is inducing a reversion to the privileging of knowledge of at least the semi-frozen kind. The approach is functional because the knowledge can be purveyed in large lectures or on-line. It also tends to slough off questioning and critique in a context where only applied knowledge is deemed to have use value, but if that is all that is taught, the legal academy is no longer a form of life, for its spirit has gone. The teaching of commodified legal knowledge then need not take place in a university at all. It can be taught equally well, and probably more cheaply, by private commercial operators, technical colleges or in-house service providers on behalf of corporate law firms. The idea of the law school as trade school could once again become a reality, thereby eviscerating all vestiges of a liberal legal education.

Professional and vocational imperatives, as suggested, inevitably constrain the notion of freedom within the law school. Nevertheless, the Kantian articulation of an idea suggests that we must aspire to the way things might be, even if realisation of the vision always eludes us. The pragmatism, functionality and cynicism of the market have caused us to lose sight of the greater good. The constellation of values associated with the idea of the university informs our understanding of the liberal law school that the Pearce Committee, however imperfectly, sought to engender in Australian legal education less than two decades ago. The Committee’s articulation of a new way of thinking about Australian legal education represented an inchoate attempt to link legal education to the idea of the university by emphasising the centrality of theory and critique. This did not mean that a particular philosophy or perspective had to be espoused, but a broad understanding of law was advocated to foster the development of a critical consciousness. While this conceptualisation of the idea of the university may be uncontentious in theory, a look at university law schools around the country underscores my fear that the ideal is being sacrificed to the rhetoric of the market and individual good. This is not to deny the existence of pockets of resistance, where committed individuals are doing their best to continue to imbue their students with a sense of the idealism associated with a liberal legal education.

86 Jaspers, The Idea, above n48 at 62.
87 An example would be the statement contained in the Faculty Plan for the ANU: ‘In summary, I am suggesting that we make a deliberate shift away from the traditional model of the typical Australian law school of preparing our students to have brilliant, individual careers, to a more altruistic model of inspiring our students to leave the legal system better than they found it.’ Michael Coper, ‘The Ethos and Identity of the ANU Law School’, Draft Implementation Plan, Faculty of Law, ANU (Canberra, 2002, updated 2004) at 13.
I do not have a simple blueprint as to how to avert what seems to be an unstoppable market juggernaut bearing down on an already beleaguered legal academy. However, as Readings informs us, if the university is in ruins and we inhabit those ruins, we have an obligation to do what we can. Individual acts of resistance therefore cannot be discounted. Thus, we must have due regard to the presuppositions of the market culture presently in the ascendancy. We are doing a disservice not only to our students, but also to the legal profession and the wider society, if we accept the minimalist approach to credentialism now in vogue. What is more, capitulation endangers not just an already fragile liberal law school, but the very future of the legal academy itself for, as suggested, the ascendancy of competition policy is bound to spawn a host of private providers.

The legal academy is presently part of the university, which is a living organism comprising staff and students engaged in an intersubjective project that includes intellectual excitement, new ways of thinking and the legal imaginary. If the life of the academy is allowed to ebb away in favour of the one-way transmission of sterile technocratic knowledge in the interests of the market, it cannot be resuscitated, as Jaspers recognised:

The idea of the university lives decisively in the individual students and professors, and only secondarily in the forms of the institution. If that life would become obliterated, the institution can not possibly save it.

---

88 Readings, above n25 at 176.
‘We’re All Socio-Legal Now?’ Legal Education, Scholarship and the ‘Global Knowledge Economy’ — Reflections on the UK Experience

RICHARD COLLIER*

Abstract

Within scholarship in the field of higher education there appears to be a general consensus that we are, internationally, living in a ‘new era’ for universities; a time when traditional understandings of what universities are ‘for’, and of the scope of academic disciplines themselves, are each being reshaped in some far-reaching ways. There is at present a growing debate taking place within the legal academic community, across jurisdictions, as to the possible implications for legal research and teaching of a number of these developments. In the UK context it also appears that there are some very different interpretations emerging as to what these changes might mean for university law schools, legal education and, in particular, for socio-legal scholarship. This article seeks to explore the main contours of this debate; to identify the key themes and concerns which have emerged within this growing literature on the ‘restructured’ university and the knowledge economy; and, in particular, to consider the extent to which, if at all, these developments have impacted on — and are fundamentally changing — the field of legal education and scholarship in the UK. In recognising the complexity and frequently ‘double-edged’ nature of many of the recent developments in this area, and in looking to issues of recruitment, retention and research capacity within the legal academy, the article argues that there may indeed be good reasons to suggest that the development of (critical) socio-legal scholarship, at least within many UK law schools, may face a troubled and uncertain future.

1. Introduction

Somebody told you, and you hold it as an article of faith, that higher education is an unassailable good. This notion is so dear to you that when I question it you become angry. Good. Good, I say. Are those not the very things which we should question? I say college education, since the war, has become so a matter of course, such a fashionable necessity, for those either of or aspiring to the new vast middle class, that we espouse it, as a matter of right, and have ceased to ask, ‘What is it good for?’

* Professor of Law, University of Newcastle Upon Tyne, UK. This article is based on the plenary address delivered to the Australasian Law Teachers Association Conference, Brisbane, July 2003. I would like to thank the anonymous reviewers for their helpful comments on an earlier version of this paper.

1 David Mamet, Oleanna (1993) at 33.
There are, at present, clear signs of a growing debate taking place within the legal academic community in the UK about the possible implications for legal research and teaching of a number of developments taking place in the field of higher education; changes in what has been termed the ‘political economy’ in which academic research is produced. There exists, within the now considerable body of scholarship concerned with higher education, a general consensus that we are, internationally, living in a ‘new era’ for universities; a time when traditional understandings of what universities are ‘for’, and the scope of academic disciplines themselves, are each being reshaped in far-reaching ways. The debate in legal studies in the UK around these issues is, perhaps, less established than in other fields of scholarship. It is also arguably less developed than has been the case in some other jurisdictions. It does appear, however, judging by a number of recent interventions, that some very different interpretations are emerging as to what these developments might mean for university law schools, legal education and, in particular, for socio-legal scholarship. This article seeks to explore the

2 Evident in the pages of newsletters of professional associations in the discipline of law, in the remit of an ongoing Inquiry into the question of ‘research capacity’ in law (see below), in the streams and plenary sessions of annual conferences, eg, at the 2004 and 2002 Socio-Legal Studies Association (SLSA) Annual Meetings, and as the focus of a growing number of books and journal articles within the rapidly developing subfield of legal scholarship concerned with the university law school: see further below.

3 Paddy Hillyard & Joe Sim, ‘The Political Economy of Socio-Legal Research’ in Philip Thomas (ed), Socio-Legal Studies (1997) at 45. Note also the references to the ‘political economy’ of academic research contained in work cited below n6.

contours of this debate, to identify the key themes and concerns which have emerged within the recent literature on the ‘restructured’ university and the knowledge economy, and in particular, to consider the extent to which (if at all) these developments have impacted on — and changed — the field of legal education and scholarship in the UK.


A. A Note of Caution: The UK University Law School

The history of legal education and scholarship has been the subject of a vast body of work and I do not want to repeat the arguments which have been made for ‘taking the law school seriously’. A theoretically and methodologically diverse scholarship has explored many aspects of university law schools.

For example, the practices and cultures which exist within the legal academic community, pedagogical issues relating to teaching, the changing experiences and aspirations of law students and, more recently, aspects of what has been termed the ‘private lives’ of legal academics themselves, a debate which has embraced in its reach questions of equity, discrimination and power. It is important to note at the outset, however, that to talk about the university law school is misleading. There is no ‘one’ type of university law school and it is, accordingly, difficult to generalise about the effects of a particular reform process in the field of Higher Education. Legal education and research into law and legal regulation take place in locations other than universities and their law schools.


11 The subject of a now vast body of research. Note the work of the UK Centre for Legal Education: <http://www.ukcle.ac.uk> (17 Oct 2004).

themselves vary greatly in terms of institutional contexts, academic reputations and the functions they are seen to have within distinctive legal, political, local and wider communities. UK law teachers are equally diverse.

Nonetheless, and notwithstanding the above, it is possible to chart a number of developments which, I wish to argue in this article, have impacted across the Higher Education sector in the UK — and the effects of which have been felt, although by no means necessarily in the same way, across all university law schools. In order to do so it is necessary to consider, first, the arguments which have emerged within the recent literature concerned with the nature of what has been termed the ‘restructured’ university.

2. The Restructured University and the Knowledge Economy

British universities have seldom been more miserable. They are short of money. Government micro-management is intrusive and contradictory. And competition forces them to do things they dislike.

13 Cownie (2004), above n7. Cownie suggests, eg, that a connection exists between power, knowledge and the development of the legal discipline: ‘the behaviour, values and attitudes of legal academics have implications for the future development of the discipline of law’. Cownie (1998), above n10 at 103. Studying legal academics will thus ‘advance our knowledge of the discipline of law (id at 109) and in making such links, it is who we (legal academics) are as individuals and as a collectivity which ‘will have a profound effect on the research which is carried out and valued, the subjects which are taught, the people who are influential in this sphere; to acknowledge this is to indicate the importance of studying ... the “private life” of higher education’ [Emphasis added.]: id at 103-104. Accordingly, the ‘...ways in which particular groups of academics organise their professional lives are intimately related to the academic tasks on which they are engaged’ [Emphasis added.]: Becher, quoted in Cownie, id at 109.

14 Eg, teaching in schools and further education colleges. Private, profit-making organisations, government departments and charitable foundations each produce ‘in house’ research into law.

15 Different jurisdictions and legal and university systems have mediated the ways in which the processes described below have been experienced across specific institutions. At the same time, and with specific regard to the focus of this article, it is important to bear in mind that the UK is itself composed of a number of different jurisdictions and that the effects of globalisation (below) can be felt differently in different places. More generally, much (although by no means all) of the literature on which this article is based derives from a common law jurisdictional perspective. At the same time, it is also important to remember that the academic community is made of diverse groups: academic staff, porters, catering and security workers, undergraduate and postgraduate students, secretarial staff, librarians, researchers and so forth all experience the privatisation processes in different ways.

16 Although a relatively homogenous employment grouping in terms of ethnicity and socio-economic background. Wells observes, ‘Readers of this journal [Legal Studies, the journal of the Society of Legal Scholars] most likely work in a law school ... most likely are male, pale, middle-class and able-bodied. True, there is more chance that they are female than there would have been 20 years ago, but those women will almost invariably be fit and white’: Wells (2001), above n10 at 116.

17 The focus of the following argument is on those UK university law schools who seek to maintain, alongside the education of undergraduate and postgraduate students, a central ‘research mission’ in law: law schools, that is, which ‘take seriously’, and seek to maximise their performance in, the RAE: see further below n62.
The relationship between British universities and the wider political economy, Hillyard and Sim suggested in their 1997 account of socio-legal scholarship, had ‘...not appear[ed] to have been studied systematically’. Less than a decade on there now exists a rich literature concerned with what has been termed, variously, the ‘restructured’, ‘corporatised’ or ‘entrepreneurial’ university. Commodification and privatisation, managerialism, credentialism and bureaucratisation are common themes re-appearing in this work, the ‘key words’ through reference to which a wider debate about the reform of universities in the UK has come to be understood. And at the centre of this debate — one which is taking place across Anglophone countries — is one central and recurring notion: that of the global knowledge economy.

It is in relation to this idea that universities have been positioned as key ‘strategic sites’ in relation to which the impact of a range of processes associated with globalisation might usefully be studied.

---

19 Hillyard & Sim, above n3 at 52. Although the following texts had in fact been published: Bill Readings, *The University in Ruins* (1996); Albert H Halsey, *Decline of Donnish Dominion: The British Academic Professions in the Twentieth Century* (1995). Note also relevant work cited above at n4. Compare ‘The state of academia must reflect broader social processes: since globalization ultimately affects everything, it stands to reason that the “knowledge economy” will also be altered. The reduction of state funding to universities and the general move to a corporate profit culture are other relevant forces. Surprisingly there has been little attempt to document systematically either the extent or the shape of these changes in the way universities work, or to consider what kinds of impact they might be having on staff, students or knowledge – one of the things universities supposedly exist for’ [Emphasis added.]: Ann Oakley, ‘Foreword’ in Brooks & Mckinnon, above n4 at xii.
20 Note, in particular, *The Future of Higher Education* (January 2003) (the White Paper) which sets out the government’s plans for radical reform and investment in universities and higher education colleges. The resulting legislation is, at time of writing, passing (with some difficulty) through parliament. There exists general cross-party agreement in the UK that the funding of universities has reached a critical juncture (if not state of crisis): see, eg, capturing the tone of reporting of these issues in the British press: ‘The Gloom Over Britain’s Universities’ *The Economist* (16 Nov 2002) at 11; ‘Universities Risk Closure as Funding Problems Worsen’ *The Times* (23 Jun 2003); ‘Degrees of Difference’ *The Observer* (21 Sep 2003) at 24; ‘Universities £1bn Debt Crisis’ *The Guardian* (20 May 2002); ‘Minister Admits Universities Are in Crisis’ *The Guardian* (15 Nov 2002). There are, however, marked differences as to what constitutes the best way forward: S Hall & Rebecca Smithers, ‘Tories Reveal Plan to Privatise Universities’ *The Guardian* (22 Jan 2004).
Globalisation itself is, of course, a deeply contested notion, historically and conceptually. It has been generally understood within this recent work on university restructuring, however, to be a phenomenon associated centrally with the idea of a ‘borderless’ world economy, with the flow and instantaneous sharing of information (whether of ideas/knowledge, capital and/or financial services) and the ‘compression of time and space’ seen to have arisen at the interface of technological advance and political, economic and cultural change. There are four key processes or interrelated themes which, taken together, have come to structure this emerging debate about the impact of globalisation on universities. I will address each in turn as they relate to the changes which are presently taking place in UK universities and, in particular, their law schools.

A. Privatisation: The Rise of the Corporatised University

Can a university be run more like a business? You bet it can …. Most universities can do a significant job of cutting costs through the same reengineering of processes and work that have characterized the best for-profit corporations.

The consequences for universities of a range of political imperatives aimed at shifting public policy away from (ill-defined, contested) ideas of ‘social good’ towards the reduction of public expenditure have been well-documented within the literature on Higher Education over the past two decades. The issues addressed within the more recent work on the privatising of universities cannot be confined, however important this has been in structuring the increasingly high-profile debate about university reform in the UK. This literature has embraced diverse issues about the kinds of activities in which universities can, and should, engage. What marks the entrepreneurial university, it has been argued, is an explicit redirection, experienced at all levels of

---


24 The term ‘global’ universities has, eg, been taken as referring both to the development of online education – the creation of the ‘virtual’ university – and the heightened move towards the recruitment of international students on a for-profit basis. What unites both developments, it is argued, are the imperatives of economic gain and the free exchange of knowledge and scholars. There is, of course, no guarantee that such ‘e-universities’ will prove successful: ‘“Shameful Waste” on E-University’ *The Guardian* (9 Jun 2004). On the phenomenon of the ‘corporate university’ R Paton & S Taylor, ‘Corporate Universities: Between Higher Education and the Workplace’ in Williams, above n4. There are signs that private businesses in the UK are to be encouraged to award degrees in direct competition with traditional universities: see Phil Baty, ‘Go-ahead for Corporate Degrees’ *THES* (29 Nov 2002) at 1.

25 Brooks, above n4, similarly identifies three ‘fundamental principles of operation’ in the way in which universities now operate – corporatisation, commodification and privatisation. A concern with these themes can also be found in the work of Thornton, above n6.

26 J Hecht, ‘Today’s College Teachers: Cheap and Temporary’ (1994) 188 (Nov) *Labor Notes* at 6, cited in Currie, Thiele & Harris, above n4 at 5. It is important to note that the relationship between privatisation and corporatisation is itself far from clear (with the terms at times used interchangeably). The following argument seeks to trace how the corporatisation of the universities relates to the broader political imperative associated with privatisation.
the institution, towards an ‘intensified emphasis’ on the capitalisation and exploitation of learning and ‘knowledge practices’. Slaughter and Leslie\(^{27}\) neatly summarise this theme in their account of the ‘far-reaching implications’ of the corporatisation of universities for the ‘academic capitalists’\(^{28}\) who, they suggest, now increasingly work in them. In addition to the ‘constricting of moneys available for discretionary activities such as post-secondary education’\(^{29}\) (as above), they identify across the sector the ‘growing centrality of technoscience and fields closely involved with markets, particularly international markets’;\(^ {30}\) a ‘tightening relationship’ between ‘multinational corporations and state agencies concerned with product development and innovation’;\(^ {31}\) and the ‘increased focus of multinationals and established industrial countries on global intellectual property strategies’.\(^ {32}\)

The term corporatisation has been used in this literature to capture the central idea that what has occurred has been a heightened *interconnection* between the objectives, goals and practices of the business and academic worlds. This is particularly clear in the apparent consensus which now exists amongst politicians, policy-makers and senior university managers in the UK that the economic, political and social transformation of the ‘knowledge base’ of society is an increasingly important source of value within advanced capitalist economies. Developing an understanding of the dynamics of corporatisation on universities cannot, however, Polster suggests, be seen simply in terms of an ‘add-on’ to the university, ‘such that after their establishment one has the old university plus these links’. Corporate links are, rather, more accurately understood as an *add-into* the university, producing qualitative and far-reaching changes in the institution and the practices of academics themselves. In turn, these changes then pervade many aspects of the university, not least in terms of its overarching culture, operating practices, funding systems and reward structures.\(^ {33}\)

In the UK the processes of privatisation, as above, have been evident not simply in the growing move towards a ‘user-pays’ system of Higher Education. They have also informed the way in which faculties, schools and individual academics have each been increasingly charged with redirecting their energies towards the capitalisation and exploitation of learning and readjusting the focus of

\(^{27}\) See above n4.
\(^{28}\) Thornton similarly notes, drawing on the work of Slaughter & Leslie, the links between the movement in favour of academic capitalism and neoliberalism: Thornton (2001a), above n6 at 47.
\(^{29}\) Slaughter & Leslie, above n4 at 36.
\(^{30}\) Id at 37; Brooks & Mackinnon, above n4 at 3.
\(^{31}\) An embrace of the term ‘innovation’ has come to pervade UK universities (in the form, eg, of renaming ‘Research Support’ as ‘Innovation Services’, the establishment of ‘Innovation’ seedcorn funding and so forth.
\(^{32}\) Slaughter & Leslie, above n4 at 37. It is not difficult, from even a cursory glance at recent developments in the UK context, to see illustrations of each of the above themes as being played out across the sector.
their endeavours by engaging, for example, in such practices as the creation of ‘spin-off’ companies, patents and innovation development, partnering with industries and applying their ‘knowledge products’ to the needs of the business community. In the case of law schools, securing further income streams, whether from Continuing Professional Development or ‘third-strand’ ‘outreach’ income-generating activity,\(^{34}\) is no longer considered marginal to what many university legal academics ‘do’. It is, rather, a central part of the work of public universities,\(^{35}\) a core academic activity with promotion and appointment criteria adjusted accordingly so as to reflect the institutional importance of income generation and ‘business development’.

At this institutional level the ‘new reality’ facing UK law schools is particularly clear in the way in which, as Thornton observes, ‘…university managers have accepted that they must enter the market’,\(^{36}\) ‘…must have a product packaged under a brand name that is going to be attractive to consumers’.\(^{37}\) Performance-driven tables, (seemingly always contested) hierarchies and rankings of achievement, marketing awards and corporate ‘branding’ abound as UK universities — and their law schools — compete for new resources and income streams. For some, however, one consequence of this ‘privatisation thrust’ and the associated drive to commercially sponsored research has been an undermining of what had once appeared to be well-established intellectual traditions and practices, not least in the way in which each have been seen as putting at risk both ‘disinterested inquiry’\(^{38}\) and academic standards.\(^{39}\) At the same time, and bound up with these processes, what is seen to have resulted is, more generally, a reduction in the public and critical role of universities and scholars — a further erosion of the status of academics in the UK as ‘public intellectuals’.

---

34 The terms used to describe such activities vary across institutions but the meaning tends to be broadly the same.
35 In July 2004 the British government announced plans for a ‘huge expansion’ of Higher Education by allowing colleges and private companies to claim university status without having to conduct any research: ‘Number of Universities Set to Double as Government Opens Door to Private Sector’ *The Times* (17 Jul 2004).
36 Thornton (2001a), above n6 at 47.
37 If not, the consumers will exercise their prerogative of market choice and go elsewhere’: ibid; P Curtis, ‘Competition Time’ *The Guardian* (9 Mar 2004); ‘The talk among senior academic managers focuses on student customers, brands and market niches as they fight for survival in an increasingly competitive Market for students’: C Johnston, ‘V-C’s Buy into Idea of Building the Brand’ *THES* (23 Jul 2004) at 9.
38 Hillyard & Sim, above n3.
39 A problem seen as acute in relation to attempts to institutionally manage the government’s ‘widening participation’ agenda in a context of infrastructural underfunding. Note, eg, the growing debate about the ‘dumbing down’ of university degree courses in the UK: ‘“Dumbing Down” Fear as Leading Universities Award More Firsts’ *Daily Telegraph* (16 Mar 2004); ‘Government Blamed for “Mickey Mouse” Courses’ *The Independent* (26 Jul 2004); ‘Conflicting Forces Result in Failing Standards’ *The Guardian* (3 Sep 2001); ‘“Degrees for Sale” at UK Universities: Failing Students Passed to Keep Funds Flowing’ *The Observer* (1 Aug 2004); ‘Universities are having to make intellectual compromises… but many lecturers are reluctant to speak out for fear of losing their jobs or ruining reputations’: M Garner & P Leon, ‘Dumbing Down has Become a Fact of Life!’ *THES* (3 May 2002) at 22.
B. The (Legal) Academic as Knowledge Worker: What Are Universities For?

Perpetuating the life of scholarship for its own sake is no longer an acceptable mission statement, nor is the delivery of inaccessible knowledge from the secret garden of academic seclusion to a grateful public.

SIR HOWARD NEWBY, CHIEF EXECUTIVE OF THE HIGHER EDUCATION FUNDING COUNCIL, MARCH 2002

In repositioning academics as individuals for whom knowledge is no longer primarily valuable ‘in and of itself’ — it is, rather, a commodity, a resource to help create wealth and competitive advantage — the idea of useful knowledge has moved centre stage within the debate about university reform and restructuring in the UK. In May 2003 the Education Secretary, Charles Clarke, declared his wish to ‘…initiate a fundamental debate about the purpose of universities’ in his remarks that certain subjects being taught in UK universities lacked ‘use value’ because they did not bring with them clear economic gain (and thus could not be justified in terms of state funding). These subjects did not, he suggested, map to the government’s agenda of promoting employability within the competitive global knowledge economy. They failed, that is, to meet the criteria of ‘value for money’ in the cost-effective delivery of education and research. On closer inspection, far from simply ‘prompting’ a debate (a rather disingenuous observation at the time) these comments simply drew on, and contributed to, the now well-established debate within the social sciences and humanities around the impact of corporatisation on the very idea of the ‘university’. Via the citation of Newman, Halsey, Readings and others, this is a debate which has focused on the question of whether operating universities like businesses does involve a change in the epistemological foundations of what has been traditionally understood as the westernised, humanistic university ideal.

---

42 Charles Clarke, speech at University College, Worster, UK, quoted in THES (16 May 2003) at 1.
44 ‘I have to ask myself why the state should fund universities and what is the value of it’; some academics were ‘…harking back to a mediaeval concept of the university as a community of scholars unfettered by difficulties and problems of wider society’: Charles Clarke, quoted in THES (16 May 2003) at 1. For a flavour of the critical response these comments prompted see Gary Day, ‘No Thinking Please, We’re New Labour’ THES (23 May 2003) at 13; Letters, id at 15; C Bassnett, ‘Opinion’ The Guardian (27 May 2003) at 10.
If the processes of privatisation and the idea of the new ‘knowledge worker’ appear symbiotically linked, however, this still leaves open the question of how, at an organisational level, such changes have been instituted within specific institutional contexts. It is in this context that the idea of ‘new managerialism’ has itself attracted a growing degree of attention within the literature on university restructuring.

C. Instituting Change: The New Managerialism

What makes academic life a pleasure is not just what we do, research and teaching, but the atmosphere in which we do it. What makes academic life a pleasure is the practice of collegiate governance … the notion that everyone in the law school is bound together in common enterprise with an equal say in its overall direction and an equal responsibility for its success or failure.47

The structural reform of higher education in the UK can be seen, Cuthbert48 has suggested, as the product of ‘High’ and ‘Low’ frequency interventions each aimed at transforming the form and the content of both individual academic and management practices. As in other countries, UK tertiary education has over the past two decades experienced political interventions aimed at producing a ‘leaner’, more flexible, cost-efficient and accountable sector (as above);49 and, at the local level, the UK has recently experienced, with an increasing frequency, an explicitly entrepreneurially-driven ‘repositioning’ — in the form of an organisational restructuring — of a number of ‘old’ civic universities. It is in the context of ‘how to’ institute organisational change that the term corporate managerialism has come to encapsulate a number of key themes associated with privatisation and the knowledge economy, denoting significant shifts in both the content, style, structure and nomenclature of management practices.50

UK universities have in recent years experienced, for example:

- the establishment of more ‘streamlined’ central administrations, a process which has involved a greater managerial control over spending and newly introduced ‘flexible’ staffing practices;
- the embrace of ‘downsizing’ packages, involving the voluntary and, at

---

49 This government sourced reform of Higher Education can be understood, Pritchard suggests, as the outcome of a ‘…number of complex and shifting alliances between the state, the private sector and international bodies,’ often, importantly, pulling in different directions. The recent history of reform in the UK is itself littered with commissioned reports, legislative provisions and policy papers which vary considerably in terms of their underlying conceptualisation of what the university is for: Craig Pritchard, quoted in Brooks, above n4 at 19.
times, compulsory redundancies of academic and, in particular, support staff;\(^51\)

- a move away from models of decision-making hitherto broadly perceived as collegial and towards the empowering of a senior executive management elite within the central university administration;\(^52\)

- a managerial drive towards the standardisation of practice across teaching, assessment and research management, a process involving what Parker and Jary have referred to as aspects of the ‘McDonaldization’ of the university;\(^53\)

- the re-evaluation of job gradings and structures; and, finally

- the widespread embrace of what Yeatman has termed the ‘new contractualism’ in universities, whereby social relationships in Higher Education generally are now understood, increasingly, to be based on the demands of the market and ‘top down’ managerial imperatives.\(^54\)

Each of the above relate to the dynamics of instituting change at the level of the university as an organisation. It is the idea of performativity, however, that has been central to developing an understanding of the impact of these changes for the individual academic.

---


52 Ian McNay, ‘From the Collegial Academy to Corporate Enterprise: The Changing Culture of Universities’ in Schuller, above n4; J Newson, ‘The Decline of Faculty Influence: Confronting the Effects of the Corporate Agenda’ in W Carroll, Linda Christiansen-Ruffman, R Currie & D Harrison (eds), *Fragile Truths: 25 Years of Sociology and Anthropology in Canada* (1992). Restructured universities in the UK have, eg, seen the emergence of the figure of the new ‘super dean’ of the ‘mega Faculty’, an individual charged with the management and control of several disciplines and commanding a pivotal (although institutionally ambiguous) position within the corporate managerial model. It is assumed, generally, that senior university managers will involve a small number of people within the ‘knowledge loop’ in relation to which decisions are made and strategy developed. As the goals of the institution and those of senior management coincide there has, in effect, occurred a fissure in the academic community between, on the one hand, the corporate managerialism embraced by the new higher and middle management; and, on the other, the ‘rank and file’ ‘grassroots’ academics (frequently positioned within the dominant managerial discourse as the ‘problem’ to be addressed in restructuring). Thus, we have seen the emergence of now well-established differential salary regimes detached from collective bargaining.

D. Measuring Performance: Accountability, Audit and Academic Identity

UK Universities have, over the past two decades, been subject to a diverse and extensive range of accountability and quality assurance mechanisms and assessments in relation to both teaching and research.\(^{55}\) It is in this context that the idea of ‘performativity’ has come to link the processes of privatisation and the imperatives of the new knowledge economy, as detailed above, to the question of how particular changes have been instituted in the behaviour of individual academics. Drawing on Lyotard’s use of the term ‘logic of performativity’\(^ {56}\) this concept has been used to describe the way both individual academics and the universities in which they work have come to be judged, across a range of areas, on the basis of their performance, as measured against an input/output equation in such a way as to determine notions of efficiency and inefficiency against predetermined criteria (for example, research income, number and quality of publications, number of research students and so forth). The appeal of performativity matrices for senior management seeking to institute change is, as Currie and Thornton have both observed, not hard to understand: as soon as performance indicators are set, and the formula is put into the computer, data can be entered from each academic/school and aggregated, with funds distributed accordingly. The system itself appears ‘objective’.\(^ {57}\)

The performativity of academics has come, notwithstanding any wider critique which may have emerged of this kind of model of assessment,\(^ {58}\) to pervade

---

54 Anna Yeatman, ‘Contractualism and Graduate Pedagogy’ (1994) 2 Connect: Newsletter of the Australian Sociological Association Women’s Section 2; Anna Yeatman, ‘The New Contractualism and the Politics of Quality Management’, paper presented at Women, Culture and Universities: A Chilly Climate? National Conference on the Effects of Organizational Culture on Women in Universities Conference Proceedings, University of Technology, Sydney, 19–20 April 1995, cited in Brooks, above n4 at 33. Also Anna Yeatman, ‘The Gendered Management of Equity-Oriented Change in Higher Education’ in Diana Barker & Madeleine Fogarty (eds), A Gendered Culture: Educational Management in the Nineties (1993); Anna Yeatman, ‘Corporate Managerialism and the Shift from the Welfare to the Competitive State’ (1993) 13 Discourse 3. It is Yeatman’s argument that these agendas of restructuring have been dominated by a ‘market-oriented economic culture of action’ and a process of ‘exchange’ in which individual academics make contractual arrangements with their institutions, students make contracts with teachers, researchers negotiate contracts with governments and so on. This is seen as leading to a system in which long working hours become increasingly common as collectivist bargaining is eroded: ‘Pay Rises will be linked to performance’ THES (22 Jun 2001).


57 Thornton (2001a), above n6; Currie & Newson, above n4.

numerous aspects of university life at the beginning of the 21st century. UK universities have experienced, for example:

- the introduction of compulsory written statements about work completed and future objectives;
- the introduction of ‘time management’ and ‘transparency review’ evaluations;
- the rise of the student evaluation of courses and lecture programs;
- a revising of staff appraisal and staff development practices;
- and, perhaps with greater impact than any other measure, the assessment of the performance of academics in terms of their research productivity in the Research Assessment Exercise (RAE).

The details of the assessment criteria which will govern the next RAE in 2008 are, at the time of writing, unclear and subject to consultation. The various RAEs which have taken place since 1986 are, however, now widely agreed to have transformed the culture of universities and to have embodied, in a particularly pure form, the spirit and ethos of individual and collective ‘performativity’. It is research performance — increasingly benchmarked internationally — which has become the crucial factor in determining the status, financial health and, in some cases, the very future of the ‘unit of assessment’. And bound up with the RAE, it is argued, has been a far-reaching transformation in the idea of the ‘academic self’ itself as

59 Although it is important to note that the measures involved in performance assessment have themselves taken a number of different forms and have varied across institutions.
60 Rebecca Smithers, ‘Anger at Student Appraisal Plan for Academic Staff: Performance Related Pay Would be Divisive Say Lecturers’ The Guardian (22 Oct 2002).
61 Previously seen as a ‘two-way’ dialogue of institutional evaluation and support – in such a way that the orientation of review is now made explicitly towards the prioritisation of institutional needs (as opposed to individual goals and/or personal development).
62 See, eg, Jayne Barnard, ‘Reflections on Britain’s Research Assessment Exercise’ (1998) 48 JLegEd 467; M Bush, ‘Grading and Degrading the Dons’ THES (7 Mar 1996); D Vick, A Murray, G Little & K Campbell ‘The Perceptions of Academic Lawyers Concerning the Effects of the United Kingdom’s Research Assessment Exercise’ (1998) 24 J Law & Society 536; K Campbell, D Vick, A Murray & G Little, ‘Journal Publishing, Journal Reputations and the United Kingdom Research Assessment Exercise’ (1999) 25 J Law & Society 470; S Court, ‘Negotiating the Research Imperative: The Views of UK Academics on their Career Opportunities’ (1999) 53 Higher Education Q 65. The consequences of selectively funding academic research are widely seen to have transformed the ethos and practices of law schools, not least in terms of the relatively low priority now given to teaching in the development of an academic career: S Court Opportunity Blocks: A Survey of Appointment and Promotion in UK Higher Education (1998). It is not argued that research did not figure in promotions before the first RAE took place in 1986. However, the research ethos is now so fundamental to the academic career in the UK that the majority of academics, as well as the academic institution itself in terms of its mission, see it as such: Dearing Report, above n43 Report 3 at 108.
63 Compare R Boaden & J Cilliers, ‘Quality and the RAE: Just one aspect of performance?’ (2001) 9 Quality Assurance in Education 5. In a development particularly evident in the run up to the 1996 exercise (with moves to limit the effects of the ‘transfer market’ introduced for the 2001 exercise), many UK universities sought to invest heavily in recruiting ‘research active’ staff, with some academics benefiting considerably in this process by obtaining significant increases in their salaries and ‘admin–teaching light’ contracts.
new modes of self-management have become internalised; a process which has, in
turn, had physical, emotional and intellectual consequences\textsuperscript{64} for individuals
resulting, for example, in a heightened form of individualism within universities
(seen as a corollary of the breakdown of collegiality\textsuperscript{65} and the rise of workplace
cultures marked by ‘...the relentless promotion of the self’\textsuperscript{66} Individual academics
in the UK exist increasingly in competition — in the name of efficiency and
effectiveness — not just with scholars in other Schools and Faculties, but also with
colleagues in their own institutions over the securing of esteem indicators and,
importantly, of the space and time in which it might be possible to produce
research in the first place. At the same time, and related to the above, there has
occurred a reframing of what it means to be a ‘successful’ academic, an issue
which has redrawn understandings of the trajectory of the university career
(traditionally, the transition from lecturer–senior lecturer/reader-professor).\textsuperscript{67} The
implications of this latter issue are, perhaps, just beginning to be thought through
as a bifurcation grows between the role of the ‘jobbing’ professoriate and senior
university management.\textsuperscript{68}

3. ‘We’re All Socio-Legal Now?’ Legal Research, the Liberal
Law School and the Limits of the Corporatisation Thesis

A core and recurring theme within the literature outlined above has been the
argument that the corporatisation of universities has brought with it a redirection
of academic activities — a move away from the (traditional) pursuit of
‘disinterested knowledge’ and towards the capitalisation and exploitation of
learning and ‘knowledge practices’. What resulted from this process, it has been
argued, is a growing pressure on, and a marginalisation of, the space and place of

\textsuperscript{64} See further Brooks, above n4 at 32; Jill Blackmore, ‘Level Playing Field? Feminist
Observations on Global/Local Articulations of the Restructuring and Re-gendering of
Topographies of Education Management’ in John Hassard, R Holliday & Hugh Willmott (eds),
Organization and the Body (2000); Craig Pritchard, ‘Know, Learn and Share! The Knowledge
Phenomena and the Construction of a Consumptive-communicative Body’ in Craig Pritchard,
R Hull, M Chumer & Hugh Willmott (eds), Managing Knowledge: Critical Investigations of
Work and Learning (2000); D Jones, ‘Knowledge Workers “R” Us: Academics, Practitioners
and “Specific Intellectuals” in Pritchard et al, ibid; Parker & Jary, above n53; A Talib, ‘The
Continuing Behavioural Modification of Academics Since the 1992 RAE’ (2001) 33 Higher
Education Rev 30.

\textsuperscript{65} On these links between a corporatised and individualised idea of selfhood see Catherine Casey,
‘Corporate Transformation: Designer Culture, Designer Employees and “Post-Occupational
Solidarity”’ (1996) 3 Organization 317; Catherine Casey, Work, Self and Society: After

\textsuperscript{66} Thornton (2001a), above n6; Collier, above n7. On the presentation of the self in the form of the
academic curriculum vitae see N Miller & D Morgan, ‘Called to Account: The CV as an
Autobiographical Practice’ (1993) 27 Sociology 133.

\textsuperscript{67} ‘Successful’ itself is, of course, a problematic term. Raymond Pahl, After Success (1995). For a
different view of the ‘inevitability’ of academic failure see C Elliot, ‘Flophouses’ The
Australian (20 Jun 2001) at 36.

those who might seek to engage in a critical social science scholarship within universities.69 This central proposition has recently been advanced by a growing number of scholars working in the legal academy, both in the UK and internationally, who have become concerned about the potential problems facing those in university law schools engaged in ‘unprofitable … political … or theoretical’ research.70 Yet it is necessary to consider at this stage just how valid this argument actually is in the case of law teaching and legal research in the UK. Does the ‘corporatisation thesis’, as above, accurately reflect what has actually happened in university law schools over the past 20 years?

It is possible, in marked contrast to the above, to present a rather different interpretation of what these developments may have meant for legal education and scholarship in the UK and, in particular, for socio-legal studies. There exists a central narrative — a ‘story’ — about legal education and university law schools from the 1960s to the present day which stands in marked contrast to the picture of research and teaching presented within the corporatisation thesis. A story which, far from there being any marginalisation of critical socio-legal research, suggests that what has in fact occurred over this period has been a ‘breaking out’ of the study of law from ‘... the sterile technocratic straitjacket that [had] accompanied and facilitated [the] postwar expansion of universities’.71 In essence, it has been argued within legal studies in the UK at the present moment that the majority, if not all, university law schools can now be characterised as embracing a broadly ‘liberal’, pluralistic approach to legal education and scholarship. Or, as it has been put by Bradney, what the majority of university law students study in, and what legal scholars teach and research in, is a ‘liberal law school’72 — an institution

69 ‘Socio-legal Studies’ is a notoriously ill-defined and contested term. Writers such as Bradney, above n7, Cownie, above n7 and Thomas, above n3 have tended to adopt the generally ‘broad church’ approach to socio-legal studies, one which is in keeping with the definition adopted by relevant professional associations in the field (such as the SLSA), much of the academic literature and a range of relevant consultation and policy papers, Hillyard & Sim, above n3 similarly accept the general purchase of this broad-based ‘socio-legal’ project, but seek to foreground in their assessment of the political economy of research what they term the position of the ‘critical’ socio-legal academic – a scholar engaged in a sustained moral and political critique of law, an analysis of law’s social consequences and origins. It is this kind of project which, they suggest, has become increasingly uncertain within, and has been undermined by, the ‘new academy’. However, writers such as Bradney and Cownie make it quite evident that it precisely this kind of moral and political critique that is of the essence to – although it does not encompass entirely the diversity of – socio-legal studies. The fragmented focus, conceptual clarity and institutional location of socio-legal research more generally is beyond the scope of this article: see Hillyard, above n7; A Hunt, ‘Governing the Socio-Legal Project: Or What Do Research Councils Do?’ (1994) 21 J Law & Society at 522; Hillyard & Sim, above n3 at 64. Compare Roger Cotterrell, ‘Subverting Orthodoxy, Making Law Central: A View of Socio-Legal Studies’ (2002) 29 J Law & Society 632.

70 Bibbings, above n8. Note in particular the work of Thornton, above n6.

marked by methodological and epistemological diversity; a commitment to a
distinctive academic (as opposed to vocational) stage of legal education; a less
deferential relation to the legal profession and legal hierarchy than has existed in
the past; and, importantly, an institutional acceptance of original, often
interdisciplinary, legal research. Whilst for some it may be the case that socio-legal
studies simply ‘stands alongside’73 the ‘still dominant’ approach of black-letter
law, for others, in contrast, it is socio-legal studies itself which now constitutes the
dominant approach to scholarship in UK law schools.74

The above presents a picture of contemporary legal scholarship which appears
to ill-fit many aspects of the argument made above regarding the consequences of
the rise of the ‘entrepreneurial university’; and there are (at least) four arguments
which can be made to support this very different interpretation of what the changes
which have taken place in Higher Education may have meant for law schools, legal
academics and for socio-legal studies in the UK.

A. Continuity, Equity and the Nature of Work

It is important, firstly, not to overstate the argument about ‘what has changed’ in
universities. There are considerable historical continuities in seeing links between
universities and commercial interests. The core university/economy nexus is itself
far from new. The conflict between alternative images of universities as businesses
and repositories of disinterested scholarship has a long history and was a matter of
debate even at the purported high-point of social liberalism in the 1960s.75 Yet
leaving aside the pragmatic issue of what, at a managerial level, could be seen as
the logic of economic necessity informing the institutional embrace of reform,76 it
is all too easy to set up a critique of change and, in so doing, look at the past
through, as it were, ‘rose-coloured glasses’. Halsey and Trow’s typical ‘British
Academic’77 in 1971 was, for example, in all likelihood white, male and middle-
class. The form of community in which he participated was itself marked by what
Hearn has characterised as a ‘white middle-class, male collegiality’.78 It is this
‘liberal’ autonomous regime of the old universities — of a ‘managerial control,
largely by men, and largely of men’ — which has, on this view, been disrupted by

72 Bradney, above n7; Bradney (1998), above n9; Anthony Bradney, ‘Liberalising Legal
Education’ in Cownie, above n6; Lord Chancellor’s Advisory Committee on Legal Education
and Conduct, First Report on Legal Education and Conduct (1996); compare Bob Hepple, ‘The
73 R Card, Presidential Address, Society of Legal Scholars Annual Conference, De Montford
University, 11 September 2002.
74 Cownie, above n7; Bradney, above n7.
75 See, eg, Edward Palmer Thompson, Warwick University Ltd: Industry, Management and the
Universities (1970) at 155: on ‘the species Academicus Superciliosus’ who is ‘inflated with self-
esteem and perpetually self-congratulatory as to the high vocation of the university teacher’.
76 For what else, it could be argued, might a university do in the face of a decline in core sector
funding other than attempt to maximise income from other sources and, wherever possible, ‘cut
costs’? To engage with the new economic, cultural and political realities facing higher
education?
the new managerial controls from government and the equity agendas with which they have been associated. In short, the changes which have taken place may have actually opened out a university system hitherto based on patronage, elitism and unaccountability to what are — for all their limitations (see below) — far more egalitarian processes and cultures in relation to such areas as recruitment and promotion.

At the same time privatisation measures and the associated drivers of internal and external competition have, over the past (at least) 25 years, been introduced across diverse organisational contexts. A range of institutions — to an arguably far greater degree than has been the case with British universities — have been encouraged to behave in ‘market-like’ ways. Processes of downsizing, audit and concerns about deprofessionalisation are not confined to the academy and, as Beck observes, within the ‘new economy’ work at all levels is characterised by a lack of conceptual clarity and inequality. Many of the changes which have taken place in universities are themselves more complex, contradictory and ‘double-edged’ in their effects than might otherwise appear at first to be the case. For example, far from witnessing any undermining or negation of collegiality within the academy, new technologies have also opened up a range of possibilities.


80 There is, Oakley suggests, something attractive to the marginalised about cultures that stress the need for open procedures and that question such potentially inefficient and unfair concepts as tenure: ‘But when the culture of bureaucracy and commodification is combined with a disregard — flagrant in its explicitness — for the way power operates, the result is bound to be discriminatory’ [Emphasis added.]: Oakley (2001) ‘Foreword’ in Brooks & Mackinnon, above n4 at xiii.


and opportunities for legal academics; indeed, new intellectual communities have been formed as a result of the national and global networks developed through the use of the Internet. Equally, whilst the evidence that academic life in the UK is more demanding than it has been in the past may be compelling (below), it is necessary to treat with caution any suggestion that the law school is, per se, a more oppressive and difficult environment in which to work. For both women and men, for example, Bradney argues, academia remains a field of employment unlike any other in the way in which it facilitates the potential management of the ‘inevitable dependencies’ of home and work.85

B. Resistance and Contestation in the Law School

Bradney has argued, in his recent book Conversations, Choices and Chance: The Liberal Law School in the Twenty-First Century,86 that the ‘corporatising tendencies’ discussed above should not be understood as ‘achieved ends’. Rather, he suggests, there is a tendency in some of the literature on corporatisation to engage with macro-processes, and to paint in ‘broad brush strokes’, in such a way as to overplay the impact of a dominant neo-liberal ideology on specific disciplines and individual practices; and, in so doing, to underplay issues of individual and collective resistance to any such changes. Practices and cultures associated with traditional models of the university, for example, may be more structurally embedded within institutions, and more resistant to ‘top down’ reform, than advocates of the corporatisation thesis allow. Equally, as Bradney and Cownie have argued in their respective recent studies of UK law schools,87 there can be marked differences between what politicians, policy makers and senior university management say law schools should do, and what the academics who work in them actually do.

These issues point to the importance of engaging with the complexity of dialogue, debate and struggle in this area. There is at present in the UK, for example, an ongoing contestation taking place in relation to research and teaching between diverse interests who, undoubtedly, have very different visions of what a university legal education is — and should be — for.88 In terms of university law schools, however, there does appear to be a degree of consensus about the desirability of defending the ‘liberal’ model of education and research, as described above.89 Although reforms to the scope and structure of legal education

85 ‘Working in a liberal law school and seeking to combine avocation and vocation offers the possibility of a way of life that is beyond the reach of most in modern society’: Bradney, above n7 at 203; ‘The environment of the liberal law school thus seems to be best placed to give academics an opportunity to satisfactorily manage their lives’ (at 202).
86 Above n7.
may be sought by elements within the legal community (not least by parts of the legal profession, notably the large commercial law firms) — changes which do map, in their intended effects, to the broad thrust of corporatisation — if anything, Bradney argues, the Law Society for England and Wales and the Bar Council now make requirements of the curriculum less prescriptive than has been the case in the past. In a similar fashion, the institution of a revised regime of audit and accountability introduced in relation to teaching is of a far ‘lighter touch’ than that which had preceded it, a reform precipitated, at least in part, by the hostile reaction the previous system had received from universities, including law schools. Equally, recent developments around the promotion of university links with industry paint a broadly similar picture of resistance and compromise. This, in short, is not a picture of neo-liberalism being simply ‘imposed’ on otherwise passive universities and their law schools.

C. Embracing Diversity: Legal Research and the Law Curriculum

There is, it has been argued, little evidence to support the view that the research agendas and curriculum of UK law schools have become more technocratic and corporatised — at least not in the way that some of the advocates of the restructuring thesis have suggested. Far from being directed to the technocratic needs of the legal profession, ‘research users’ or the economy more generally, for example, the content of contemporary legal research, Bradney argues, reflects a diverse set of research agendas which, ultimately, Cownie suggests, derive from the interests and personal beliefs of individual academics themselves. No one, Bradney states, can ‘tell’ an academic what to do; resistance, as noted above, is

88 The Law Society for England and Wales, eg, recently made a number of suggestions regarding changes to undergraduate legal education which do provide evidence of technocratic and corporatising pressures on law schools. Noting the government’s desire to bring universities and industry closer together, the Law Society has suggested the creation of more exempting law degrees that integrate the academic and vocational stages of training for the solicitor’s profession. However, as Bradney argues, the review process itself provides evidence of resistance to such pressures. Bradney, above n7 at ch 7; Jan Currie, ‘Legal Education Locks Horns with Regulators’ (2002) 2 Lawyer 2B at 1.

89 Note, eg, the responses of professional associations to the above proposed changes: SLSA Response to the Joint Academic Stage Board Consultation on the Relationship of Foundation Degrees to the Law Qualifying Degree (copy with author): also the ongoing consultations around the forthcoming (2008) RAE, which attest to the degree to which the legal academic community is speaking (broadly) with ‘one voice’ on these central issues: Claire Sanders, ‘Academic Lawyers Fight for Resources’ THES (27 Aug 2003).

90 Bradney, above n7 at 164–171.

91 The present QAA model is one of ‘developmental engagement’ in which, although pitched at both discipline and institutional level, and for all the intrusiveness it involves, is less directive in nature than previous teaching audits; and, certainly much less so than that which had at one time been envisaged: Bradney, above n7 at 155–189; Joe Plomin, ‘Report Details “Lighter Touch” University Inspections’ The Guardian (6 Nov 2001).


93 Cownie, above n7.
always possible (perhaps, it is implied, inevitable for the ‘true’ academic). Servicing the economy is thus, on this argument, at best a marginal consideration in terms of what motivates most legal academics. In addition, and for all the continued dominance of the ‘core’ and private law subjects, the contemporary law school curricula in the UK is one in which, generally, contextual, socio-legal, ‘critical’, ‘essentially academic’ subjects abound and continue to prove popular with students, notwithstanding the financial imperatives which undoubtedly inform their choice of degree subjects and future careers.

It cannot be assumed, moreover, that essentially commercial/business orientated subjects are necessarily taught in a way geared to the creation of ‘new knowledge workers’. Bearing in mind the influence of the RAE in this regard — not least in undermining the academic status of the traditional, explanatory doctrinal textbook — there is no reason to presume that the teaching of, say, commercial law or company law is more doctrinal in nature in terms of delivery and assessment methods, and more resistant to theory, than other more traditionally contextual subjects. Both recent empirical work on law schools, and the stated research aims of legal academics themselves within their own published work support what is, at the very least, a more complex picture in this regard; one which, Cownie suggests, indicates that many legal academics do see themselves as engaged in a broadly defined ‘socio-legal’ approach to law, even if it is the case that they are working in areas that they recognise would be seen by others as traditionally doctrinal in nature.

In sum, far from the curriculum of the legal academy being dominated by a technocratic turn, law schools in the UK continue on this view to be methodologically and epistemologically diverse; and, compared with the past, more — not less — open to a range of diverse perspectives and intellectual debates.

D. ‘Getting On’: Socio-Legal Studies and the Changing Academy

Following on from this picture of research and teaching, it is revealing to consider the career trajectories of scholars who have engaged in, or who have been otherwise associated with, socio-legal approaches to law (including those who entered the legal academy during the 1960s and 1970s). As has been noted in relation to other jurisdictions and disciplines, there is a case to be made that ‘once outsiders’ can, over time, ‘become insiders’. Across many UK universities

94 Bradney, above n7.
96 Jane Pitcher & Kate Purcell, ‘Diverse Expectations and Access to Opportunities: Is There a Graduate Labour Market?’ (1998) 52 Higher Education Q 179. As Bradney, above n7 has argued, it cannot be assumed that legal academics take the same kind of view as students (or senior university management) as to the purpose of the law curriculum; note also David Halpern, Entry into the Legal Professions: The Law Student Cohort Study: Years 1 and 2 (1994) at 40; Collier, above n7.
97 Cownie, above n7.
98 See, eg, and generally, the arguments contained in Thomas, above n3.
individuals engaged in socio-legal research are now in senior managerial positions within their institutions; key figures, either within central university administrations (as Deans, Faculty Directors of Research, Pro-Vice Chancellors and so forth) or else Heads of law schools. As such, they are in positions to influence, at least to degrees, the future strategic direction of law, both in the university in which they work and in the field of legal education.

This argument can, however, be taken further in the UK context in the light of the development of the RAE. There is reason to believe that legal academics and university law schools have been particularly well placed to reap the benefits of many of the changes described above. Indeed, it has been suggested, the rise of the ‘performative university’ has, if anything, served to advantage the socio-legal scholar, a view certainly supported by one interpretation of the results of the 2001 RAE. Thus, we have seen over the past 15 years the proliferation of new socio-legal journals, the emergence of energetic professional associations and a shifting staff profile in law schools, with the result that there is a now ‘critical mass’ of socio-legal scholars in many, if not all, UK university law schools. As Thornton observes, law generally is still perceived across many universities (internally at least) as falling on the ‘applied’ side of the research equation, and empirical socio-legal studies in particular would in this regard appear to lend itself well to the demands of the new university and new economy (although see further below).

Thus, in the UK, as elsewhere, many law schools have established lucrative links with the legal profession, business and industry, in the form of paid consultancies, continuing professional development courses and other post-degree vocational provision. There is considerable evidence to suggest, in addition, that the introduction of performance matrices, whereby individuals are judged on clear outcomes, as above, has itself well-served not just many socio-legal and critical legal academics, but also the field of legal studies in general. The results of the 2001 RAE indicate that 63 per cent of law units of assessment received the highest 5 or 5* rating (compared, for example, with 21 per cent in the case of Social Policy). It has been estimated that 85 per cent of UK legal academics now work in such ‘top’ rated departments. The RAE results have been widely interpreted as having valued legal research on the basis of its originality and distinctive contribution to knowledge, rather than its ‘use value’. At the same time (and no doubt to the surprise of some who invested considerable energies in such activity) it appeared that external research grant income was not accorded a particularly high priority in determining the grades of individual Units of Assessment in 2001.

100 Hillyard, above n7.
101 Alongside changes in the scope and content of some well-established legal journals: note, eg, the recent development of *Legal Studies: The Journal of the Society of Legal Scholars*.
102 Thornton (2001a), above n6.
103 Hillyard, above n7.
The spread of law schools in the UK achieving the highest 5* grading in the most recent assessment suggests, moreover, that neither departmental size nor institutional predisposition to contextual, critical work precluded the award of a high rating.\textsuperscript{104}

This is, in short, hardly a picture of a discipline under threat. The recent upgrading in the UK of the Arts and Humanities Research Board to the status of a Research Council serves to further signal a commitment to the promotion of the ‘non-applied’ social sciences in UK universities.\textsuperscript{105} None of the above is to argue that critical socio-legal scholarship is necessarily accepted or seen as legitimate within every UK law school. It is to suggest, however, that developments have taken place which question aspects of the corporatisation thesis, as outlined in section two. Far from undermining socio-legal studies, the nature of the changing academy described above can be seen to have \textit{served to facilitate} a more far-reaching and complex transformation in the form, content and scope of legal scholarship.


Newman …would not have recognized the government’s concept of glorified further education colleges with a sideline in helping local business. There may be a managerial logic in taking this route, but such institutions will find it hard to recruit high-caliber staff or students.\textsuperscript{106}

Bradney’s recent account of the ‘liberal law school in the twenty-first century’\textsuperscript{107} draws on a formidable body of historical, philosophical and policy-based research. And it is in keeping with the spirit of resistance and contestation which informs his analysis of the legal academy that it is important to recognise the degree and scale of the uncertainty and disagreement which underscores many aspects of the debate now taking place in the UK about university restructuring. I have suggested above that it is certainly possible to present a different reading of what these changes may have meant for law schools and for socio-legal studies. I wish now, by way of drawing this discussion to conclusion, to make two points which do suggest that, notwithstanding the above, there may well be reason to raise concerns about the future development of anything like a distinctively critical socio-legal studies in the UK — although not, I wish to argue, for the kinds of reasons that the corporatisation thesis would, at least on the surface, seem to suggest.

\textsuperscript{104} In the case of one institution, Keele University, a relatively small law school with an international profile in the field of gender and sexuality work secured a 5* rating, the highest grading possible. The RAE panel themselves made a point of recognising, in the list of subject areas to be embraced by the law assessment, bodies of scholarship such as feminist legal studies.
\textsuperscript{105} See <http://www.ahrb.ac.uk/> (17 Oct 2004).
\textsuperscript{107} Above n7.
A. Counter-Tendencies: Research, Vocationalism and the Legal Profession

There is evidence to suggest that the various RAEs have served (some) socio-legal scholars well. There is no guarantee, however, that the framing of assessment criteria adopted in the past will take the same form in the future. The details of the 2008 exercise in this respect are, at the time of writing, unclear.\(^{108}\) It is widely agreed, however, that much will depend on what will be considered to be the appropriate performance indicators for each discipline. If it were to transpire, for example, that external grant income is a key measure of research productivity it is likely that many UK law schools (and, certainly, the smaller–medium sized institutions) would stand the risk of being seen as weak in terms of their research performance.\(^{109}\) At the same time there exists, we have seen above, powerful internal organisational imperatives across many UK universities arising from senior management to engage with business and industry, maximise ‘third strand’ income and embrace applied research agendas. Meanwhile the kinds of ‘messages’ being conveyed at an institutional level within the dominant cultural economy in which universities now operate (for example, by Faculty Research Committees, by some School Research Directors) — not least regarding what is seen to constitute a ‘gold standard’ (RAE acceptable) publication outlet — further runs the danger of entrenching established hierarchies of journals, publishers and institutions in such a way as to marginalise work published in overtly critical, less established media. The parameters of ‘acceptable’ research, in short, are not fixed, and it seems beyond question that internal pressures are now being placed on many legal academics in the context of the corporatised university which militate towards the promotion of an expectation that ‘... [research] results should point to clear and direct policy implications’.\(^{110}\)

In the case of law schools, and running alongside the above, it is important not to downplay the power of those constituencies who are, in a political and economic climate of apparent neo-liberal hegemony, seeking to promote and institute the broader corporatisation of the law school curricula. For all the robust defence of liberal legal education made by writers such as Bradney there is reason to believe that the influence of the legal profession on law schools — and of the large city and corporate provincial firms in particular — is considerable and may be growing.\(^{111}\) And this, importantly, is not just a matter of the control and regulation of the curriculum via accreditation requirements, in relation to which the profession has recently been ‘pushing for change’.\(^{112}\) Rather, it is the cultural

---


\(^{109}\) Thus exacerbating the division between a ‘super elite’ and the rest of the sector. See n152 below.

\(^{110}\) Hillyard & Sim, above n3 at 56.


\(^{112}\) See above n88.
relationship between the university law school and the legal profession which is — in the context of an increasingly privatised and marketised Higher Education sector — shifting in more subtle ways. As the twin pincers of privatisation and widening participation lead to ever higher levels of student debt, it is perhaps unsurprising that the large firms should hold a powerful appeal for many law students. The elite status of these firms has long meant they have, as Lee observes, an almost ‘...magnetic quality’ in attracting the ‘...most highly qualified candidates from the most prestigious institutions’; 113 The influence of corporate legal employment, however, and of the ethic of corporate endeavour they embody, cannot be confined to questions of student recruitment; nor to the way ‘cash-strapped’ law schools now increasingly seek the ‘grace and favour’ of firms in the form of potential alumni donations, sponsorship of academic posts, student competitions and so forth.114

Rather, the wider processes of corporatisation are, as Thornton puts it, themselves helping to shift ‘...the orientation and purpose of universities generally from intellectual inquiry to instrumentalism and vocationalism’. 115 ‘There has occurred an added impetus to the drive towards a more practice-centred and market-oriented model of legal education.’ 116 Many UK law school cultures and practices have, of course, historically facilitated the gravitation of considerable, although by no means all, numbers of law students to commercial/business-oriented subjects as the embodiments of ‘real’ and, in career terms, ‘useful’ law. The logic of privatisation, however, along with the cutting back, in some institutions at least, of non-core ‘luxury’ courses, can be seen to facilitate a further reorientation within the law curricula towards commercial-oriented subjects and practical skills — now widely seen as the particularly ‘salable’ features of the law curricula within an international market. Law students (as fee-paying consumers or customers), their parents (increasingly) 117 and the legal profession — positioned as key legitimate ‘stakeholders’ in the contemporary law school — each appear concerned to promote a model of legal education which will produce, if not credentialised proto-lawyers, then at least individual ‘knowledge workers’ able to start earning as much as possible, just as soon as they graduate.118

113 Calculated from The Lawyer Student Special (2000), as quoted in Robert Lee, “‘Up or Out’ – Means or Ends? Staff Retention in Large Law Firms” in Thomas, above n10. In the 1999 intake of trainee solicitors, the top 10 firms by size sought to recruit 930 trainees, accounting for over 20% of all training contracts offered that year.

114 As part of the wider thrust whereby universities are now encouraged by government to raise finances from the private sector: Tom Baldwin, Tony Halpin & Rosemary Bennett, ‘Universities Must Raise Private Cash’ The Times (4 Dec 2003).


116 Id at 45. It is Thornton’s argument that ‘...law schools, too, [appear] magnetically drawn to the wealthy firms and their perceived needs in design of their curricula’ (at 40).


118 It appears beyond doubt that the model of knowledge as commodity and the privatisation of higher education have each impacted on the nature of the expectations of the – widely seen to be increasing – demands of the ‘student as consumer’.
It is in such a context that there are signs that the ‘purely academic’ is indeed being positioned as less attuned to the dominant economic, cultural and political climate and ‘…the populist message of neoliberalism …that one should not waste time on knowledge lacking use value’. Whilst it is the case that the majority of UK undergraduate university law students do not go on to practice law and ‘…are not all able to obtain positions as practicing lawyers, the institutional aspiration that they will do so’ remains a powerful influence on the inclusion of an increasingly marketised curriculum. [Emphasis added.] The perceived graduate employment needs of the profession, and the demand for market-attractive and increasingly international focused courses, itself appears to feed through to considerations of law school staffing, with all the related implications that this has for recruitment and retention strategies at the level of the institution.

B. Staffing the Law School: A ‘Coming Crisis’?

The declines in salary, status and autonomy of academic careers have roots and repercussions far larger than the SLSA [Socio-Legal Studies Association] or the [Nuffield] Foundation can realistically address.121 The above discussion of research, curriculum and the market raises concerns specific to the discipline of law in the UK. There is, however, no reason to think that law schools are, in a more general sense, ‘immune’ from a number of wider pressures impacting on the academy. One might expect the processes of privatisation to support the institutional promotion of a model of ‘funder friendly’ interdisciplinarity in law; and that, within the technocentric, ‘research user’ focused academy, empirical policy and practice-orientated socio-legal research would fare well. And yet, it appears, something else may be happening. There is said to be at present a ‘crisis in waiting’ of research capacity in the field of socio-legal studies. A major inquiry is underway at the time of writing seeking to explore this question, to identify the scale of the problem and set out possible solutions.122 ‘Research capacity’, of course, covers a range of issues. It encompasses concerns about the level and mix of skills within the academic community, as well as the increasing pressures on many academics to find the time to undertake research in the first place. In the context of socio-legal studies, however, it has come to embrace a specific concern ‘…over the numbers of new or younger researchers [entering the academy] and what this may mean for the future’. ‘Alarm bells are ringing’,123 it is said, in particular amongst socio-legal research funders and users, about the numbers of individuals being trained in quantitative skills and evaluation methods. There are ‘very few’ socio-legal applications to research grant schemes

119 Thornton (2001a), above n6 at 44.
123 Witherspoon, above n121.
‘from new or younger socio-legal researchers’. There is, at best, a patchy and minimal training program in socio-legal methods within UK law schools; and there are ‘few students wishing to undertake socio-legal research’ in applications for studentships.124

It is, perhaps, surprising that this should be the case, given the picture painted above by Bradney, and others, of the generally healthy state of socio-legal studies in the UK. This recent debate has been focused, primarily, on evaluative, empirical socio-legal research — the very kind of ‘useful’ research which, advocates of the corporatisation thesis would suggest, has been institutionally encouraged within the new academy.125 It is important, however, to place these developments in the context of what is now widely seen as a more general and growing concern about recruitment and retention in UK universities. For some time now law has been one of a number of disciplines identified as experiencing particular difficulties in relation to recruitment, especially at senior levels and in relation to certain subject areas (notably, commercial and company law).126 The ongoing Nuffield Inquiry on Empirical Research in Law127 is focused on empirical socio-legal studies. There is reason to believe, however, that the corporatisation of universities may be having some far wider consequences in terms of broader perceptions of the legal academy as a ‘worthwhile’ career.

Across the higher education sector in the UK the declining salaries, status and autonomy of academics have, over the past two decades, been the subjects of numerous studies and research reports. And what has emerged is a picture of an academy beset by problems of low morale and long working hours;128 pervasive work-related stress and, at times, ill-health;129 of an embedded institutional

124 Ibid.
125 The identification of a problem has been made, indeed, not so much by legal academics themselves, but by research users and funders concerned about a growing disjuncture between this ‘burgeoning demand for socio-legal evidence’ on the part of policy makers and government – ‘more aware of the need for socio-legal research’, Witherspoon, above n121, and the limited capacity of universities to provide such research. The urgency of the debate is seen as arising because of this concern that policy makers are becoming unable to turn to ‘tough-minded’ socio-legal scholars for ‘…current and forthcoming policy changes …to be based on and evaluated by robust empirical evidence’: ‘there may not’, it is suggested, ‘ …be enough capacity to meet the policy makers demand for program evaluations’, ibid. See also Tracey Varnava, ‘Building Research Capacity in Legal Education’ (2002) 38 SLN at 4; David Cowan, Sally Wheeler & Paddy Hillyard, ‘What is the State of Socio-Legal Training in UK Law Schools?: SLSA Questionnaire Results’ (2003) 39 SLN 1 at 3. The ESRC set up a ‘Research Users Forum’ in 1994, comprised of over 30 members drawn mainly from key institutions of government and bodies representing legal services and private sector institutions.
126 J Hurstfield & F Neathy, Recruitment and Retention of Academic Staff in UK Higher Education 2001 (2002) at 10: ‘Pay levels were cited by many as the main reason for …problems. Higher pay offered by the private sector was viewed as a key factor impacting upon institutions’ ability to attract and retain …some groups of academic staff – notably those in law, IT and engineering’ [Emphasis added.]; ‘The subjects that were particularly problematic were accountancy, law and economics’ (at 57); see Recruitment and Retention in UK Higher Education (2000). See generally Maurice Kogan, I Moses & E El-Khawas, Staffing Higher Education: Meeting New Challenges (1994), esp at 35–50.
bifurcation between research and teaching (alongside the increasing emergence of differential ‘career tracks’); and a widespread erosion of democratic control within the context of an increasingly low-trust environment resulting from the centralised and directive management practices outlined in section two.\textsuperscript{130} It is particularly important, in considering this context, not to overplay the purported equity ‘positives’ associated with the processes of corporatisation, as discussed above. Whilst some research does point, for example, to cracks in the ‘glass ceiling’, and to a degree of gender convergence,\textsuperscript{131} it has also been argued that what may more accurately be seen as taking place at present is a far more complex reframing of gender relations in such a way that, across universities, it continues to be (white)\textsuperscript{132} men who remain the overwhelming beneficiaries of a university

\textsuperscript{128} Note J Wills, ‘Labouring for Love? A Comment on Academics and Their Hours of Work’ (1996) 28 Antipode 292. Bradney neatly, and light-heartedly, observes: ‘In the universities, families are frowned upon; new academics have to take an oath to abstain from all personal relationships for the first 10 years of their careers, agree to take their meals by intravenous injection and promise to go to the toilet only on every second Sunday’: Anthony Bradney, ‘Rejoice, Rejoice’ (2001) 23 SPTL Reporter 1; Association of University Teachers (AUT), Long Hours, Little Thanks: A Survey of the Use of Time by Full-Time Academics and Related Staff in the Traditional UK University (1994); Phil Baty, ‘Get a life? Not With Our Hours’ THES (22 Aug 2003) at 7.

\textsuperscript{129} One recent survey of academics in the UK found that 25% had suffered from a stress related illness during the last 12 months which was serious enough to warrant taking time off work. 53% of academics reported poor psychological health, including stress, sleeplessness and depression, while 44% of university lecturers had seriously considered leaving higher education and 49% had considered early retirement over the past few years; G Kinman, Pressure Points: A Survey into the Causes and Consequences of Occupational Stress in UK Academic and Related Staff (1996). Kinman found that, on average, more women academics than men reported that the pressure to publish had increased significantly (para 9.11.2); and that women, rather than men, reported the difficulty balancing family and workplace commitments as a source of stress (para 9.11.12). See also I McNay, The Impact of the 1992 RAE on Institutional and Individual Behaviour in English Higher Education: The Evidence from a Research Project (1997). Compare Geoff Maslen, ‘Stressed Dons Left Suicidal’ THES (31 Mar 2000) reporting the findings of the Australian study by the National Tertiary Education Union, Unhealthy Places of Learning (2000). See also Jan Currie, ‘The Effects of Globalization on 1990s Academics in Greedy Institutions: Overworked, Stressed Out and Demoralized’ (1996) 37 Melbourne Studies in Education 101; Donald Mcleod, ‘Universities “Bullying Weak Research Staff”’ The Guardian (9 Jun 2004); Phil Baty, ‘Academic Life is Hell’ THES (15 Mar 2002) at 4; Kate Coxon, ‘A Degree of Stress’ Guardian Education (19 Feb 2002) at 12; Elizabeth Thorsen, ‘Stress in Academe: What Bothers Professors?’ (1996) 31 Higher Education at 471; Polly Curtis, ‘Lecturers Stressed by Student Influx’ The Guardian (31 May 2002).

\textsuperscript{130} The erosion of collegiality experienced in the higher education sector which, interestingly, stands in marked contrast to governmental attempts to counter a decline of collegiality and foster ‘community’ in a number of other contexts.

\textsuperscript{131} Paul Hill, ‘Women Crack Glass Ceiling’ THES (25 Jun 2004) at 1. Thus, whilst gender stereotyping and benchmarking (all too clearly) still exist in the academy, it has been argued that there do appear to be real opportunities for advancement, recognition and empowerment for (some) women which did not, perhaps, exist in the past: see Wells (2002), above n10. At the time, and recently, it has been suggested that ‘…men are being deterred by a decline in the perceived status of higher education fuelled by low pay and increased regulation’, that ‘[M]en leave the lower status academy to women’: Hill, ibid; Editorial, ‘The Future’s Female’ THES (25 Jun 2004) at 12.
system\(^{133}\) in which, increasingly, visible quantifiable achievements are seen to denote productivity.\(^{134}\) For some, indeed, what has actually taken place can be more usefully described as a remasculinisation of university practices and cultures.\(^{135}\) The new emotional economy fostered by the corporatised university\(^{136}\) has itself been seen to promote distinctively ‘masculinist’

\(^{132}\) With regard to issues of race and ethnicity there is little reason to suggest that there has occurred a significant shift away from the socio-economic and cultural homogeneity of the legal academic community, as noted by Wells (2001), above n10 as being predominantly white, middle-class and able-bodied. According to AUT figures (2002), 96% of employees in ‘old’ (pre-1992) universities are white: ‘Ethnic Staff Suffer 12% Pay Gap’ \(THES\) (31 May 2002) at 4. I have argued elsewhere, above n7, that, if anything, the complex interrelation of the shifting hierarchy of UK law schools, together with the move to a mass higher education system, means that what is taking place at present will result in the further cultural and financial empowerment of those who are already privileged in terms of their social, economic and cultural capital. It is not difficult to foresee the potential implications of this for many working-class and ethnic minority students seeking a career in law. At the same time, it is important to recognise the increasingly high profile of concerns around sexuality and discrimination in the sector: see AUT, Lesbian, Gay and Bisexual Participation in UK Universities (2002); Donald MacLeod, ‘I Live a Lie Every Day’ \(The Guardian\) (26 Mar 2002).


\(^{134}\) For some (including this author), of course, ‘[w]e would all be better off if academics wrote fewer but better books’: Lynne Segal, ‘Opinion’ \(The Guardian\) (13 Feb 2001).

cultures, for example, in relation to managerialism, the feminising and devaluing of teaching and pastoral work, in the pursuit of (relentless) publication productivity and in the positioning of the securing of the large research grant as the ‘new patriarchal heartland’ of the academy. The physical and psychological dimensions of each of these processes would themselves, research suggests, appear to be playing out in some very different ways for women and men at different stages of the life course.

It is not difficult, in such a context, to see connections between the present research capacity debate in law and these questions about broader perceptions of the legal academy. If the well-documented ‘proletarianisation’ of university

---


137 University restructuring has been seen to have had consequences for the gendered composition of management in its embrace, eg, of a corporate expectation that managers would work longer hours and, in some cases, be contactable at any time (the culture of ‘get in early, out late’): David Collinson & Margaret Collinson, ‘Delaying Managers: Time-space Surveillance and its Gendered Effects’ (1997) 4 Organization 375 at 399. The discourses of the new corporate management styles, Kerfoot and Knights suggest, are particularly well suited to the patterns of a ‘compulsive masculinity’ which can, in turn, lead to a ‘disembodiment’ in the continuous individual pursuit of the new targets and challenges within the overarching ethos of performativity (something experienced by both men and women, although not necessarily in the same ways): Deborah Kerfoot & David Knights, ‘The Best is Yet to Come? The Quest for Embodiment in Managerial Work’ in David Collinson & Jeff Hearn (eds), Men as Managers, Managers as Men: Critical Perspectives on Men, Masculinities and Managements (1996). The new management practices required by the restructured university are characterised by such ‘overly rational, disembodied and instrumental pursuits’ which ‘make modern management particularly important sites for the reproduction of masculine discourses and practices’ (at 97). (Emphasis added.) See further Lalage Bown, ‘Beyond the Degree: Men and Women at the Decision-making Levels in British Higher Education’ (1999) 11 Gender & Education 5; Jeff Hearn, ‘Men, Managers and Management: The Case of Higher Education’ in Whitehead & Moodley, above n78; David Collinson & Jeff Hearn, ibid; Catherine Itzin & Janet Newman (eds), Gender, Culture and Organizational Change: Putting Theory into Practice (1995); Judy Wajcman, Managing Like a Man: Women and Men in Corporate Management (1998); Amanda Sinclair, Doing Leadership Differently: Gender, Power and Sexuality in a Changing Business Culture (1998); Kathleen Jones, Compassionate Authority: Democracy and the Representation of Women (1993).


140 See the work of Pritchard, above n49 at 64; Yeatman, above n54. AUT Research, published July 2004, reports that ‘male academics [are] almost twice as likely as female to be described as research active’; the conclusion reached is that ‘women are discriminated against by the RAE’; AUT, Academic Staff 2002–3: Gender and Research Activity in the 2001 Research Assessment Exercise (2004). As to possible reasons why this is the case see Clare Burton, ‘Merit and Gender: Organisations and the Mobilisation of Masculine Bias’ (1987) 22 Aust J Social Issues 424; Clare Burton, The Promise and the Price: The Struggle for Equal Opportunity in Women’s Employment (1991). See also Donald MacLeod, ‘Pay Tables Highlight Gender Gap “Scandal”’ The Guardian (23 May 2003).
academics is a long-standing theme in the Higher Education literature, the ambiguous standing of legal academics vis a vis the status and potential financial rewards of professional practice raises a number of concerns about the human resource implications of the corporatised academy. Many of the generation of socio-legal academics who entered universities during the late 1960s and 1970s are now nearing retirement. In some cases these individuals have been presented with the attractions of early retirement packages which allow them to continue to take on teaching responsibilities and other professional commitments on an ad hoc basis. At the same time, however, and for a younger generation of law students, whilst the market-led drive towards increasing international students does provide vital income streams for universities, there appears to be, across many UK institutions, increasing problems attracting home PhD students. For both law students, in considering their future careers, and for some early career academics, when faced with the choice between ‘shaping up’ or ‘shipping out’ of the emotional economy of the ‘academic as new knowledge worker,’ as outlined above, there does appear reason to believe that leaving the academy — regardless of whether it is to be into the harshly competitive, but potentially financially lucrative, world of legal practice — appears, for many, an increasingly attractive option. Importantly, for those who may have once in the past considered the academy the ideal place for the ‘critical thinker,’ the ‘independent’ scholar, there now exist a range of new cultural industries which provide, potentially, more

---


142 Dearlove, above n50.

143 Something which anecdotal evidence suggests is increasingly taking place, illustrating not only a demographic shift in universities but also the erosion of the ‘job for life’ model in higher education as new attitudes to work and career, and innovative orientations to the labour market, emerge amongst middle-class professionals. Higher Education Statistics published in 2003 point, generally, to an increasingly aging profession, with almost half of UK academics being 45 or over.

144 See eg, Lee Elliot-Major, ‘A New Bridge To Cross’ The Guardian (19 Feb 2002) at 9. Although, as noted above n15, this issue is itself mediated by local context, with the problem particularly pressing in England and Wales rather than Scotland.

145 Beyond the legal academy, the issue of ‘drift’ from universities has become a recurring theme within both the professional and general press in the UK: see eg, ‘Opinion: Why I Have No Regrets about Having Left Academe’ THES (14 Nov 2003) at 16; M Tytherleigh & C Cooper, ‘Lives on the Rocks: Jobs in Academia Carry Too High a Personal Price’ THES (3 Oct 2001) at 16; Rebecca Smithers, ‘Third of Academics Want to Quit’ (citing poor pay and workload as primary reasons) The Guardian (10 Mar 2003).
lucrative and possibly challenging work environments more attuned to the complex fissures which have taken place between the ‘ascetic’ (non-commercial) and ‘postmodern’ middle-class more generally.146

5. Concluding Remarks

Though individualistic self-interest and consumer desires are core parts of who we are and nothing to be ashamed about, they are not all of who we are …. We know that our values, capacities, aesthetics, and sense of meaning and justice are, in part, created and nurtured by communal attachments.147

This article has considered the impact of various dimensions of the restructuring of universities on academic institutions and identities — on an ‘ivory tower’ confronted by the new realities of a global knowledge economy manifest in the processes, described above, of corporatisation, privatisation and commodification; on the rise of a ‘metallic new entrepreneurialism’,148 a position in which ‘...the pursuit of knowledge driven by curiosity, that is, knowledge for its own sake, is no longer regarded as valuable because it does not contribute to wealth creation’.149

Drawing on the growing international literature concerned with the application of business practices and managerialism to the field of higher education, I have suggested that there are growing signs that university legal education and scholarship in the UK is, increasingly, being transformed into an industry preoccupied with economic rationalism, efficiency and the generation of income. The new model university is itself a quasi-capitalist, technocratic, instrumental institution increasingly concerned, primarily, with the production (the teaching, the selling) of ‘useful knowledge’.

The embrace of the term ‘liberal legal education’ may continue to have a rhetorical power across many universities. It is important to remember, however, that for many legal academics in the UK the purpose of the law school has long been, and continues to be, primarily, the training of legal professionals. The idea of the liberal law school itself, as expounded by writers such as Bradney and Cownie, stands in an uneasy relation to neo-liberalism. There are, I have argued, signs that what may well be occurring in the present climate is, as Kelsey predicted, a ‘withering away’ of ‘non-market friendly’ sectors of curricula.150

---

146 On class fragmentation and social change within the legal academy, see Collier, above n 111.
Note, generally, Mike Savage, P Dickens & T Fielding, Property, Bureaucracy and Culture: Middle-Class Formation in Contemporary Britain (1992). See also Mike Savage & Tim Butler (eds), Social Change and the Middle Classes (1995); Rosemary Crompton, ‘Consumption and Class Analysis’ in Stephen Edgell, Kevin Hetherington & A Warde (eds), Consumption Matters: The Production and Experience of Consumption (1996); Tim Butler, Gentrification and the Middle Classes (1997); on law see Collier, above n 111.


149 Thornton (2001a), above n 6 at 43: ‘Universities now generally evince little patience with basic or theoretical research. As the only credible goal of research is power, not truth, the humanist goals of social liberalism are regarded as effete’.

150 Kelsey, above n 8.
fact that socio-legal studies has become an accepted and established feature of many (if by no means all) university law schools in the UK does not detract from the force of the pressures which are, in the context of the intellectual and emotional economy fostered by the corporatised university, serving to marginalise certain kinds of scholarship. There have been, it is important to remember, institutional (and, indeed, individual) ‘winners’ and ‘losers’ of the diverse processes outlined above, and it would be profoundly misleading to see particular responses to global practices as necessarily ‘forced upon’ universities. It is necessary in this regard to consider how the hierarchy of the established pre–1992 Russell Group universities is being realigned as a tier of ‘research elite’ universities, and their law schools now seek to reconfigure their place and purpose in the sector in the context of a government policy of research concentration. In such a context there is growing reason to question whether those socio-legal scholars who, only so very recently, lauded the demise of doctrinalism in law schools — and the influence of the legal profession — may well themselves, perhaps, have been speaking too soon. For many scholars working outside the elite institutions organisational pressures and demands are such that ‘everyday’ academic life is, for the majority, far removed from the model of a unity of ‘vocation and avocation’ underscoring Bradney’s recent analysis of the liberal law school.

Why, ultimately, are these questions about the changing nature of (legal) academic life worth asking? Identity politics are grounded in institutional location. They embrace questions not just about the work individuals do (and who they work for) but also about the facilities and material conditions which allow for particular kinds of social practices — let us say, the production of certain kinds of legitimate ‘legal’ research. Writing of recent developments in the UK Tombs and Whyte have recently ‘urge[d] colleagues [in law] to joint the debate’ about Higher Education and research capacity. Whatever the differing views individuals in law schools internationally may have of the processes transforming universities —

---

151 Some institutions, eg, have benefited from the increased flow of industry funds into areas for research and development and a heightened differentiation among faculties in terms of ‘winners’ and ‘losers’ (itself identified as a consequence of globalisation): note the divergence between the ‘everyday’ experience of academics in the 5* ‘golden triangle’ institutions (London, Oxford, Cambridge: a ‘diamond’ if one includes Manchester), ‘mid-table’ Russell Group ‘redbricks’ (such as the university in which I work), and the post-1992 ‘new universities’ (formerly the polytechnics): see ‘Elite Plans to Go It Alone Over Pay’ THES (8 Dec 2000); Chris Johnston & Aian Thomson, ‘Golden Diamond Outshines Rest’ THES (23 Jul 2004) at 10–11; Donald MacLeod, ‘Fears of Elite Split: New Universities Feel the Pressure as Gulf Widens’ The Guardian (10 Sep 2002).


153 An answer to which can be found in Janet Finch, ‘Foreword: Why be Interested in Women’s Position in Academe?’ (2003) 10 Gender, Work & Organization 133.

154 Above n5.
and in recognising that the local contexts in which we live mediate experience of these processes — underscoring the concerns which are increasingly being expressed about research capacity in law is a fundamental question about what is presently happening to many aspects of academic life and to academic identities — to what it means to ‘be’ a legal academic; questions which, it appears, have a resonance for many of us who work in law schools and

…who are experiencing an increasing sense of alienation in their everyday working lives from the central goals that led many of us into universities in the first place: the idea that we might be able to make some contribution, however small, to the forms of knowledge and understanding that make living on this planet a more comfortable and intelligible destiny. [Emphasis added.] ¹⁵⁵

This article has sought to contribute to a growing international debate on this issue. There are, of course, different ways of doing things; it may be that ‘we simply lack sufficient publicly acknowledged experience and evidence of alternative visions’. ¹⁵⁶

¹⁵⁵ Oakley, above n80 at xiii.
¹⁵⁶ Ibid. See also Janice Newson, ‘Conclusion: Repositioning the Local Through Alternative Responses to Globalization’ in Currie & Newson, above n4.
Changing Legal Education: Rhetoric, Reality, and Prospects for the Future
MARY KEYES* AND RICHARD JOHNSTONE†

Abstract

This article examines the extent to which Australian legal education has transcended the traditional model of legal education which dominated most law schools until the mid-1980s, and outlines a modest agenda which might guide further development in legal education in Australia. The article outlines challenges to the traditional model, changes in legal education following the 1987 Pearce Report, and identifies factors that impede lasting and profound change. It concludes by proposing a series of issues which might be addressed by law schools seeking to provide a learning environment in which students can actively engage in learning about law, in a framework that does not simply prepare students for private legal practice.

1. Introduction

Australian legal education has changed substantially in the last 30 or so years. In 2000, Le Brun suggested that:1

Legal education in Australia is markedly different today from what it was, say, a decade ago. Changes in curriculum, teaching approaches, and assessment strategies have occurred that could not have been easily predicted in the late 1980s.

We do not doubt that many of these changes are for the better. The purpose of this article is critically to assess the nature and extent of changes which have occurred in Australian undergraduate legal education since the late-1980s.2 We argue that change has been uneven, often temporary, and has struggled entirely to transcend the traditional model of legal education.

* BA LLB (Hons) Qld, Grad Cert Higher Ed, PhD Griff, Senior Lecturer, Griffith Law School.
† BBusSci (Hons) Cape Town, LL B (Hons), PhD Melb, Professor, Director of the Socio-Legal Research Centre, Griffith Law School. We thank two anonymous reviewers for their careful and detailed comments.
We begin by describing the key characteristics of the traditional model of legal education, which dominated many Australian law schools until the 1980s. We then briefly canvass two sources of challenge to Australian legal education: the recommendations of various reports into legal education and the insights from various schools of contemporary teaching and learning theory. Drawing on a recent report into legal education in Australia, we assess the current state of Australian legal education, with reference to the overall funding environment in which legal education seeks to operate; developments in curricula, and improvements in approaches to teaching and learning in law.

We then argue that there are significant impediments to change in Australian law schools: in the form of demands of students and the legal profession; the unwillingness of many academics to look beyond protecting their own subjects to engage in broader collective curriculum development and to engage with the educational literature; and the inadequate resourcing of law schools.

We conclude with some key challenges facing tertiary legal educators. The first challenge is for Australian law schools to rethink their relationship with the legal profession, to ensure that law schools assert their autonomy in matters of curriculum, teaching and learning and research, so that legal education aims for more than preparing students for work in private legal practice. A second challenge is to take a collective, law school-wide, approach to integrate matters such as legal theory, interdisciplinarity, ethics, general and legal skills, and issues of internationalisation, gender and indigeneity, so that law students are provided with a co-ordinated and incremental approach to developing knowledge, skills and attitudes. Third, law schools need collectively to engage with educational theory to develop approaches to structured and activity-based teaching, and to co-operative and collaborative learning in law schools. Finally, the evaluation of teaching and of subjects needs to be rescued from its current use predominantly as a management instrument, and to be used instead by law teachers to understand, reflect upon, and respond to the ways in which students experience law subjects and law teaching.

2. The Traditional Model of Legal Education

The traditional model of legal education provides a benchmark (albeit flawed and unsatisfactory) against which developments in the last twenty years are to be judged. Understanding the traditional model is necessary in order to enable us to identify and understand the factors which have affected and limited change, and provide a background to the suggestions which we make below as to some desirable developments for the future of legal education. In this section, we outline the main characteristics of the traditional model, which held sway in the majority of Australian law schools in the mid–1980s. This is not intended to be descriptive of present practice, although in our experience some aspects of the traditional model of legal education can still be found in some institutions.

The traditional model has five dominant characteristics. The first is the teacher-focused nature of legal education. In this model the role of the teacher is to transmit their own expertise in some specific and narrow subject matter area of law to students, who are conceived as empty vessels to be filled with this information. Teachers are regarded as subject matter experts in narrow fields of substantive law, and protecting their subject matter territory, or patch, dominates other considerations, including coordination within the curriculum. It can also prevent teachers from recognising how legal education should and could change, and from implementing those changes. Teachers are not required to have any qualifications in teaching, and very few teachers have any familiarity with the literature on learning and teaching. Cownie notes that ‘Conscientious preparation for teaching appears to demand that one be up-to-date as regards the latest research in the area, or the latest Court of Appeal pronouncement, but little thought is given to any but the most basic of the pedagogic aspects of teaching.’ In the traditional model, law schools do not provide or support training in legal education — teachers are expected to pick up the relevant skills on the job. In the traditional model, most teachers uncritically replicate the learning experiences that they had when students, which usually means that the dominant mode of instruction is reading lecture notes to large classes in which students are largely passive. Students’ understanding of that material is assessed in terminal examinations. That is not to say that all law schools or all individual teachers taught in precisely the same way. For example, from the 1950s some Australian law schools adopted a version of the Socratic method, but this method is heavily rule-oriented and teacher-focused.

There are three negative consequences of the teacher-focused nature of traditional legal education. The first is that it leads governments and universities to believe that legal education is inexpensive to provide. Second, students are treated amorphously and as though they are homogenous. Given that law teachers

4 According to Brand, some of these characteristics are beginning to reappear in law schools because of students’ demands and funding constraints: Vivienne Brand, ‘Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education’ (1999) 10 Leg Ed Rev 109 at 111.
6 We have often heard teachers remark that they cannot see how they can change their subjects to incorporate theory, skills, or ethics, for example, because there is a certain quantity of content which must be covered.
8 Pearce, Campbell & Harding, above n3 at 191.
10 Pearce, Campbell & Harding, above n3 at 173–174.
12 Id at 284–285.
were traditionally predominantly middle class white men, this had predictable consequences for female students, and students from any other socio-economic, cultural or racial background.14 The third consequence of the teacher focus is that students’ experience of learning is not taken seriously. The assumption is that if the teacher teaches, then the students will learn: if they do not do so successfully, it is the students’ fault.15 Consistently with this, student learning is not properly evaluated.16 Evaluation, if it is undertaken at all, is likely to be used in a purely pragmatic sense by both teacher and law school, in which the teacher’s overall satisfaction or popularity rating is used for various purposes and any other feedback received from students is discarded.

The second characteristic of traditional legal education concerns what is taught. Traditional legal education is almost entirely concerned with the transmission of content knowledge and, more particularly, with teaching legal rules, especially those drawn from case law.17 According to Dicey, nothing ‘can be taught to students of greater value, either intellectually or for the purposes of legal practice, than the habit of looking on the law as a series of rules’.18 The main teaching resource, aside from didactic lectures, is textbooks and case books.19 These books are commonly written in treatise style, and do not engage the reader in any activity aside from reading. Often texts are marketed as being as suitable for practitioners as they are for students,20 and this is so even for some subjects commonly taught in the first year of the law degree.21 This suggests not only a close connection between legal education and legal practice, but also that there is no appreciation of the students’ intellectual development as they progress through their degree.22 Legal rules are taught in year or semester long subjects, based on nineteenth century categorisations of law and without any consideration of their theoretical, historical, political, or economic foundations.23 Subjects are treated as

15 Biggs, above n5 at 21–22.
16 Pearce, Campbell & Harding, above n3 at 192.
17 Id at 4, 156; Report on the Future of Tertiary Education in Australia to the Australian Universities Commission (1964) (the ‘Martin Report’) at [11.37].
19 Sugarman, ibid. Even where a casebook method of teaching is adopted, the focus is almost exclusively on legal rules derived from case law: Le Brun & Johnstone, above n11 at 20.
20 For example, the back cover of Peter Nygh & Martin Davies, Conflict of Laws in Australia (7th ed, 2002) states that ‘This authoritative, wide-ranging text is ideal for students taking Conflict of Laws as part of the LLB course and legal practitioners requiring information in this area.’
21 The back cover of Lindy Willmott, Sharon Christensen & Des Butler, Contract Law (2001) states that the book ‘is a valuable resource for all students and practitioners in the area of contract law.’ See similarly the back cover of John Carter & David Harland, Contract Law in Australia (4th ed, 2002) (while the book’s main aim ‘is to provide a text for students undertaking Contract courses at tertiary institutions’, it is ‘an indispensable reference for practitioners as well.’)
22 The one concession made to this is that subjects which are perceived to be easier (like contract law) are taught earlier than subjects which are perceived to be harder (like civil procedure).
23 Sugarman, above n18 at 26–27.
discrete and having little direct interaction. Students are taught the same type of material — a detailed analysis of common law rules — and given the same type of assessment — examinations testing mastery of the legal rules and their application to hypothetical problems — semester after semester, in much the same way, focusing often exclusively on learning legal rules from listening to an expert describing them, or reading a text which focuses on legal rules. The only thing which changes between subjects and between semesters in the student’s progression through the degree is the substantive rules which form the content of the subjects.24

The traditional law curriculum gives little express consideration to generic skills (such as oral communication, self-reflection, teamwork, computer skills, and so on) or legal skills (such as legal reasoning and problem solving, legal research, interviewing, negotiation, advocacy and so on),25 ethics, theory, attitudes and values, interdisciplinary perspectives on law, or the international aspects and implications of law and legal practice.26 Whatever skills students learn are acquired with little direct guidance or instruction from teachers, and they are often not specifically assessed. Ethics is taught only as required by professional admitting authorities, and is usually taught in the final year — often in discrete subjects. Theoretical issues are seldom addressed explicitly, except in subjects on ‘Jurisprudence’, and the socially constructed and contestable nature of law is seldom explored.27 Attitudes and values are seen as irrelevant. Law is taught almost exclusively in a local perspective — usually at the level of the State or Territory in which the law school is situated.28 Interstate and international aspects of law are not directly considered, except in elective subjects in private or public international law.

The third characteristic of the traditional model is the strong conviction that law is an autonomous discipline; quasi-scientific in nature.29 Lawyers have little, if anything, to learn from other disciplines and interdisciplinary studies are regarded as having limited value, at best.30 Until the 1960s, most law students did

---

25 For example, the United States’ MacCrate Report identified the following 10 fundamental skills: problem solving; legal analysis and reasoning; legal research; factual investigation; communication (oral and written); counselling clients; negotiation; understanding litigation and alternative dispute resolution procedures; organisation and management of legal work; and recognising and resolving ethical dilemmas: American Bar Association, Section on Legal Education and Admissions to the Bar, Legal Education and Professional Development — An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) (the ‘MacCrate Report’) at 138–140.
26 Pearce, Campbell & Harding, above n3 at 31, 47, 49, 105–106.
not take combined degrees.\textsuperscript{31} Law is also seen as \textit{sui generis} within the academy, in the sense that it is not truly academic in character, but rather closely associated with the legal profession.\textsuperscript{32} In this model few teachers of law hold research-based higher degrees,\textsuperscript{33} collaborate on research projects,\textsuperscript{34} or undertake research unless it is perceived to have clear practical relevance to practitioners and the judiciary (usually, requiring that it involves analysis of legal doctrine and rules).\textsuperscript{35} In short, as a discipline law is perceived as being outside the core of the academy. This conviction about the autonomous nature of law is carried through to its teaching, so adherents of the traditional model doubt whether general principles of learning and teaching have any application to legal education.\textsuperscript{36}

The fourth characteristic of traditional legal education is the close relationship between legal practitioners and the academy.\textsuperscript{37} Sugarman suggests that ‘Despite the variety of producers and consumers of legal discourse, it is what the judges say and the supposed needs of the legal profession as narrowly defined that have had the greatest magnetic pull over the nature and form of legal education and scholarship.’\textsuperscript{38} Until the 1960s, in Australia the great majority of law teachers were full-time private practitioners.\textsuperscript{39} Although the relationship is close, the academy is clearly subservient to the profession. It is much less controversial than one might have thought that legal practice exerts a very large degree of control over the curriculum.\textsuperscript{40} The dominant consideration in curriculum design is the responsibility of the academy to prepare students to work in the private legal profession. One particularly concerning consequence of this is that it has the effect of uncritically endorsing and perpetuating the status quo.\textsuperscript{41}

The fifth characteristic of traditional legal education is that the law school experience is individualised and isolating for both teachers and students. Teachers prepare and teach their subjects in isolation from each other so that there is often no direct coordination between subjects, either within any year of the degree

\begin{itemize}
\item \textsuperscript{31} Pearce, Campbell & Harding, above n3 at 7.
\item \textsuperscript{32} William Twining, \textit{Blackstone’s Tower: The English Law School} (1994) at 28; Chesterman & Weisbrot, above n28 at 711.
\item \textsuperscript{33} In 1974, 16\% of law teachers had PhDs; this had only increased to 18\% by 1985: Pearce, Campbell & Harding, above n3 at 557. Much higher proportions of staff held LLM degrees, or equivalents: ibid.
\item \textsuperscript{34} Id at 315, 393–394.
\item \textsuperscript{36} Jay Feinman & Marc Feldman, ‘Pedagogy and Politics’ (1985) 73 \textit{Georgetown LJ} 875 at 895.
\item \textsuperscript{37} Chesterman & Weisbrot, above n28 at 710–713.
\item \textsuperscript{38} Sugarman, above n18 at 27.
\item \textsuperscript{39} Pearce, Campbell & Harding, above n3 at 3–4, 549–450.
\item \textsuperscript{40} For a description of the recent history of attempts by the legal profession to entrench and extend this control, see Australian Law Reform Commission, \textit{Managing Justice: A Review of the Federal Civil Justice System} (Report No 89) (2000) at 123–127. See also Brand, above n4 at 125–126.
\item \textsuperscript{41} Goldsmith, above n35 at 91.
\end{itemize}
program, or between different years. Compared with other disciplines, there is little scope for collaboration with other teachers, except in the context of teaching particular subjects. Students are given no opportunity in their formal education to learn from and with each other.

3. Criticisms of the Traditional Model

In this section, we consider criticisms of the traditional model of legal education which have been made in reports into legal education in Australia and other common law jurisdictions. Those reports are critical of the content of traditional legal education, but generally have little to say about the teaching and learning implications of the traditional model. We draw on contemporary teaching and learning theory to address this shortcoming.

A. Criticisms of the Content of Traditional Legal Education

Many aspects of the traditional model of legal education have been criticised in reports into legal education in the United States, England and Australia in the last 35 years. Many of these reports have been critical of the emphasis in traditional legal education on transmission of knowledge about legal rules and doctrine, and on the intellectual skills of analysis and synthesis which dominate traditional legal education. The dominant justification for substantial changes to university legal education which motivates most of these reports has been the perception of legal practitioners that graduates are deficient in fundamental legal skills. They have consistently advocated the need for a more ‘practical’ focus in university legal education, particularly the need to teach more legally specific skills. Some reports have recommended a greater emphasis on the contextual, critical and theoretical study of the law; the Cramton Report justified this on the basis that such subjects provide the foundation for ‘self-learning about an ever-

45 Martin Report, above n17 at [11.37]–[11.38]; Pearce, Campbell & Harding, id at 4, 156; Australian Law Reform Commission, above n40 at 139.
46 Foulis Report, above n42 at 92–93.
47 Id at 93; Cramton Report, above n42 at 15; MacCrate Report, above n25 at 138–140; Australian Law Reform Commission, above n40 at 142. Some of the reports also recommend greater emphasis on generic skills, such as self-reflection: Cramton Report, id at 39.
49 ACLEC, above n43 at [2.4]; Pearce, Campbell & Harding, above n3 at 149.
The importance of teaching attitudes, values and ethics has been raised in some of the recent reports. The Cramton Report advocated a structured curriculum which incrementally developed students' abilities in problem solving. The MacCrate report proposed that an experiential cycle incorporating reflection should be used in teaching skills and values; and the Pearce Report recommended greater use of small group teaching.

An important factor in the development of Australian legal education has been the adoption of nationally unified requirements for admission to the legal profession. In 1992 the Consultative Committee of State and Territory Law Admitting Authorities, chaired by Justice Priestley, prescribed 11 ‘areas of knowledge’ (the ‘Priestley 11’) that students are required to have studied successfully before they could be admitted to the profession. These areas of knowledge are contract, tort, real and personal property, equity (including trusts), criminal law and procedure, civil procedure, evidence, professional conduct (including basic trust accounting), administrative law, federal and state constitutional law, and company law. The Priestley Rules do not specify the detailed content which should be required for these areas of knowledge. The Priestley Rules focus on areas of traditional areas of knowledge rather than on graduate attributes or skills, and do not explicitly require attention to theoretical perspectives.

In 2000, the Australian Law Reform Commission urged the abandonment of the Priestley Committee’s ‘solitary preoccupation with the detailed content of numerous bodies of substantive law’. It criticised the Committee’s failure to

50 Cramton Report, above n42 at 10.
52 Cramton Report, above n42 at 17.
53 MacCrate Report, above n25 at 243, 331.
54 Pearce, Campbell & Harding, above n3 at 159–160.
55 The requirements of the State and Territory admitting authorities which applied before the Priestley rules came into effect were diverse: Pearce, Campbell & Harding, above n3 at 90.
56 The Law Council of Australia has recommended more specific content for each area of knowledge, and these are widely used as a guide as to whether a program has satisfied the requirements.
57 The Priestley Committee has also listed 12 skills areas of importance to practising lawyers, referred to as ‘The Priestley 12’, to be undertaken during practical legal training.
consider the changing nature of the legal profession and legal practice for which law students were being prepared, noting that contemporary legal practice was much more internationalised, process-driven and teamwork reliant than had hitherto been the case. It was critical of the assumption made by the Priestley Committee, without any discussion of whether this was necessary or desirable, of a rigid divide between law school education and professional legal training, in which law schools teach legal rules and professional legal training teaches practice or skills. It concluded that legal education should focus on what lawyers need ‘to be able to do’, rather than on what lawyers ‘need to know’.

This brief overview of reviews of legal education shows that the traditional model of legal education, outlined in Part 2 of this article, has been strongly challenged. What is striking in these reviews is that the debate is dominated by the perceived need for legal education to serve the present requirements of the legal profession. The reports assume that the most important concern in curriculum is preparation for private legal practice, rather than the law degree as early preparation for a career in legal scholarship, or in a range of other professions. With several minor exceptions, these reports exclusively address curriculum content issues. They give very little direct attention to teaching and learning in law — that is, how students should be taught in law schools. In the next section, we consider the implications of educational research for this very important question.

B. Criticisms of Teaching in the Traditional Model

Educational research from a variety of traditions, including behavioural, cognitive, constructivist and relational learning theories, heavily criticises the teacher-focused nature of traditional education, and emphasises that teaching should be concerned with enhancing the learning experience of students; that is, that it should be student- rather than teacher-focused. The notion that teaching is about the transmission of knowledge from teacher to students has been

61 See similarly Twining, above n32 at 27.
63 Behaviourists start from the premise that learning takes place when the learner responds appropriately to a specific stimulus, and see the goal of teaching as developing and reinforcing the relationship between the stimulus and the response: Schwartz, id at 368–369.
64 Cognitivist theory is concerned with what happens between the stimulus and the response: how the brain processes and retains learning. Cognitive theorists ‘equate learning with the learner’s active storage of that learning in an organized, meaningful, and useable manner in long-term memory’: id at 372.
criticised; rather, teaching should be about enabling, stimulating, prompting and
guiding students to develop their own conceptions and abilities. Educational
writers argue that the development of students’ understanding of and ability to
apply key concepts and skills is more important than coverage of a large quantity
of content. Students in the traditional model are largely passive recipients of
information, in lectures and in reading texts written in a particular didactic style.
Educational research demonstrates that this is extremely undesirable, and that high
quality learning requires that students be actively engaged. ‘Learning takes
place through the active behaviour of the student; it is what [s]he does that [s]he
learns, not what the teacher does.’ This has implications not only for the
design of classes, but also for the design of textbooks and other printed study aids,
such as subject materials.

In the traditional model, teachers’ expectations of students are infrequently
directly articulated, leaving students to try to determine what is required of them
in learning and assessment. Modern learning theory indicates that teachers’
expectations should be clearly explained in terms which are readily understood and
applied by students. Recent research shows the importance of assessment in
student learning. A variety of assessment tools should be employed which

65 Constructivism begins from the postmodern position that knowledge and understanding is built
up by learners from their individual experiences of the world and their interpretations of that
experience. They consider that ‘three factors are crucial to learning: practice in real settings
(experience), the opportunity to develop personal interpretations of experiences (construction
of meaning by the learner), and the opportunity to negotiate meaning (collaboration’; id at 380.
See also John Seely Brown, Allan Collins & Paul Duguid, ‘Situated Cognition and the Culture
of Learning’ (1989) (Jan–Feb) Educational Researcher 32; Leslie Steffe & Jerry Gale (eds),

66 Relational student learning research envisages ‘learning as a change in the way we conceptualise
the world around us’ and contends that ‘a conception of an aspect of subject matter can be
thought of as a sort of relation between the person and a phenomenon’ (Ramsden, above n5 at
40). When a person understands a concept, they are relating to the concept in the way that an
expert would relate to the concept. (Ramsden, id at 41). Researchers have identified at least two
qualitatively contrasting ways in which learners can relate to a learning task, based on whether
or not a learner is searching for meaning when engaged in the task, and the way in which the
learner organises the task: these are commonly referred to as ‘deep’ and ‘surface’ ‘approaches
to learning’. (Ramsden, id at 43 and ch 5; Prosser & Trigwell, above n62 at 3–5).

67 Biggs, above n5 at 13, 24–25.

68 Ibid; Prosser & Trigwell, above n62 at 153–157; Keith Trigwell & Michael Prosser, ‘Changing

69 Biggs, above n5 at 45–47.

Leg Ed Rev 149 at 150–151; and Schwartz, above n62 at 365–383.

71 Ralph W Tyler, Basic Principles of Curriculum and Instruction (1949) at 63, quoted in Biggs,
above n5 at 25.

72 Richard Johnstone, Printed Teaching Materials: A New Approach for Law Teachers (1996);
Richard Johnstone & Gordon Joughin, Print Materials for Flexible Teaching and Learning in

73 Richard Johnstone, Jennifer Patterson & Kim Rubenstein, Improving Criteria and Feedback in
Student Assessment in Law (1998); Biggs, above n5 at ch 3; D Royce Sadler, ‘Formative
encourage students to take a deep approach to learning; assessment should be clearly aligned to stated learning objectives. The over-use of examinations and the failure clearly to state learning objectives and assessment criteria in the traditional model of legal education impede effective learning.

Good teaching requires teachers to engage with students at their own level of understanding, motivating them to learn by stimulating their interest in the subject. Rather than being remote from students, and treating them as homogenous, teachers should respect students, be aware of diversity in the student body, and respond to that diversity appropriately in the selection of teaching material and activities. Student diversity relates not only to gender and racial, social and cultural background, but also to different learning styles, which has clear implications for the selection of learning activities and assessment.

We noted above that in the traditional model, there is no explicit appreciation of students’ intellectual development. Learning theory shows that students’ intellectual development should be taken into account in the design of individual subjects and of the curriculum as a whole. This implies the need to provide meaningful and timely feedback on student performance in assessment, as well as the need to ensure the progressive development of skills and knowledge in related subjects.

As we outlined in Part 1, the traditional model of legal education is highly individualised. It does not encourage or reward collaborative work by students. Recent research demonstrates the considerable intellectual and social benefits of collaborative work to students, as well as its pragmatic benefits to teachers.

Finally, one of the most important implications of the student-focus mandated by modern educational research is that students’ experience of learning should be closely evaluated by teachers, and that appropriate modifications to teaching should be made in the light of that evidence. The main purpose of teaching evaluation should be to lead to further improvements in student learning, rather than to certify teaching competency.

In short, there is a great deal of evidence available about what constitutes good teaching in higher education. Almost every aspect of that evidence is at odds with the traditional model of legal education. We think it is a matter of serious concern that very little of this research has directly influenced the policy debate on desirable changes in tertiary legal education.

74 Ramsden, above n5 at ch 5.
76 Biggs, above n5 at ch 3.
78 Schwartz, above n62 at 368, 375.
80 Prosser & Trigwell, above n62 at 168.
81 For further discussion, see Part 6F below.
4. Changing Legal Education?

Many commentators have remarked on the changes which have occurred in Australian legal education since the Pearce Report was published in 1987.82 In this Part we examine the evidence of these changes, drawing on the recently published report by the Australian Universities Teaching Committee into Learning Outcomes and Curriculum Development in Law.83 We first outline the impact of general contextual factors on law schools, and then consider changes to law curricula, and conclude by considering changes to teaching in law schools.

A. Contextual Factors

Perhaps the most outstanding changes have been the dramatic increase in the number of law schools and of law students since 1989. In the period 1855 to 1960, six law schools were established in Australia. By 1975 a further six law schools had emerged. Since 1989, seventeen new schools have been established; evidently, several more are in the planning stage. The rapid growth in law schools has been accompanied by significant growth in law student numbers,84 which itself has increased student diversity by reference to factors including academic background and prior achievement, geographical location, career aspiration, and socio-economic status.85

Another very significant change has been the introduction by the Commonwealth Government of a user-pays model in higher education, which has affected every discipline but has particular implications in law. Under the differential system of student contribution to the cost of higher education, law programs are assigned to the highest charge band; however, under the Commonwealth Government’s funding formula, they receive the lowest level of funding.86 Law students are charged on a full cost recovery basis while law schools are starved of resources. A lack of adequate resourcing for law has been a serious difficulty affecting legal education for many years87 and has drawn repeated calls for reform.88

Law schools have, due largely to the commodification of higher education, become even more vulnerable to the demands and expectations of students and employers of law graduates. One consequence is that law schools have sought to emphasise their distinctiveness, and differentiate themselves, particularly from their local competitors.89 Despite the apparent diversity of undergraduate offerings

83 Johnstone & Vignaendra, above n2 (the AUTC Report).
84 Johnstone & Vignaendra, above n2 at 3; Craig McInnis & Simon Marginson, Australian Law Schools After the 1987 Pearce Report (1994) at 11.
86 Johnstone & Vignaendra, above n2 at 4.
87 McInnis & Marginson, above n84 at vii–viii.
88 Pearce, Campbell & Harding, above n3 at ch 16.
89 See Johnstone & Vignaendra, above n2, at 25–43.
among Australian law schools, senior academics interviewed for the AUTC Report argued that these developments mask an underlying homogeneity, a uniform response by law schools to market pressures from employers and students. From the 1960s and until recently, most law schools required school-leavers to undertake a combined degree. The AUTC report found a recent reversal in this trend, in that most law schools now offer stand-alone law degrees to school-leavers. It appears that law schools have been influenced in this regard by market pressures. Market pressures, including student demands for greater flexibility in teaching arrangements and accelerated progress through the LLB program, have resulted in most law schools adopting intensive modes of teaching.

One implication of the high cost of university education and of the massification of education is that students are far more likely to be engaged in substantial amounts of paid employment while they are undertaking university studies than was the case in the past. Many law teachers feel that this factor has dramatically changed students’ legal education, resulting in poor class attendance or poor participation in, and preparation for, class.

The lack of adequate resources for law schools has led to a great administrative burden for teachers. Teachers interviewed for the AUTC Report stated that they were consequently left with very little time to reflect on their teaching, subject design, assessment activities and preparation for classroom teaching.

B. Changes in the Content of Law Curricula

There has been a notable change in thinking about the objectives and substance of legal education in the last 20 years. During the 1980s, law schools began to move away from their traditional ‘trade school’ approach, ‘towards the classic, liberal model of university education’. McInnis and Marginson credit the Pearce Report directly with improvements in the content of legal education. They found that it had generated ‘critical reflection on the nature and content of courses’. Partly in response to the recommendations of the Pearce Report, many law schools now give greater attention to teaching generic and legal skills, theory (including interdisciplinary perspectives on law) and ethics.

90 Id at ch 3.
91 Id at 86–87.
92 The Pearce Report stated that this was a ‘widespread though not universal’ requirement: Pearce, Campbell & Harding, above n3 at 7.
93 Johnstone & Vignaendra, above n2, at 66–69.
94 Parker & Goldsmith, above n51 at 45.
97 Id at ch 13.
98 Goldring, Sampford & Simmonds, above n82.
99 Chesterman & Weisbrot, above n28 at 718.
100 McInnis & Marginson, above n84 at vii–viii.
In 1994, McInnis and Marginson reported that most schools espoused a commitment to teaching theoretical, critical and contextual approaches to law. The AUTC Report found that most law schools required students to undertake at least one subject in legal theory. Some also required students to complete further legal theory subjects in later years; some encouraged, if not required, teachers to incorporate theoretical perspectives into both core and elective subjects, and a few attempted to co-ordinate the infusion of legal theory into substantive law subjects. In some law schools teachers with little interest in, or who felt threatened by, legal theory resisted these attempts so that legal theory remains marginalised at some law schools. As Sugarman has commented, while there is ‘a growing movement to broaden the study of law beyond’ the traditional focus on case law principles, ‘transcending it is easier said than done.’

Whereas in the traditional law curriculum, the teaching of skills was confined to legal analysis and reasoning, legal research, legal writing and mooting, as a by-product of teaching in substantive law subjects, most law schools now pay greater attention a wider range of skills, although there is still disagreement about the importance of practical legal skills. The AUTC Report found that a third of law schools adopt a minimalist approach to the introduction of generic and legal skills, most focusing on the relatively traditional skills of legal research and writing, case analysis, statutory interpretation, oral communication, and advocacy. Many schools include specific legal skills such as alternative dispute resolution and negotiation in their curriculum. Most of the small number of remaining law schools have an integrated skills program in their LLB curricula, including clinical teaching programs and placements. Only two law schools have developed an incremental, integrated and co-ordinated skills program which spans the entire law curriculum. Four law schools include fully-fledged professional legal training programs within their LLB programs.

All but two law schools now teach legal ethics as part of the mainstream LLB program, and most do so as part of the compulsory program. Some law schools teach ethics in stand-alone subjects, and others as one component of a subject. In some schools, ethics is addressed frequently in different subjects at various stages of the curriculum; in other schools, this appears to be an aspiration but there are no formal arrangements to ensure a co-ordinated approach to teaching ethics. Critics argue that legal ethics teaching in Australian law schools requires a more coherent philosophical basis, and that ethics should be taught as a pervasive set of values that underpin the practice of law, rather than by reference only to practical ethical problem solving. They also suggest that ethics should be seen as an integral part of learning the law as a social phenomenon.

101 Id at 154, 157.
102 Johnstone & Vignaendra, above n2 at ch 5.
103 Sugarman, above n18 at 27–28.
104 Pearce, Campbell & Harding, above n3 at 25.
105 This is consistent with McInnis and Marginson’s findings in 1994: above n84 at 168–170.
106 See further Part 6C below.
107 Johnstone & Vignaendra, above n2 at 118.
108 Johnstone & Vignaendra, above n2 at 118–122.
Most law schools require students to complete at least one international subject, such as public international law and international trade law. Some law schools have reciprocal teaching programs or student exchange programs with overseas law schools. A few schools have made comparative and international law their special focus. One the whole, however, Australian law schools have not developed coherent and systematic strategies to address the implications of globalisation and internationalisation for the law and for legal practice. This is largely because of the restrictions placed on LLB curricula by the Priestley requirements, which are seen to be antipathetic to curriculum developments addressing globalisation and the issues it generates for law, and which have evidently been interpreted as being relevant mainly to the level of local and national jurisdictions.

C. Quality in Teaching

The Pearce Report is widely credited with stimulating interest in teaching in legal education. The establishment of the ALTA Law Teaching Workshop in 1987 and initiatives in most universities to improve teaching and learning have also invigorated concern with teaching and learning in law schools since the late 1980s. Fewer law teachers than before assume that teaching involves the transmission of their knowledge to students. Some teachers conceptualise teaching as predominantly concerned with facilitating active student learning. The changes in thinking about teaching and learning in Australian law schools are illustrated by the many examples of theoretically-based teaching strategies developed in Australian law schools; a greater interest in legal education; increased research into, and scholarly writing about, legal education; the small but growing number of teachers who complete formal qualifications such as a Graduate Certificate in Higher Education; and the offering of subjects and graduate programs in legal education by some law schools.

It would not be accurate to claim that all law schools or all law teachers treat the scholarship of teaching as important. Developments in the scholarship of teaching in law are far from uniform, even within individual law schools, and many law schools maintain a traditional approach to legal education. There is
evidence of ignorance, even disparagement, of educational theory amongst teachers, and of the ‘anti-intellectual’ approach to teaching that Cownie has identified in British law schools.\(^{119}\)

The two most significant improvements to teaching and learning in Australian law schools since the late 1980s have been a greater concern with student-focused teaching,\(^{120}\) and a trend towards smaller class sizes.

Law teachers are increasingly using discussion-based teaching methods, small group work, and occasionally teacherless groups, to supplement, and even replace, lecturing, in order to facilitate student learning. Lectures are still the norm at many law schools, especially given the increase in student enrolments at most law schools; however, those teaching small classes are increasingly adopting discussion- and activity-based teaching, with some able to use such methods even in larger classes.\(^{121}\)

McInnis and Marginson found that the Pearce Report contributed to a commitment to the increased use of small groups in teaching, although even in 1994, for funding reasons some law schools were struggling to continue to provide small class sizes.\(^{122}\) By 2002, the majority of Australian law schools had taken measures to reduce class sizes, under the assumption that smaller class sizes allow for a variety of teaching methods to be adopted which promote active student learning.\(^{123}\) This demonstrates a commitment to student-focused learning, although because of funding constraints many law schools are only able to offer small class sizes in the early years of the LLB program. Since the publication of the AUTC Report, some law schools have abandoned a commitment to smaller group teaching, even in first year.

University-led teaching and learning initiatives are seen by law teachers to have contributed to the improvement of subject design.\(^{124}\) Clearer learning objectives, better alignment of learning objectives with assessment tasks, more varied assessment and teaching methods, more feedback on assessment tasks, and increased use of teaching materials and methods to encourage active learning is evidence of this.\(^{125}\)

Complementing positive changes to classroom teaching methods has been a rethinking of the design of teaching materials.\(^{126}\) Fifteen years ago, many law teachers merely provided students with ‘reading lists’, limited to topic headings and lists of case citations. Many law schools now require that teachers provide

\(^{119}\) Id at 289; Fiona Cownie, ‘The Importance of Theory in Law Teaching’ (2000) 7 Int J of the Legal Profession 225; and Cownie, above n7 at 43–46.

\(^{120}\) Johnstone & Vignaendra, above n2 at 292–296. Student-focused teaching also found expression in better pastoral care for students in some law schools, more student-friendly approaches to law school administration, and longer student consultation hours.

\(^{121}\) Id at ch 16.

\(^{122}\) McInnis & Marginson, above n84 at vii–viii.

\(^{123}\) Johnstone & Vignaendra, above n2 at ch 16.

\(^{124}\) Id at ch 17.

\(^{125}\) Id at chs 15 and 16.

\(^{126}\) At some law schools, this has been influenced by the need to cater to external students.
students with subject information including learning objectives and details of assessment tasks. A small, but growing, number of teachers provide teaching materials designed to structure activity-based learning, with introductory text, topic summaries, questions to guide reading and discussion, and learning activities (eg, hypothetical problems, simulations) to provide a context for student learning.127

The AUTC report notes continued staff and student antipathy to the use of group work in legal education. The dominant focus in education remains upon the assessment of individual achievements. In such a context, students are not surprisingly often openly hostile to working in groups, and may be inclined to downplay the importance of group work.128 Many teachers, like students, have negative perceptions about group work, and are often pessimistic about using group work.129 There is a high level of resistance in most law schools to adopting group work as part of the formal curriculum, particularly if the group work is assessable.130 Interestingly, this is one area in which law schools have evidently resisted employers’ expectations. Employers commonly perceive that law schools do not focus sufficiently on teaching important practical skills. The skills which they identify as most important, and most lacking in formal legal education, are skills in teamwork and communication.131

The management of, and support for, teaching in law has also shifted in line with the new ways of conceptualising law school teaching. This has led to a considerable amount of evaluation of law teaching,132 generally undertaken at the behest of the university. In addition to surveying law students about subjects and curricula, most law teachers are required, or encouraged, to have their teaching evaluated by students using written, multiple-choice questionnaires, often designed by a central university unit. Other forms of teaching evaluation are less common, although many schools reported that peer evaluation and mentoring occurs informally, usually at the initiation of individual teachers.133 The purpose of the evaluation of subjects and teaching in most law schools, however, appears to be for management purposes — to identify poorly performing teachers and deficient subjects — and to provide teachers with evidence of the quality of their teaching, rather than for collecting evidence of the way in which students are experiencing the subject and the way the subject is taught.134

The changes to support for teaching within law schools have also led to a growth in teaching interest groups and seminars on teaching within law schools,

127 Johnstone & Vignaendra, above n2 at 398–403.
128 In Johnstone & Vignaendra’s study, ‘quite a few law teachers reported that many students are opposed to group assessment’: id at 372.
129 Ibid.
130 Ibid.
131 For evidence and discussion, see Johnstone & Vignaendra, id at 238–246.
132 The Pearce Report found that law schools had very variable practices in relation to student evaluations, and that several law schools conducted no evaluations at all: Pearce, Campbell & Harding, above n3 at 192.
133 Johnstone & Vignaendra, above n2 at 436–438.
134 Id 427–439.
law schools’ support for individual teachers’ attendance at the ALTA Law Teaching Workshop, and less frequently, mentoring schemes. Some law schools encourage staff to complete Graduate Certificate-level qualifications in education.\footnote{135} Very few law schools, however, reported that they had in place systematised support for a scholarly approach to teaching, which would include measures to ensure that teachers individually, and schools as a whole, evaluate students’ experience of teaching and in particular the impact of teaching upon student learning.\footnote{136}

In summary, while it is true to say that legal education today is vastly different to what it was 17 years ago when the Pearce Report was published, the changes which have occurred, as documented in the AUTC Report, are not as profound, as well-embedded or as focused on the serious problems with the traditional model as one might have expected or hoped.\footnote{137} The most substantial changes have resulted from external factors — for example, the tremendous increase in student numbers, the increasing workload of both teachers and students, and the decreasing levels of funding for legal education. The major internal changes supplement rather than supplant or challenge the traditional model — for example, the use of small classes in addition to lectures and the addition of theoretical perspectives to legal rules in terms of the content of legal education. These changes do not fundamentally address the problems with the traditional model which we have identified.

5. Impediments to Change in Legal Education

In this part, we identify some of the substantial inhibitors to profound and enduring change in legal education. They arise from a diverse range of sources, from the demands of students and the legal profession, to factors affecting legal academics, to the culture of law schools, to the role played by universities, and to the funding treatment of legal education by the Federal Government.

The corporatisation of universities has led to the perception of students as consumers. This perception legitimises student demands as to the content and delivery of the law curriculum\footnote{138} and exposes the vulnerability of some law schools to these demands. Although some student demands are justified and require attention in curriculum development, others may undermine important educational goals. The less well established law schools may be driven by actual or perceived student demand to alter their programs and subjects in ways which are not necessarily desirable — for example, as some law schools have done to permit school leavers to undertake a straight law degree, or to minimise or exclude the kinds of topics and skills which some students perceive as irrelevant to legal practice.\footnote{139} Some of these perceived demands are also likely to cause individual academics to avoid exploring new approaches to subject design and teaching.

\footnote{135} Id at ch 17.  
\footnote{136} Prosser & Trigwell, above n62 at 161–162.  
\footnote{137} Thornton notes that ‘the “core” curriculum has witnessed comparatively few major changes of substance over the past half century’: Margaret Thornton, ‘Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same’ (1998) 36 Osgoode Hall LJ 369 at 373.  
\footnote{138} Brand, above n4 at 121.  
\footnote{139} Id at 123–124; Johnstone & Vignaendra, above n2 at 66–69.
The academy’s ‘uneasy’ and largely subservient relationship to legal practice places considerable impediments in the way of change. We noted above that even the most progressive of the recent reports into legal education continue to refer to the requirements of practice as the dominant criterion for determining what should be taught at law school. The legal profession has exercised and continues to exercise considerable control over what is taught at law school, and has in the last decade indicated its desire to exercise a greater degree of control. At the same time, the self-perception of some legal academics that law is not unambiguously an intellectual discipline also influences the kinds of changes we can pursue in legal education. The persistence of the view that doctrine is the centre of research also has an inhibiting effect on our ability to perceive different ways of conceiving legal education.

Merely covering the subject matters identified as essential by the Priestley requirements accounts for a large part of the LLB program in most law schools. In conjunction with the traditional focus on teaching legal rules, this concentration on content leaves little space in the LLB curriculum to devote to the kinds of issues which have been identified as important by the reports into legal education referred to above, as well as by numerous commentators. What little ‘space’ is left after accommodating the Priestley requirements, law schools choose to devote to incorporating ethics, theory and skills into existing subjects, or by adding on new subjects which address these issues. This is done at the expense of addressing newer and more complex issues such as the coordination of the curriculum and the implications of globalisation.

At the level of individual teachers, two factors inhibit change. The first is individual teachers’ concern to protect the status quo with their subjects, based perhaps on a combination of insufficient resources, increasing workloads and inertia. Teachers are therefore reluctant to change their teaching, even though there is no shortage of material suggesting how the law curriculum generally and individual subjects specifically might be developed, both in terms of content, and in the modes of learning which are employed.

The second factor which prevents teachers from advocating and implementing profound changes to legal education is a general lack of awareness of or concern for the educational literature, its implications for teaching practices, and an actual or perceived inability to implement change. The traditional attitude that university teachers do not need formal qualifications in education, or otherwise to
engage with the educational literature, seems deeply entrenched in law. Without an understanding of the literature, law teachers will understandably be inclined to retain conventional and established approaches to teaching. Although an increasing number of legal academics possess educational qualifications and are acquainted with the educational literature, they still clearly constitute a minority who find it difficult to pursue substantial change in the face of a disinterested, if not hostile, majority.

Within law schools, change is inhibited because of the individual focus of teaching, as well as a general lack of support from law schools for improving legal education. Subjects are commonly treated as self-contained, not interconnected, and most academics teach in isolation from each other. There is a lack of collective corporate focus on the curriculum within the vast majority of law schools. Few law schools provide systematic assistance and support for legal academics who wish to improve their teaching. Such assistance and support would clearly play a vital, and probably essential, role in promoting a scholarly approach to teaching, and especially in agreeing collective curriculum objectives, and ensuring their implementation and evaluation.

While universities’ increasing emphasis on teaching and learning is laudable, and appears to have influenced improvements in legal education, this emphasis is often interpreted by legal academics as excessively bureaucratic. It appears, ironically, to fuel some academics’ cynicism about teaching and learning. We have already referred in several places to the serious issue of resourcing of law schools. Law schools suffer because the Commonwealth Government funds law at a substantially lower rate than other disciplines to which it ought to be compared; most universities apply a similar formula to determine funding to schools. This lack of resourcing has seriously undermined the ability of law schools to undertake substantial change. Of all the factors identified here as impeding reforms to legal education, this is the most severe and the most difficult to overcome. Twining observes that ‘law has traditionally been perceived as one of the cheapest disciplines’ and that ‘[t]his image is so deeply entrenched that it is almost impossible to change.’

The recent history of legal education in Australia suggests both that the traditional model is profoundly embedded and that the impediments to change are extremely effective.

6. Issues for the Future Development of Legal Education

In this article we have argued that since the late 1980s there have been significant developments in Australian legal education. At the same time, we have suggested that many aspects of the traditional model of legal education still hold sway in Australian law schools. Limitations of space prevent us from canvassing all of the issues that law schools face in developing curricula and teaching and learning

---

147 Twining, above n32 at 41; See also Ian Duncanson, ‘Interdisciplinarity in the Law Discipline’ (1996) 5 GLR 77 at 85.
strategies suited to contemporary challenges. In this section we discuss some of the issues that appear to us to be pivotal in renovating law curricula and teaching and learning strategies.

We have noted in several places the very serious consequences of the continued underfunding of legal education by government and by universities. The assumptions which lie behind the funding level applied to legal education are clearly influenced by the traditional model of legal education, one of the few virtues of which is that it is relatively inexpensive to offer. The underfunding of law comes at the expense of individual academics, in terms of high workloads, and the educational experience of students. It also has the effect of maintaining the subservient relationship between the academy and the private legal profession, in that underfunded law schools are required to seek external, often corporate, sponsorship. Developing and implementing change in legal education requires resources, and attending to this should be regarded as a matter of very high priority.

A. The Relationship Between the Academy and the Legal Profession

We have explained above the dominant influence of the Priestley 11 requirements on legal curricula in Australia. This influence is regressive for several reasons. First, it focuses exclusively on students’ acquisition of knowledge expertise in certain subject matter areas and entirely neglects the importance of other important aspects of legal education, even those which are far from controversial, such as the acquisition of generic and legal skills and attitudinal awareness. Second, it assumes that all that is important for practice is subject matter knowledge in certain traditional narrowly defined areas of law. Third, it assumes that the central purpose of legal education is to train students for private legal practice, and more particularly, that it is appropriate for the profession to dictate to universities a substantial part of their curricula. Roper noted nearly ten years ago that fewer than half of final year law students intended to work in private practice. He suggested that this finding ‘could have ramifications’ for legal education; in particular it called into question ‘the extent to which law schools’ curricula principally reflect the needs or requirements of the private legal profession’ as well as ‘the extent of influence which the private profession, through the professional bodies, should be able to exert on law schools’ curricula, in virtue of their capacity as representatives of the dominant vocational destination of the students.’ These sentiments have been repeatedly endorsed, and yet we remain in a position where our curricula are largely dictated by an unrepresentative group of the consumers of law graduates.

Cownie recently identified evidence from English academics that the ties between the legal academy and the legal profession are becoming weaker, and that academics are becoming more autonomous. We hope that a similar trend could

149 Brand, above n4 at 120; Cownie, above n140 at 34–35.
151 Id at 80, emphasis in original.
152 Cownie, above n140 at 156–158.
be demonstrated in Australia. We certainly advocate and look forward to a more mature, ‘consultative and respectful’ relationship, in which the function of the academy is regarded as significantly broader than the preparation of graduates for private practice, and the production of research of utility to practitioners and judges. Ironically, Brand suggests that recent changes in higher education may have had the opposite effect, forcing legal education back into a more traditional model.

B. Rationale for Legal Education and its Scope

Legal education must be about much more than a narrow, teacher- and subject-matter focused approach to learning the law; it must also be about more than merely preparing students for work in private legal practice. Even the recent reports which recommend changes to legal education with a view to preparing students for work in the legal profession emphasise the importance of learning material, skills, attitudes and values beyond the scope of the traditional model of legal education. There seem to be few (outside the profession) who dissent from such sentiments, and there is a wide body of material outlining and evaluating the types of material, issues, perspectives, activities, skills and values which might compose a different and better type of legal education. It is essential to commence with a clearly articulated understanding of the theories of law, lawyering and learning on which our curricula are based. These theories should be ‘more than platitudinous and anecdotal’, they should be ‘systematic, conceptual and rigorous’.

We noted above that what has been missing from many of the policy discussions about legal education concerns how law should be taught; accordingly we have tried to address some of the most important aspects of learning and teaching in this article.

C. Co-ordinated and Incremental Development in the Curriculum

In Part 2 of this article we observed that the traditional legal education model has been preoccupied with the study of narrow legal rules. We also suggested that the traditional model taught the same thing — analysis of legal rules — repeatedly, with little evident recognition of students’ intellectual development. In Part 4 we reported that law schools are now addressing some of these issues in their curricula. Most law schools report that they teach more legal theory, that legal ethics is a compulsory part of the curriculum, and that there is greater attention to legal and

---

153 Australian Law Reform Commission, above n40 at 137.
155 Brand, above n4 at 139–140.
158 Feinman & Feldman, above n36 at 895.
generic skills. While some law schools claim that some of these themes pervade their curricula, the most common approach to including theory, ethics and skills in the curriculum is in separate one-off subjects. Apart from appearing tokenistic, this approach does not enable students to practise and test their knowledge and skills in different, increasingly complex, contexts, and gives them little opportunity for structured and incremental development throughout the law degree.

The challenge for law schools is to embed, or integrate, legal and generic skills, ethics, and legal theory within their law curricula, so that law students are provided with a co-ordinated and incremental approach to developing their knowledge and skills. The first law school to embrace this challenge was the Queensland University of Technology (QUT) Law School. The first step in this redesign of the curriculum was to identify the generic and discipline-specific capabilities that the school required of its graduates. The school then identified the different skills, and the expected level of achievement for each of those skills involved in developing the required attributes to guide students as they progress through the program, and staff in designing subjects and assessment. The third stage involved reviewing the undergraduate law curriculum to integrate the identified skills within the law degree program.

While the QUT model could be criticised for confining its focus to skills and ethics, and not adequately including legal theory, interdisciplinarity, indigenous and gender issues, it provides a very useful framework. Each element should be introduced in the first year of the five-year combined degree program, in ‘modules’ within substantive subjects, and then developed in at least one further module in later year subjects. Academic teaching staff will need to collaborate to ensure that the learning objectives relating to each element in each subject build on earlier learning, and that assessment tasks assess learning at each stage.

D. Structured and Activity-based Teaching

Teaching and learning theory provides useful principles, or guidelines, to help law teachers move away from the traditional teaching as transmission model to a

159 Johnstone & Vignaendra, above n2 at ch 5.
161 See also the recommendations of the Crampton and McCrate Reports in relation to incremental development in the law curriculum, discussed in Part 3A above.
163 Christensen & Kift, id at 224, 216–219.
164 Id at 214–219.
student-focused approach which helps students to construct their own knowledge by engaging deeply with learning through activities.

Schuell argues that ‘[i]f students are to learn desired outcomes in a reasonably effective manner, then the teacher’s fundamental task is to get students to engage in learning activities that are likely to result in their achieving those outcomes.’ Learning objectives, assessment tasks and learning activities should be mutually supportive. Educational theory outlines flexible models of teaching which generally ask teachers:

- to think about the learning context, and who our students are — their characteristics (age, gender, ethnic and class background, previous work and educational experience, motivation for taking the subject, academic ability, relevant prior experience and learning) and the implications of their characteristics for subject design;
- bearing in mind the learning context, and characteristics of our students, to articulate our purposes and expectations, in the form of learning objectives — which can include intellectual, generic and legal skills, and attitudes and values;
- to select assessment activities which help us determine students’ progress towards our specified learning objectives, and which are integrated into the whole subject and designed as an intrinsic part of ongoing learning, rather than something done at the end of teaching. We should make our expectations and criteria clear, and maximise the opportunities for students to receive constructive feedback so that they have information to correct their misconceptions of the subject matter, to improve their skills, and develop their skills in self-monitoring;
- to select learning activities that facilitate students’ achievement of specified learning objectives — a useful rule of thumb is to reduce the time in which students are simply attending, and increase the time they spend articulating, discussing, practising and experimenting with, and reflecting on, the subject material, and

---

167 Biggs, id at 25–26. See also Johnstone, Patterson & Rubenstein, above n73.
169 Schwartz, id at 384–386.
170 Id at 392–404; Biggs, above n5 at ch 3.
171 For discussions of assessment, see Derek Rowntree, Assessing Students: How Shall We Know Them? (rev ed, 1987); Peggy Nightingale et al, Assessing Learning in Universities (1996); Ramsden, above n5 at ch 9; Le Brun & Johnstone, above n11 at ch 4; Johnstone, Patterson & Rubenstein, above n73; Terry Crooks, Assessing Student Performance, Higher Education Research and Development Society of Australasia, Green Guide No 8; Biggs, above n5 at chs 3, 8 and 9.
to evaluate students’ perceptions and experience of the subject and the way it is taught.\textsuperscript{175}

There are also helpful frameworks for structuring topics to promote robust student learning. For example, Diana Laurillard\textsuperscript{176} has outlined a ‘template for the design of teaching’ which begins with teachers presenting ideas to students, via, for example, teaching materials which require students to question, clarify, and express their understanding of the ideas, so that the teacher can then re-express the ideas in order to clarify student misconceptions. The teacher then provides students with opportunities to re-express their understanding of the material, and invites students to engage in a task which requires an application of the learned material. The students receive feedback on their performance from the teacher and use the feedback to improve their performance. Robert Gagne\textsuperscript{177} provides a nine-step framework using ‘instructional events’ in which the teacher gains student attention by illustrating the importance of the topic; informs students of learning objectives; stimulates recall of prior learning in relation to related topics; presents new information; provides learning guidance to help students engage with new material; provides activities requiring students to apply their learning; gives feedback; provides activities in the performance of which students can assess their progress; and finally encourages students to review what they are learning, and to apply their learning to new situations to enhance retention.

These frameworks are not meant to be straitjackets for law teachers, but rather guides to ways of thinking through issues of curriculum and subject design, so that student learning is structured and developed through students’ active engagement with subject material, their teachers and their peers.

E. Collaboration in Legal Education

One of the greatest challenges for the development of legal education may be to redress the present focus on individualism, as it affects both students and teachers. Zimmerman asserts that ‘cooperative and collaborative learning cut right to the heart of traditional legal education and challenge its underlying traditions.’\textsuperscript{178} Individualism is pervasive in legal education, both in terms of how legal academics work and in terms of how students learn and are assessed. This is a factor which is seldom addressed in policy reports on higher education, except insofar as teamwork is identified as a desirable generic attribute (often only because practitioners perceive that graduates lack the ability to function effectively in groups in the workplace).\textsuperscript{179} It has likewise generated relatively little comment in

\begin{itemize}
  \item See below at Part 6F.
  \item Laurillard, above n62 at 195–196.
  \item Teamwork is – probably for the same reason – commonly identified as a desirable generic attribute by universities.
\end{itemize}
the Australian legal education literature. Nevertheless, the individualised nature of assessment and learning in law school has been demonstrated to create student anxiety and stress in numerous United States studies.  

Addressing the individual focus of legal education presents significant obstacles for law schools and most law teachers. Zimmerman observes that ‘the root of institutional concern [about the use of group work] lies in four notions embedded in traditional legal education: competitiveness, teacher control, authorship/individualism, and individualized grading’. Each of these is deeply ingrained in most law teachers’ experiences as law students and as academics, and these experiences cause profound resistance to the use of group work.

Even if individual teachers are willing to incorporate cooperative learning into their subjects, they are likely to meet resistance as most students are socialised into individual learning in pre-tertiary education. Given that the dominant mode of learning and assessment at university is individualistic it is not surprising that students resist group work. It is essential that students receive specific instruction in learning how to work collaboratively; like other aspects of the curriculum, this should be learnt in a co-ordinated and incremental fashion through the law degree. Ramsden points out that from students’ perspective, assessment defines the curriculum, and if students observe that group work assessment is worth less than individual assessment, they will draw the conclusion that group work is not valued by us, and therefore should not be valued by them. Requiring students to work cooperatively where there is no extrinsic reward for doing so (that is, if every item of assessment is assessed at the level of individual achievement) will create the perception that group work is unimportant.

There are many substantial academic and social benefits both to students and to law teachers from working in groups, and yet the underlying culture in legal education remains profoundly individualistic. This characteristic of the traditional model appears to be the most deeply entrenched and the most resistant to the changes which have affected legal education over the last thirty years. This seems

180 See the references noted in Zimmerman, above n178 at 968, footnote 42. The same results almost certainly could have been demonstrated in Australia.
181 Id at 971.
182 Boud et al suggest that if ‘the weighting of any given element of a course is less than 20%, it can give the message that this aspect is valued very little, and students might be prompted to ignore it or put little energy into it’: David Boud, Ruth Cohen & Jane Sampson, ‘Peer Learning and Assessment’ (1999) 24 Assessment and Evaluation in Higher Education 413 at 422. See also Helen Brown, ‘The Cult of Individualism in Law School’ (2000) 25 Alternative Law Journal 279 at 287.
184 Paul Ramsden, Learning to Teach in Higher Education (1992) at 187; Rowntree, above n171 at 1.
185 These are much better documented in the case of students than academics, although similar arguments can be made for the benefits of cooperative work to academics. For evidence of benefits to students, see David W Johnson & Roger T Johnson, Cooperation and Competition: Theory and Research (1989) at 74, 170; Elizabeth A Reilly, ‘Deposing the “Tyranny of Extroverts”: Collaborative Learning in the Traditional Classroom Format’ (2000) 50 J of Leg Ed 593 at 598–601. For evidence of the benefits of cooperation for academics, see Cownie, above n149 at 153–155.
likely to be at least partly a result of the way in which legal academics work. Relative to other disciplines, legal academics are much less likely to collaborate in research teams,\textsuperscript{186} in teaching, many academics’ experience is highly solitary. We strongly advocate the development of scholarly communities, both for the purposes of legal research and teaching.\textsuperscript{187}

\textbf{F. Evaluation as Part of a Reflective Strategy}

A student-focused approach to teaching requires teachers to gather information about student experiences of teaching, and to reflect on how students perceive and experience their subjects. In the past decade law schools, in line with developments across Australian universities, have made increasing use of student surveys of teaching and subjects. Student surveys almost always utilise written, multiple-choice questionnaires, which are rarely designed by the law school. Instead, they are often designed by a central university unit, which, in some cases, analyses the results for the law school. A few teachers at some law schools also conduct other types of student evaluations of subjects, which invite open-ended responses from students.

This evidence suggests that student evaluation of teaching has become a management instrument,\textsuperscript{188} or a tool used by law academics to provide management with evidence that they are satisfactory, even excellent, teachers,\textsuperscript{189} and is not seen as a means of enabling teachers to find out how students are perceiving and experiencing the subject and the teaching of the subject. Educationalists emphasise the importance of teachers collecting information (including student feedback) about their teaching and its effect on student learning, so that they can use this information to improve their teaching. McKeachie\textsuperscript{190} suggests that:

\begin{quote}
The ultimate criterion of effective teaching is evidence of impact upon student learning. What we are concerned about in evaluating teaching is not what the teacher has done, but what has happened to the students.
\end{quote}

Prosser and Trigwell\textsuperscript{191} argue for a use of evaluation which elicits information which can be interpreted:

\begin{quote}
in terms of the way the students experience the teaching. The issue ... is not whether the students’ ratings were right or wrong on particular items. It is what the students’ responses say to the university teacher about the way the students experienced the teaching; was that the way the university teachers planned or meant the students to experience the teaching and what can the teachers do to bring these aspects into closer alignment?
\end{quote}

\textsuperscript{186} Goldsmith, above n35 at 87.
\textsuperscript{189} Johnstone & Vignaendra, above n2 at 427–439, at text accompanying notes 132–134.
\textsuperscript{190} WJ McKeachie, ‘The Role of Faculty Evaluation in Enhancing College Teaching’ (1983) 63 National Forum 37.
\textsuperscript{191} Prosser & Trigwell, above n62 at 161.
Most importantly, this approach to evaluation does not seek to elicit student judgments on the quality of teaching, but looks for information to help the teacher understand how students have experienced the subject, so that the teacher can make changes to the subject and the way it is taught to enable student experience to be brought into line with the experience planned by the teacher. If law schools are to improve the quality of teaching, as measured by student experience of teaching in the context of the law school and university environment, then academic leaders in law schools will have to advocate for the proper use of evaluation, using triangulated sources, and resist its use as a crude management tool.

7. Conclusion

In this article, we have outlined the traditional model of legal education, pointing out its key characteristics. We have canvassed debates that have challenged this model, from the perspectives of policy and of teaching and learning theory. Drawing on the recent AUTC Report, we identify evidence of positive changes in Australian legal education, which have been stimulated by these debates. We pointed to factors which impede the achievement of important and profound changes, and have proposed a modest agenda for the future development of legal education.

Although recent changes to legal education appear impressive, this impression is largely formed by reference to the low benchmark provided by the traditional model, which has dominated legal education in Australia for far too long. The existing debate about the future direction of legal education is certainly progressive in part, challenging to the academy, and provides much scope for improvement. However, this debate is framed by an assumption which in our opinion prevents real progress: that the dominant purpose of legal education is preparation for legal practice. Even more problematic is the limited extent to which this debate engages with teaching and learning issues — questions about what good teaching is, and how it is necessary to enrich an understanding of law and to promote student learning.

We were hesitant to publish this article, because we know Law Deans will remind us that they lack the resources to implement substantial changes, and our colleagues are already heavily overworked, ironically particularly in relation to their teaching-related activities. In short, an essential precondition to the achievement of change is a greater allocation of resources for legal education.

---

192 Id at 161–162.
194 Johnstone & Vignaendra, above n2.
Legal Research, the Law Schools and the Profession

JEREMY WEBBER*

Abstract

This paper addresses the gulf that is said to exist between the law schools and the profession in legal research. It examines the causes and extent of the divide. It argues that some measure of divergence is appropriate, for the mission of the law schools is substantially different from that of the profession. The law schools speak to a broader range of legal phenomena and a more extensive professional and non-professional audience. They must take a critical approach to law and law reform. They have an obligation to explore not only the requirements of legal practice, but also the intersections between law and other social phenomena, and law’s relationship to philosophical arguments. The law schools are therefore best conceived as a parallel branch of the profession, with their own standards of excellence and their own purposes. Interaction between academia and the profession is an indispensable source of insight for both, but in this interaction the law schools must remain true to their distinctive role, a role that only they can fulfil.

* Canada Research Chair in Law and Society, Faculty of Law, University of Victoria; Visiting Professor of Law, University of New South Wales; and from 1998 to 2002, Professor and Dean of Law, University of Sydney. My thanks to Marcia Barry, Sarah Ferguson, Tony Price and Carolyn Webber for their assistance, and to Marcia Barry, Angela Cameron, Terry Carney, Michael Coper, Catherine Dauvergne, Dimity Kingsford Smith, Andrew Petter, Ralph Simmonds, Adrienne Stone and the members of the editorial board of the Sydney Law Review for their comments on a previous draft of this article.
1. Introduction

In February 2002, at the Canberra launch of The Oxford Companion to the High Court of Australia, the Hon Chief Justice A Murray Gleeson referred to a ‘gulf’ that exists between the view of the legal institutions and of the Court from within the universities, and the view from within the practising legal profession. This suggested, he added, ‘the need for some bridge-building.’

The Chief Justice was giving voice to concerns often raised by barristers and judges informally but also, from time to time, in print. Although the strongest concerns are by no means universally shared, they include a sense that the law schools have turned away from the profession, no longer providing the assistance they once did; that academics and practitioners have divergent understandings of law; that they are drifting towards profoundly different, perhaps even mutually unrecognisable, standards of interpretation and evaluation; and even amongst those practitioners most critical of the separation between academia and practice, that academics have lost touch with the law and no longer truly understand its practical operation.

In this paper I take up the Chief Justice’s invitation to build bridges. I do so from the perspective of one engaged in legal academia for close to two decades, in Australia and Canada, including four-and-a-half years as Dean of Law at the University of Sydney. My purpose is to explore why there appears to be a gulf between the law schools and the profession and to suggest how we might better understand that relationship. I will advance a vision of the contemporary role of law schools that is both descriptive (attempting to provide a picture of what law schools are doing today) and normative (describing what they should aim to do). I will focus especially on one dimension of law schools’ activity, namely research. That, of course, is the subject of this issue of the Sydney Law Review. But more importantly, research is the area of greatest divergence between the law schools and the profession; it is the area least understood outside the law schools, including amongst the public at large; it speaks most directly to the interests, sense of calling, and passions of legal academics; and it has been the focus of most suggestions that a disquieting gulf has emerged.

I will also draw heavily on my experience at the University of Sydney. That means that my account will be partial, drawing its examples disproportionately from Sydney (and for that, I apologise to my colleagues at other universities). But this has the benefit of grounding these reflections in a comprehensive understanding of one institution, its strengths and weaknesses, its relationship with the profession, its challenges. That institution has, moreover, played an

---

1 Tony Blackshield, Michael Coper & George Williams (eds), The Oxford Companion to the High Court of Australia (2001).
unparalleled role in the law in Australia. It is the law school of three of the seven members of today’s High Court, including the Chief Justice (a fourth is a former Dean at Sydney; a fifth attended the lectures of the Law Extension Committee, provided by Sydney University). It is the law school of the vast majority of NSW judges. To the extent that there is a perception of a gulf between academia and the profession, there is a fair chance that the implicit point of comparison is the past of the Sydney Law School.4

Now, the gist of my argument is that there has been a separation between the Bar and the law schools, but that on the whole that separation has been beneficial. It has enabled law schools to speak to a broader range of legal phenomena, including those of most concern to solicitors and government lawyers, not only those with which the Bar is chiefly concerned. It has fostered more extensive and balanced reflection on the practical import of law, as well as more profound reflection on legal theory. These have in turn generated very substantial improvements in the education of lawyers, in law reform, in regulatory efficacy, in our general knowledge of law’s role within society and, I hope, ultimately in the quality of the assistance provided to practitioners and judges. I am not arguing that we in the universities should be complacent. The Chief Justice’s challenge reminds us to reflect on how what is done in law schools relates to law in action. The tension between theory and practice is a crucial spur to understanding. But the mere fact of divergence is not a sign that the law schools are failing to do their job. On the contrary.

The law schools and the profession have complementary but different functions. The law schools are not mere appendages to the profession, their purposes entirely defined by the latter’s needs and aspirations. The law faculties have a responsibility to bring the kind of investigation to law that other disciplines bring to their areas of study. In the late 1980s, I attended an informal seminar by a visiting English academic in the offices of the Law Reform Commission of Canada. It was a dispiriting event. The visitor, who had once been an innovator in English legal academia, was reflecting on the purposes to which law schools should aspire in what was still Thatcher’s Britain. His principal argument, when pressed, was that they should do precisely the same kind of research that law firms did, only with more countries and a longer timeframe.5 What an impoverished aspiration! Legal academics have a responsibility to do more than act as the extended research departments of law firms (although they should not shirk their obligations to the profession, obligations to which I will return at a number of points). They should include within their purview law’s broader themes — themes that are present in professional practice, but that tend to be submerged by the demands of the moment, and the effects of which are evident only in the long term. They should provide insight and reflection on the broader nature and determinants

4 This is not the result of any special virtue of the Sydney Law School (although it is a very fine school). Sydney was the only law school in NSW until 1971.

5 Some of the flavour of his presentation is found in Geoffrey Wilson, ‘English Legal Scholarship’ (1987) 50 MLR 818.
of law. They should lay the groundwork for the creative solutions of the future. I will say more about this breadth of research below, but for now it is sufficient to note that it involves more than the reproduction of current professionals’ practice — more even than the dissemination of their best practice (although it does involve that). Law is an immensely important social institution, making unique normative demands and having enormous impact. Those demands, that impact, deserve concerted attention, in a manner that ultimately goes beyond today’s practice.

Most practitioners, of course, fully agree. Indeed it is often precisely that broader perspective that they appreciate most when they think back on their own legal education. That perspective has helped them prepare for, indeed contribute to, a continually changing legal environment. There is, and should be, a creative distance between the law school and the profession. I want to reflect on that relationship, its reasons, and determine whether the current distance is appropriate or requires change.

2. **The Nature of the Gulf**

What, then, is the gulf between the law schools and the profession? Its size is easily exaggerated. Indeed, different practitioners will perceive it differently. One should be careful, for example, not to attribute to the Chief Justice the stronger criticisms noted at the beginning of this paper, which imply that there has been a breakdown in respect between the two sides. He made clear that in his view, the law schools and the profession had much to learn from each other. 6 He argued for more communication, not less.

Moreover, I suspect that for some participants, the perception that there is a gulf is the product of rolling together two quite separate arguments: (1) concern for the relationship between the profession and the law schools; and (2) debate over the role of the courts, often expressed as a debate between judicial conservatism and judicial activism. For these individuals, left-leaning politics, judicial activism, rights adjudication and an academic approach to law are conflated on one side, and contrasted to conservatism, judicial restraint, the common law and the traditions of the Bar on the other. That, of course, leads only to confusion. The two issues are separate. For one thing, it is not merely those judges who take a conservative approach to adjudication that have been concerned with the relationship between the courts and the law schools. Few would accuse Justice Michael Kirby of being a judicial conservative, yet he has argued eloquently that legal academics should pay more attention to matters before the court and be more assiduous in providing judges with the benefit of their views. 7 Moreover, many academics argue against ‘activist’ conceptions of judges’ role. This has been an important theme, for example, in the arguments of Tom Campbell, Jeff Goldsworthy, Helen Irving, John Macmillan, Robin Creyke, Greg Craven and others against a constitutionally

---

6 Gleeson, above n2.
7 Kirby, above n3.
entrenched bill of rights. The point is that the universities contain people who hold a range of views on the judicial role, as indeed does the judiciary.8

The law schools may contain proportionately more people who favour an expansive view of the judicial role. Barristers and judges tend to work within the existing order; their attitudes are formed, quite rightly, by an attempt to argue within a framework largely determined by existing practice and past decisions. Legal academics are engaged in a broader assessment of law’s justice and efficacy, one that doesn’t take so much for granted. The effect of this difference in perspective was abundantly evident, for example, in differing attitudes towards alternative dispute resolution, at least until ADR came to be embraced by the profession. (Interestingly, the roles now seem to be reversing, with academics sounding notes of caution about ADR.)9 Academics generally have a more sceptical, a more critical opinion of the law than do practitioners. When one firmly believes that the law is wrong, one is more likely to press for change by all available means. Hence, there is a tendency among some academics to push the limits of the judicial role — a tendency which (I and others believe) should be tempered by more careful attention to institutional roles.

And there may be a more fundamental reason for divergence over the judicial role. Academics often engage in the sociological or historical examination of law; at least they pay considerable attention to those modes of analysis. Anyone who does can’t help but be struck by the disjuncture that exists between sociological explanations on the one hand, and the forms of argumentation traditionally used by barristers and judges on the other. That disjuncture is important, and I will discuss it at greater length below. But my point here is that the disjuncture leads many academics to distrust the claims often advanced in favour of a restricted view of the judicial role. Are those claims merely a smokescreen for what has always been a more complicated, a more discretionary and ultimately more contestable set of judgements? Do they dress in the guise of ‘judicial conservatism’ something that is simply conservatism? I have my own answers to those questions, answers to which I avert below. But one can see how an embrace of sociological explanations might lead one to doubt claims that judges simply apply the law.

Still, it is important not to collapse the debates over the judicial role on the one hand and over the profession’s relationship with the universities on the other. To a large extent, the former debate occurs in both the profession and the law schools.

---

8 Indeed although, in his famous attack on judicial activism in Quadrant, Justice Dyson Heydon appeared to lay some of the blame for judicial activism at the feet of ‘quarante-huitard’ intellectuals who were ‘dismissive of what they do not fully understand’, he implicitly recognised the distinction made in the text. He strongly argued that judges should not make major changes to the law, but pointedly did not criticise the weighing of legal efficacy, policy and proposals for reform that occurs in the universities and law reform commissions. He clearly separated the two issues: the merits of reform on the one hand, and the appropriate means for achieving it on the other. See: Hon Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ Quadrant (January–February 2003) 9 at 14–15.

9 See, for example, Hilary Astor & Christine Chinkin, Dispute Resolution in Australia (2d ed, 2002) ch 5.
And even if one screened it out, many practitioners would still perceive that there was a widening gulf between themselves and the law schools.

The common denominator in this perception regards the extent to which the law schools are speaking to practitioners’ concerns: Are they producing the textbooks, the analyses of specific questions of legal doctrine, on which practitioners might rely? Sometimes the comments have a more institutional focus: Have academics turned away from professionally oriented venues such as continuing legal education programs or the *Australian Law Journal*? The critics’ meaning is often shaped by their conception of professional roles, and this, of course, can vary. Practitioners differ, for example, on what scholarship might assist them. This means that they also differ on whether their comments are meant as a reproach. A few clearly think the law schools are wasting their time on the wrong things; many others — I believe most — simply wish that law schools would do more. But the fact remains that many judges and barristers wish that academics would offer more guidance on matters of professional concern. This, for example, has been the gist of Justice Kirby’s comments (who clearly does not mean them as a reproach; he has made clear that he actively values the insights of the academy).10

Some critics, however, go much further. These suggest that academics are losing touch with the profession, that they no longer understand law as it works in practice. The question here is not merely whether legal academics are doing useful research, but whether they are capable of doing so. Have they lost their distinctively legal expertise? Have they become so walled up in their ivory tower that they no longer connect with the profession? Have they become so distracted by sociology or theory that specifically legal analysis has been neglected? I want to make clear that I don’t think this more far-reaching criticism is dominant, in the sense that I don’t think that most practitioners firmly believe it to be true. But I do think that the question exists in the minds of more practitioners than one would like. Any serious attempt at bridge building must try to answer it.

The law schools have sometimes done a singularly poor job of responding. Often the criticism has been expressed in relation to teaching, the most curmudgeonly (and least informed) critics openly wondering whether legal academics know enough about the practice to be training the next generation of legal practitioners. Law-school administrators have sometimes been tempted to respond by noting the large proportion of Australian law graduates — in some estimates approaching 50 per cent nationally (the percentage is much lower at many schools, including Sydney)11 — who proceed to careers in areas other than the private practice of law. The administrators’ argument appears to be that the law schools no longer need to be so concerned with training for practice. This is an utterly self-defeating argument. It may well be that many of our graduates go on to

11 Sumitra Vignaendra, *Australian Law Graduates’ Career Destinations* (1998). This study reports national data only. Separate institution-specific data were also provided to the law schools.
other careers (indeed some of them always did). It may also be that legal education prepares students for a wide range of careers (as it does). But it remains the case that the vast majority of our students study law in order to satisfy the academic requirements to enter the profession, even if they do not exercise that option. We certify that we have so educated them. Indeed, ours are the only institutions that can so educate them, at least as they should be educated. We have a responsibility, then, to make sure that preparation for practice remains a *sine qua non* of our teaching. And of course it does. The most exasperating aspect of this non-response is that it is so false to law schools’ practice. Law schools do seek to educate students, above all, for practice.\(^\text{12}\) Indeed, at the same time that law schools have moved to emphasise theoretical and sociological approaches to law, they have sought new ways to prepare students for the profession through better instruction in such skills as legal research, writing, advocacy and ADR; through the expansion of clinical programs; through (at some schools) the integration of the academic programs and professional legal training; through pro bono schemes; and through problem-based learning. Moreover, there is an exceptionally strong argument that a broader approach to legal education — more theory, more sociological analysis and more legal history — makes for better practitioners. That seems to be reflected in the reputations of law schools: those with the highest reputation, both in Australia and abroad, tend to be those that offer an expansive and rigorous education. There is certainly a question as to the success of our educational initiatives, one that needs careful, not merely anecdotal assessment. But for law schools to imply that they are no longer concerned with the practice of law is plainly false.

There is one further reason to be sceptical of the most strident claims that there has been an erosion of legal expertise in the universities: Legal academics remain in great demand in the profession. Many academics have been recruited to work one day a week in solicitors’ firms. Some are on fractional appointments, formally dividing their time between practice and the academy. In the last year of my term at Sydney, something like one-quarter of the academic staff were engaged in practice on one or the other of these bases, and it is certain that more could have been, had they been willing to suffer the reduction in their own research that was often (though not always) the result.\(^\text{13}\) Indeed, over the years, several such academics have been enticed into full-time practice, especially given the erosion of academic working conditions and the substantial and growing gap between academic and professional salaries. In addition to academics’ involvement in solicitors’ practice, several fine barristers — among them Margaret Allars of Sydney, Sarah Pritchard and George Williams of UNSW, and Patrick Keyzer of UTS — are (or were) essentially academics in part-time practice. Legal academics are in demand as members of professional or government committees; members of tribunals both within Australia and at the international level; participants in law

---

\(^\text{12}\) Of course, there have also been non-professional legal studies programs, which made no pretence of preparing students for legal practice. One prominent example would have been LaTrobe University’s Department of Legal Studies, before its conversion to a professional school.
reform; and expert consultants to the International Monetary Fund, law firms, hospital ethics committees and a host of other bodies. Virtually every one of my Sydney colleagues has served at one time or another in such a capacity, and many have long and distinguished service on tribunals, boards and committees. Academics also serve as law reform commissioners: two members of the faculty were appointed to the Australian Law Reform Commission during my time at Sydney: David Weisbrot as Chair, and Brian Opeskin as Commissioner; Reg Graycar and others served on the NSW Law Reform Commission.

This is a remarkable record. It is due, in part, to the impressive quality of the academic staff at Sydney University. But I would be very reluctant to claim that there was a substantial difference between Sydney and the other Group-of-Eight universities\(^{14}\) in this regard. With respect to the newer law schools, their resources, working conditions and quality are much more variable, but at virtually all of them there are exceptionally fine scholars.

There appears to be no shortage of respect, then, for individual academics. Law schools are threatened more by the loss of colleagues to the profession than they are by the disrespect of their practising cousins. The gulf between practice and academia does not go to professional ability (or at least, it does so rarely, arising no more frequently than concerns about professional ability within the practice itself). Rather, it goes to professional orientation: whether the law schools are paying sufficient attention to professional concerns; whether their efforts are being directed towards types of inquiry that are the province of other disciplines, neglecting the core of legal analysis; and whether this is creating a regrettable disjuncture between the understanding of law in the courts and that in the academy. It is to those concerns that I now turn.

3. The Causes of the Gulf

In this section I will review the factors that have produced the gulf. But before doing so, it is worth making a few general observations about the state of legal research in the universities.

---

\(^{13}\) By my count, in 2002 there were something like 14 members of Sydney’s academic staff, out of a total of 51 full-time and 9 fractional members, in such arrangements (with casual academic staff and staff on leave without pay not included). The estimate is impressionistic. It is based on my review of the staff list from June 2002, combined with my recollection of individuals’ activities. It is difficult to do better without a full-scale survey, given the range of appointments (full-time; fractional; various forms of casual appointment; various forms of leave), and the fact that faculty members are not always obliged to disclose outside activities (for example, if they are employed on a fractional appointment). It is also important to note that of the 51 full-time and 9 fractional members, three were non-lawyers (one economist, two criminologists) and several worked in areas that are not conducive to spending one day a week in a law firm, such as constitutional law or legal philosophy.

\(^{14}\) The ‘Group of Eight’ is a phrase coined to refer to the following universities, which now form a loose association: Adelaide, ANU, Melbourne, Monash, UNSW, Queensland, Sydney and Western Australia.
First, overall research productivity in the law schools has almost certainly expanded — dramatically — over the past 40 years. It is always difficult to measure research productivity. Methods of reporting are haphazard and have changed over time. Publications can vary greatly in length, complexity and audience. Even the denominator of any measure of research productivity (the number of faculty members) is difficult to pin down, given leaves, fractional appointments, casual appointments, and the like. Those measures that do exist (almost always of recent origin) generally focus only on quantity of publications, not quality. I am reminded of a visiting academic from the United States who on reading a particularly impressive article exclaimed: ‘Gosh! This must have at least three MPUs in it!’ ‘MPUs’ were ‘minimum publishable units’.15

It is difficult, then, to convert one’s impression into empirical proof. But a brief review of the research websites of the leading law schools cannot fail to impress with the volume and range of publications.16 For example, the Sydney Law Faculty’s website reports that in 2003 alone, eight authored, two edited, and three subsequent editions of books, 41 chapters in books, 64 refereed articles (ie, articles that were subject to blind academic review) and 51 other articles (including articles in non-refereed professional journals) were published.17 To give a sense of this accomplishment, in 2003 there would have been, on continuing appointments, no more than 60 full-time-equivalent academic staff at Sydney. The totals given include some publications by part-time lecturers and graduate students, but for reasons indicated in the notes the total figures almost certainly understate the actual production. This rate of publication is representative of the output at most leading Australian law faculties. Moreover, it is fair to say that the length and complexity of the average article — especially those appearing in refereed publications — has expanded in comparison to the average article of the past. This has resulted in part from the attempt to treat questions of empirical context, historical background and the assessment of alternative options with the same rigour that is applied to the strictly legal materials; gone are the days when much of the analysis was hidden in an opaque reference to ‘policy’. There is no doubt that this productivity compares very well with — indeed in terms of quantity, almost certainly exceeds — the output of Canadian law schools.

A substantial proportion of this output consists of standard legal analysis directed to the profession. The most characteristic form of professional publication

15 This expression is not apocryphal: at the time of writing, a Google search for ‘minimum publishable unit’ produced 34 hits.
16 See, for example: <http://www.law.usyd.edu.au/research_publications/> (especially the links under ‘Publications’); <http://www.law.unsw.edu.au/research/> (especially under ‘Staff Publications’); <http://www.law.unimelb.edu.au/research/> (especially under ‘Research Publications’); <http://www.law.monash.edu.au/research/publications.html>; <http://law.anu.edu.au/index.asp> (especially links for the ‘Research Quality Review’). Even these sites are not always comparable. Standards of reporting and auditing differ between universities. The Sydney website, for example, appears to include only publications associated with present members of staff, not members of staff of the year in question. It therefore systematically under-reports research productivity in past years (because publications by departed staff are omitted).
17 Ibid.
is the textbook. If one includes only textbooks that were directed to the profession (not merely to students) and omits highly specialised books examining a specific area, during my four-and-a-half years at Sydney at least four new textbooks and six subsequent editions of textbooks were published by Sydney academics. At the time I left, at least three new textbooks and two subsequent editions were under preparation (the latter have since appeared). If one included student texts and casebooks in this total, the number would be even larger. Several Sydney colleagues are also among the authors of *Halsbury’s Laws of Australia* and LBC’s *Laws of Australia*. It is much more difficult to distinguish between professionally-oriented and purely academic publications when it comes to articles, but when one scans the list of titles on the websites, there is no doubt that a great many, perhaps most, refereed articles are directed at least in part to a professional audience. In addition, in 2003, the faculty members at Sydney published at least 35 articles in non-refereed professional journals. Although some academics specialise in writing exclusively for the profession, a great many combine professionally-oriented publications with work directed towards a more academic audience. Because this paper is concerned primarily with explaining the ‘gulf’ between the profession and the law schools, the examples given in the remainder of the paper focus on research that is not directed primarily to the courts. But one should not forget that there are a substantial number of talented researchers for whom the profession remains the primary audience.

This record does not suggest profound neglect of the practising profession. Nevertheless, a gulf has emerged between the law schools and the profession. What has produced it?

### A. Change in the Teaching Complement

In the last 40 years, there has been a substantial change in law-school staff, especially at Sydney University. This alone has driven a wedge between the law schools and the profession — or, more accurately, between the law schools and one branch of the profession to which it was once extremely close: the Bar.


21 See the Sydney University website, above, n16.

22 I reiterate that the examples given below do not represent all researchers, or indeed all prolific researchers, in the faculty. Rather, they provide examples of specific types of scholarship, especially scholarship that might otherwise escape the notice of the profession. There are a number of very fine researchers whose work is not mentioned.
It is perhaps an exaggeration (although not much of one) to say that the teaching program at the Sydney Law School was once a joint venture between a small number of professors and the Bar, assisted by a cohort of junior-academic tutors. Many core undergraduate courses were taught by barristers.\footnote{For the history of the Law School, see generally Thomas Bavin (ed), \textit{The Jubilee Book of the Law School of the University of Sydney 1890–1940} (1940); John & Judy Mackinolty (eds), \textit{A Century Downtown: Sydney University Law School’s First Hundred Years} (1991).}

Over time this presence has waned. The process started earlier than in many jurisdictions. The controversy over the appointment of Julius Stone as Challis Professor of Jurisprudence and International Law in 1941 involved, amongst other things, a fierce battle over an academic versus a predominantly professional approach to law. These conflicts were more severe than anything we have seen in recent years. The appointment of Stone led to the resignations of the Chancellor of the University, the Dean of Law, and Fellow of University Senate, Justice Colin Davidson.\footnote{A description of the events surrounding Stone’s appointment is contained in Leonie Star, \textit{Julius Stone: An Intellectual Life} (1992) at 56–64, and Mackinolty, id at 78–81.} But as with many fights, the battle-lines came to be exaggerated, compounded with personal disputes, and crystallised into institutional structures that long outlived the forces that gave rise to them. In fact, an evolution toward more academic approaches to law was occurring across the faculty. Many of the most respected practitioner-lecturers were those who took an academic approach to their subject. The philosophy department at the University of Sydney, and especially the disenchanted empiricist rigour of John Anderson (Challis Professor of Philosophy from 1927 to 1958), exercised a decisive influence over many who were in the conservative camp on law-school affairs, including some members of the Bar who taught in the program.

The evolution towards an increasingly academic approach accelerated from the 1970s on. The permanent academic staff expanded. The faculty was integrated increasingly into university structures of appointment and promotion. Postgraduate training in law became a prerequisite for a permanent academic position. There was, in short, a gradual extension of the view that university teaching and scholarship had their own standards of professionalism, their own standards of excellence, which diverged from those of the Bar. This led to a gradual reduction in the number of barristers and judges teaching in the undergraduate program until, by the time I was Dean, only one undergraduate unit was fully taught by a barrister or judge: Roman Law, under Justice Arthur Emmett of the Federal Court.

I know that many alumni saw this change as a loss, and look back with nostalgia on the days when they were taught Equity or Evidence by the leaders of the Bar. It was a loss that was even more striking in the new law schools, which lacked Sydney Law School’s historical and geographical connection with the Bar. Some of the estrangement between the profession and the law schools is undoubtedly a product of this change. Let me say a few things in response.
First, the extent of the separation should not be exaggerated. I have already mentioned the number of academic staff who themselves are directly engaged in practice. But more importantly, full-time members of the profession remain highly valued participants in Sydney’s and other universities’ teaching programs, both as visitors in undergraduate courses and as lecturers in postgraduate programs. There, their specific expertise can be most effectively deployed. In fact, few practitioners would be willing to take on full responsibility for an undergraduate course today, given the increasing demands of both practice and academia. Practitioners also remain actively involved in the research output of the law schools. The Sydney website lists publications by Justices Graham Hill, Robert Austin and Arthur Emmett, and by barristers such as Chris Birch and Stephen Odgers.25 There has been a shift in the balance of these connections. Often, the contemporary links are as much with the solicitors’ profession as with the Bar. This is particularly so in the newer law schools, which began with an expanded sense of their professional constituency. But professional links generally remain highly valued.

Second, there have been real benefits as a result of the move towards full-time academic staff. This is true on the teaching side. While many alumni deeply appreciate many of their practitioner-lecturers, they also realise that not all of them had the time to take their teaching responsibilities as seriously as one would like, or the ability to communicate their expertise. The current apportionment of roles is clearly preferable as long as the universities can secure and retain lecturers of the requisite quality. The effect of the change in personnel has been especially pronounced in the area of research. The volume of research now conducted, its disciplinary range, and the consequent incorporation of broader perspectives into the teaching of law would simply not have been possible without the move to a full-time, postgraduate-trained, academic staff.

B. Change in the Constituencies and Areas of Research

One aspect of the transformation has been an expansion of the constituencies and areas of law to which research is directed. These include areas that are perceived to be of limited relevance — and are therefore of limited visibility — to the Bench and the Bar, although they are crucial nonetheless.

A good example would be international and comparative law. Sydney University has had a long and distinguished tradition in international law, from Pitt Cobbett, AH Charteris and Julius Stone to, in recent years, James Crawford, Ivan Shearer, and now Don Rothwell, David Kinley and a strong group of younger colleagues. The faculty has also had a strong interest in foreign and comparative law, including Asian legal systems (especially through the work of Alice Tay and now Luke Nottage). Those areas were long considered to be of little practical relevance. They were overwhelmingly the preserve of full-time academics and would still have very little presence in the vast majority of practices at the Bar. But few would deny their immense significance in our globalising world. They are now genuinely important to the profession, although that practice tends to be located in

25 Above, n16.
government, solicitors’ firms, and international agencies. Although questions of international and foreign law seldom arise in litigation before the domestic courts, they are crucial to diplomacy, to the development of fisheries, environmental protection and migration regimes, to commercial transactions and foreign investments, and to proceedings before commercial arbitration boards, international tribunals, and international commissions. Much of the law school’s engagement at the international level would be unknown to members of the domestic profession. Sydney’s three leaders in the field of taxation law, for example, Richard Vann, Lee Burns and Graeme Cooper, have done extensive work for such international organisations as the Organisation for Economic Co-operation and Development and the International Monetary Fund, advising post-communist and developing countries on the redesign of their taxation systems. A number of Sydney’s environmental lawyers, Ben Boer, Nicola Franklin, Rosemary Lyster and Don Rothwell, are also strongly engaged in international cooperation, especially through the World Conservation Union and other initiatives in the Asia-Pacific region.26

A similar phenomenon exists in many areas of domestic law. There too, legal academics devote considerable effort to areas that pass below the radar of most barristers’ practices, or, where the courts see only a small and unrepresentative segment of the area. This is true, for example, of many areas where the bulk of the action occurs in regulatory forums or through alternative dispute mechanisms: child protection (in which Patrick Parkinson has made important contributions in research, on governmental task forces and in advice to religious denominations); policing and incarceration (where the Institute of Criminology, including Julie Stubbs, Mark Findlay, Chris Cunneen and Gail Mason, exercises leadership in the field); incapacity and guardianship (which is the domain of one of the most prolific researchers in the faculty, Terry Carney); medical ethics (where Belinda Bennett, Roger Magnusson and Kristin Savell do remarkable work); and environmental regulation (where Sydney’s environmental lawyers have long made strong contributions). It is also true of such areas as company and taxation law, which do come before the courts but in which large tracts of the law are essentially the preserve of solicitors, commissions such as the Australian Securities and Investments Commission, government departments, and specialised tribunals. There, much of the best scholarship is of great relevance to those agencies but unlikely to be cited in court proceedings. I think, for example, of Jennifer Hill’s fine article on implicit models of shareholders’ roles.27 Even in an area such as constitutional law, much of the writing (such as George Winterton’s on the reserve powers of the Governor-General, or work generally on parliamentary privilege, the

26 Here and elsewhere, I will not provide citations to publications when referring to a body of work, but only when singling out a particular article or book. There are generally a large number of publications in each area. Full references would make these notes voluminous indeed. In most cases, references can be obtained by visiting the staff members’ pages on the University of Sydney website, above, n16.

This expansion in constituencies has distributional consequences. The universities have long worked on issues of critical interest to the disadvantaged — to people who may be the target of legal proceedings and are certainly subject to social or regulatory constraint, but who are seldom in the position of effective legal actors and whose concerns often remain below the notice of the private practice of law: Aboriginal people and Torres Strait Islanders; the poor; recipients of government benefits; asylum seekers; and children. One would not want to romanticise the universities’ contribution. The law schools still pay less attention to many of these issues than the groups’ share of the population would justify. But they nevertheless do pay proportionately more attention than the profession. Law schools have also long been concerned with issues of gender equality and, more recently, sexual orientation. But beyond this specific focus on social equality, legal academics are able to pursue questions in a manner that is less constrained by the need to sustain a viable practice. That affects how they approach a whole range of issues. To take one example, intellectual property lawyers are naturally disposed to advance the interests of their clients, which generally tend toward the expansion of proprietary rights. Patricia Loughlan’s work has, among other things, drawn attention to the cost that certain types of expansion would pose to broader public interests, which are widely dispersed and therefore less clearly represented in judicial proceedings.29

C. Expansion of the Forms of Analysis

The expansion of the intended audience of legal scholarship has also led to an expansion of the forms of analysis used in law schools. Legal academics are not concerned solely with making arguments admissible in court. They are concerned with the assessment of the law, with proposals for reform, and with reasoning that melds legal analysis with insights derived from other disciplines.

Much research is now directed to the criticism and revision of the law. This, of course, has always been part of practice. Lawyers have long engaged in the legislative process as elected representatives, legislative counsel, advisers and lobbyists; they have served as members of and represented clients before legislative committees, commissions of inquiry, professional committees, and expert advisory groups; and they have dominated law reform commissions. Even

---

28 Indeed, an expanding literature specifically addresses legal topics for a lay audience. See, for example, Ron McCallum, Employer Controls over Private Life (1999); Peter Butt, Robert Eagleson & Patricia Lane, Mabo: What the High Court Said (4th ed, 2001); Mary Crock & Ben Saul, Future Seekers: Refugees and the Law in Australia (2002); Patrick Parkinson, Child Sexual Abuse and the Churches (2nd ed, 2003). There is still another audience for legal scholarship: legal scholars themselves. An increasing body of research seeks to assess and improve the teaching of law.

if one takes a conservative view of the role of the courts, then, lawyers have long been central participants in legal change. Legal academics perform a similar function, examining the law and contributing their own views on its merits and options for reform. Indeed, academics provide an added dimension of rigour, doing the in-depth and often interdisciplinary studies that can improve our understanding of existing and proposed regimes. It is crucial that law schools continue to do this work and do not merely leave it to other disciplines. Proposals for reform often require that one weigh the efficacy of different legal mechanisms, invent new mechanisms, or recognise the limits of legal regulation. Distinctively legal values — procedural fairness, human rights and respect for acquired rights, jurisdictional competence and so on — are frequently implicated. It is important that people who know those institutions be engaged in the solution.

New forms of analysis are also crucial outside the legislative context. Tribunals, commissions and expert committees have often been created precisely so that they can bring rich subject-matter expertise to bear in the making of decisions. These decisions often require that one combine specifically legal insights with knowledge derived from other disciplines, sometimes to such an extent that the boundary between the elements disappears and a new amalgam is formed. The term ‘transdisciplinary’ has been coined for this amalgam, to differentiate it from collaboration where the disciplines remain separate. Such amalgams are found in medical ethics, competition policy, environmental regulation, telecommunications regulation and a host of other domains. Legal academics are often in the forefront of these developments, sometimes in collaboration with scholars from other disciplines, sometimes developing transdisciplinary expertise themselves.

D. Growth of Sociological Research in Law

All of these developments remain close to the practice of law. They essentially involve a recognition that practice extends beyond the courts. Law schools have adjusted their activity so that they now address that larger set of questions and that broader professional audience.

The next cause of the gulf — the expansion of sociological research on law — departs from the professional’s perspective. I have in mind a capacious definition of ‘sociological’, capturing all research that examines law’s impact on society from the outside, as a sociologist or an economist would. This research is less interested in the arguments deployed within legal institutions and more interested in describing and measuring their practical effects. When it seeks to explain legal phenomena, it tends to do so in terms of larger social forces, not in terms of legal doctrine. Its perspective is therefore substantially different from that of a practitioner. It may still be useful to practice. Sociological research is immensely valuable in the reform of legal institutions, providing a rigorous empirical foundation for proposals. Indeed, much sociological research combines detailed investigation with suggestions for change. But law reform tends not to be its primary focus. It is concerned, above all, with describing accurately the social causes and effects of law.
This research has become much more common in law schools, especially as they have become more tightly integrated into the general research culture of universities. Much of the legal history now being written takes this approach. But sociological analysis remains much less common than more professionally oriented work. To do it properly is expensive (if done well, the robustness of its findings fully justifies the expense, with the cost usually being borne by the Australian Research Council or by institutional partners). But more importantly, most legal academics remain committed to a fundamentally professional perspective — giving that perspective a more expansive definition and generally deploying a more critical approach and a broader array of argumentation than many practitioners would use — but nevertheless concentrating on how the law should be interpreted or changed.

Few would argue against the need for more sociological research. Some examples from Sydney University indicate both its relevance and interest (this is a very partial list drawn only from the last four years): in 2002 Roger Magnusson published a remarkable study drawn from interviews with health professionals concerning the actual use of euthanasia and assisted suicide for AIDS sufferers in Australia and California. Reg Graycar, Helen Rhoades and Margaret Harrison, in collaboration with the Family Court of Australia, conducted an extensive review of the incidence and role of parenting orders under the first three years of the Family Law Reform Act 1995; Patricia Apps, an economist, has published on the impact of taxation law given different household structures, and on the effects of various taxation rules on household decision-making; Terry Carney has collaborated with researchers in psychology and psychiatry on the management of coercive treatment in the case of anorexia nervosa; and Miranda Kaye, Julie Stubbs and Julia Tolmie have studied the relationship between domestic violence and child contact orders.

Each of these has clear policy implications. Each provides information about law’s operation that is essential to the sound evaluation of legal regimes. They are unlikely to be cited in counsel’s submissions in court, but this research is clearly part of the central mission of a law faculty.

**E. Development of Legal Theory**

At the same time, the law schools have seen a striking expansion in theoretical scholarship.

Legal theory is a broad term, encompassing a wide variety of reflection on the organising principles of law. Some theory is sociological, attempting to describe the relationship between law and society. This work is valuable for much the same

---

33 Once again, detailed references are omitted when referring to a body of work. See above, n26.
reason that empirical research is valuable: it helps us to understand the forces that shape the law and determine its efficacy. But there is another kind of theory that is profoundly important. This work probes beneath legal arguments to analyse the nature of legal reasoning, the requirements of the interpretive process, the justification (or lack thereof) for legal principles on the basis of moral principle, the implications of political theory for the role of courts, lawyers and legislatures, and the lessons to be derived from law for moral and political philosophy (because of course the direction of influence is not one-way; indeed, at its deepest level, legal theory runs together with moral and political philosophy). This theory too occupies a crucial place in the law schools. It serves as an extension of the systematising and rationalising that has always been part of their role — although in this case it leads beyond the surface of the authorities to test the underlying premises and justifications of legal doctrine. It takes issues of legal concern and subjects them to searching evaluation.

Its practical importance was brought home to me in 1990, when I was still in Canada. The Meech Lake Accord (a bundle of constitutional amendments designed to reconcile the people of Quebec to the Canadian constitution) was then going through the process of ratification. It was abundantly clear that the process might fail. In the last months before the deadline, I became involved in an effort to provide a reasoned justification for the Accord in the popular arena. In that struggle, it became evident that our efforts were hobbled by the lack of careful, systematically developed justifications for the positions we were asserting. Most political theory paid no attention to cultural difference and offered no useful concepts for understanding culturally divided societies. The theory that did exist applied a non-discrimination model derived from the United States, a model that was pernicious when applied to questions of language and political community in a society with two principal languages of public debate. It was impossible to remedy that defect in mid-discussion, through talk back shows and opinion columns. As a result, in English Canada the arguments of justice appeared to be wholly on the side of the opponents of the Accord. Principles that had been essential to Canadian political life went largely unacknowledged, and the Accord itself was largely dismissed, in English-speaking Canada, as a mere political compromise.

Predictably, the Accord failed. In the aftermath of the defeat, with a very real prospect of Quebec’s secession, many conferences, commissions, task forces and parliamentary committees were established to find a solution. It was extremely tempting for a young constitutional scholar (as I was) to commit his energies to those hearings. But the void resulting from the lack of theory had been all too evident. Instead of participating in that process, I returned to my study and began writing. Now, I claim no great impact for the book that resulted. But I do know that at that juncture, the decision to write it was the most effectual thing I could

have done. The published body of reflection in society shapes what is conceivable and, as a result, what it is possible to achieve. Because of theoretical work along similar lines by many scholars — Charles Taylor, Jim Tully and Will Kymlicka chief among them — the Canadian constitutional debate was transformed, and with it, the analysis of culturally diverse polities worldwide.

Similar stories could be told in other areas: the recognition of restitution as an autonomous ground for recovery; the emergence of the concept of restorative justice; both the development of corporate personality and current efforts to conceive it in more limited terms. Theoretical writing is the lawyer’s equivalent of basic research: the mathematical formulae, conceptual models and bold hypotheses that permit real advances in knowledge and striking practical innovations. It lays the foundation for the creative solutions of the future. It provides the critical purchase for the evaluation of the present. Nor is it necessarily anti-conservative. It can provide better understanding of existing practices, revealing what is most valuable about them and rendering their justification explicit, so that they too can be refined and extended. That is what occurred in the aftermath of the Meech Lake debate. Where will that systematic theoretical reflection on law occur, if not in the universities?

Theory is so important to the academic enterprise that all scholars have an obligation to grapple with it. I cannot see, for example, how one can be a first-rate corporations-law scholar today without coming to grips with the scholarship inspired by the law-and-economics movement in the United States. One need not embrace it. One can define one’s position in opposition to it. But one needs to read it and understand its analytical power. Theory is not a blueprint that one must rigidly follow. It is a provocation to think more deeply. This does not mean that all legal academics must become theoreticians (God forbid!). But they do need to reflect on why they are asking the questions they do and how those questions are best answered.

---


37 See, for example, John Braithwaite, *Restorative Justice and Responsive Regulation* (2001).

38 I do not suggest that there is no theoretical reflection outside the academy. There are remarkable exceptions to the rule, and indeed barristers and judges have made valuable contributions to jurisprudential discussion and teaching at Sydney (in my time, Chris Birch and Justice Bill Priestley would be good examples). But the existence of a privileged space, where reflection is valued for its own sake and where scholars have the time – indeed the obligation – to develop their ideas fully and systematically, communicating those ideas to their peers and subjecting them to criticism and refinement, is irreplaceable.
F. The Emergence of Differing Readings of Legal Phenomena

To this point, my argument has suggested that the gulf between the profession and the law schools is a result of the expansion of the latter’s role, so that the law schools speak to new audiences and engage in more profound analysis of legal phenomena. But while these developments are important, I do not believe that they yet address the nugget of the Chief Justice’s concerns.

A clue to those concerns is provided by their context. They were made at the launch of *The Oxford Companion to the High Court*, and although the Chief Justice did not elaborate, I suspect that his principal concern was that in the *Companion*’s entries, events, personalities and cases that were familiar to the Chief Justice and others at the Bar were discussed in ways that were, at certain points, unrecognisable to them. There had been a very similar controversy over Brian Galligan’s important *Politics of the High Court* fifteen years before.39 Both books addressed the world of the courts — they spoke of events in which barristers and judges had been actors, knowing intimately what had occurred — but they explained them in ways that sometimes bore no relation to the actors’ own understanding.

That is a serious problem. Some divergence is to be expected. Academics and judges bring different tools to the task. They ask different questions. They situate their comments in different contexts. Academics, for example, may work with a longer timeframe, compare parallel developments in different societies, or explore the links between the law and other domains of activity (the economy; politics; and gender relations). They are meant to ask difficult questions of authority, not simply follow it. Moreover, it is by no means certain that practitioners are aware of all the factors that shape their activity. None of us, not even academics, are blessed with such perfect self-knowledge. But it is a problem when the two sets of explanations never meet: when they purport to explain precisely the same events, but provide mutually incompatible readings.

Sometimes, of course, a reading is just wrong. But often the problem derives from the difficulty we all have combining sociological explanations with explanations in terms of legal reasoning. The problem is not confined to the academic/professional divide. It is apparent in the contrast between the arguments barristers make in court and the explanations they give in their chambers which cite (for example) the professional background, philosophy and life experience of a particular judge, or whether the nature of the facts and the unsympathetic character of one’s client were conducive to a favourable outcome. On both sides of the divide, we have trouble bringing the two types of explanation together. Sociological explanations in academia generally adopt a simplistic conception of legal reasoning (with little room for argument or judgement) or they ignore legal explanations altogether. Explanations in terms of legal reasoning often screen out

---

39 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987). I do not want to overstate the concerns with the *Companion*. The *Companion* involved the participation of many authors (indeed several practitioners). The Chief Justice’s concerns may well have been limited to a few entries.
sociological factors, or they treat those factors as regrettable intrusions, which run the risk of undermining the system’s legitimacy. Very few explanations integrate the normative and the sociological in satisfactory fashion. Very few provide an account of legal argument that is conscious of the fact that we are historical beings, inevitably marked by the social contexts within which we live, yet who strive to justify what we do.

That, I believe, is one task to which we should direct more of our energies. Legal sociologists should seek ways of incorporating practitioners’ deliberation into their analyses, exploring the relationship between it and broader social factors. And those making legal arguments — professionals, judges and academics alike — should similarly reflect on how the two modes of explanation intersect. This may mean exploring how sociological studies might contribute to the construction of legal argument. This was one of Julius Stone’s concerns — although I doubt that his solutions can withstand our current awareness of deep-seated disagreement: we are no longer confident that better sociology can resolve our normative disputes. Our grappling with these issues may also have consequences for our willingness to revise the law. If, for example, we believe that social attitudes have an unjustifiable impact on judicial decision-making, yet we still acknowledge that such an impact will inevitably occur, we may be more willing to revise past decisions, attempting through critical scrutiny to make up for our lack of normative perfection. At the very least the encounter should drive us to acknowledge the historical nature of law, so that we no longer pretend that judges declare a timeless law, but rather strive to incorporate a theory of change expressly into our legal reasoning.

This acknowledgement of change, this realisation that there is a relationship between broader social factors and legal decision-making, need not promote an unrestrained judicial activism. There is still good reason for judicial restraint — for deference to legislative decision-making; for stability in the law even when that law is less than perfect; and for distinguishing changes that judges can legitimately make from those they should leave to the legislatures. But the one thing we cannot do is put the genie of the broader determinants of law back in the bottle.

The central task, then, is to listen to different interpretations, give them the respect they deserve, and strive for an over-arching understanding that can comprehend them all, or at least explain why they diverge. This is the bridge building that the Chief Justice has urged upon us. We will not always agree. Indeed, we may vehemently disagree precisely because there is tension between

---


different modes of explanation. But that very tension, and the struggle to resolve it, is productive of insight. What is versus what should be; the question of how we might sustain normative community in a world of difference and disagreement, in which we ourselves are thoroughly entangled — these are the central problems of law, problems that have no easy answer. They present themselves in every instance of adjudication. They plague our work as legal scholars. And they are worthy of the concerted attention of both the profession and the academy.

4. Conclusion

The law schools are essential institutions in Australia’s legal culture. Their role includes, as a *sine qua non*, the training of a new generation of barristers and solicitors. It also includes the in-depth consideration of issues important to practice. But in addition to these tasks, the law schools’ role extends to the systematic investigation of law’s effects, consideration of law’s function in society, and reflection on law’s nature and foundational principles. Those are essential tasks of law schools. If they are not done there, they will be left to the haphazard attention of researchers in other disciplines, who despite their strengths are likely to have little sense of law’s peculiarities, little sense of its subtlety and complexity. Law deserves focused and expert reflection.

The role of the universities is therefore fundamental, and independent from that of the practising profession. There is a necessary gulf between practice and academia. Indeed the law schools are best conceived as a parallel branch of the profession, with their own responsibilities and their own set of professional standards. They are not merely the teaching and research arm of practice.

To insist upon that independence is not to say that the law schools should ignore the profession. Judges, barristers, solicitors, and legislators are essential interlocutors for legal academics. They form the constituencies that share our concerns most directly. The law schools and the profession confront, in their different ways, many of the same issues. Interaction with the profession serves as an indispensable stimulus for academic work and an important check when we find ourselves on the wrong road. The relationship should be cultivated. But in that encounter, we in the universities need to remain true to our role. Our very difference is what makes us valuable. It is only by maintaining that distinction that we can provide the level of commentary, criticism and comparative perspective that the profession has a right to expect. That commentary derives much of its power from the range of our empirical research and the quality of our theoretical reflection. Our ability to contribute to the development of the law — through reasoned reflection on the common law and proposals for legislative change — is a function of our capacity to see beyond today’s solutions, to shake ourselves free of accepted wisdom.

This sense of our mission is, moreover, fully consistent with our teaching obligations. Our students work in a changing environment. We must give them tools to function in that world so that they can reflect on where the law may be going and contribute to that development. Theoretical reflection is an important
way to refine judgement, probably the most important (and most elusive) quality in a practitioner. And the more we know about the empirical effectiveness of the law, the better our students will be able to advise their clients on courses of conduct that are reasonable, not chimerical.

A good law faculty therefore balances a complex set of demands, all of which are integral to its responsibilities. A law school must pitch an expansive tent, bringing together people who are focused on everything from the teaching of professional skills to the elaboration of an area of law, empirical research, and the most difficult concepts of legal philosophy. Arguments over balance will arise, and precisely because there is no absolutely right answer to such questions, it is important to take challenges like the Chief Justice’s seriously and use them as the occasion for satisfying ourselves that our choices are defensible. But our answers must, in any case, preserve the range of our work and its aspiration to academic rigour. That variety is crucial to the students obtaining a well-rounded experience. It is indispensable to the critical commentary, reasoned evaluation and provocative suggestions for future development that the profession, and Australians at large, should expect from their law schools.
Power-Knowledge in Australian Legal Education: Corporatism’s Reign

NICKOLAS JAMES*

Abstract

“Corporatism” is the name commonly given to the approach to legal education which prioritises the accountability of staff and students, the efficiency of the teaching process and the marketability of the law school. It is an approach which is frequently questioned and criticised by legal scholars but which is nevertheless increasingly widespread. This paper seeks to determine how and why corporatism exists and persists within Australian law schools. It does so not by proving or disproving corporatism’s claims to truth, but by conducting an analysis of corporatism as a vector of power-knowledge. As a form of knowledge, corporatism’s success is attributable to the convergence of a range of historical, social and political contingencies. As an expression of power, corporatism deploys a range of compelling disciplinary strategies — including normalisation, hierarchical observation and the enforcement of micro-rewards and micro-penalties — in the achievement of its objectives.

* Dr Nickolas John James, BCom LLB(Hons) LLM PhD, Lecturer, T C Beirne School of Law, University of Queensland. This paper is part of a larger project analysing power-knowledge in Australian legal education. I am grateful to the following colleagues for their feedback regarding this paper: Dr Helen Stacy at Stanford University; Dr Barbara Hocking and Dr Sally Sheldon at Queensland University of Technology; and Dr Bill McNeill at Griffith University. I am also grateful for the comprehensive feedback and useful suggestions provided by the three anonymous referees of this article.
1. **Introduction**

The ways in which individual law teachers and law schools approach the teaching of law depend largely upon their answers to certain questions: What is it that we should be teaching? How can it best be taught? What are our objectives in the teaching of law? To these questions in recent years have been added a new set of questions: Is the law school providing a quality product? Are students receiving value for money? How can the cost of legal education be reduced? These latter questions are characteristic of a recently emergent and increasingly widespread legal education discourse referred to here and elsewhere as ‘corporatism’.

Corporatism’s infiltration of Australia’s law schools has been remarkably successful. Decisions about what is to be taught, by whom and to whom are increasingly likely to be based upon what is perceived by law school decision-makers to be the most economically advantageous course of action. The notions of accountability, efficiency and marketability dictate the form and content of many law courses. The relationship between law teachers and their students has subsequently evolved into one which bears many similarities to that between service provider and customer, or even that between manufacturer and product.

This paper seeks to determine how and why corporatism exists and persists within Australian law schools. In doing so, this paper does not seek to either prove or disprove corporatism’s claims. Nor does it suggest that law school administrators are wrong to be concerned about the cost of delivering legal education or with the quality of that education. It provides, instead, an analysis of corporatism as a Foucauldian discourse and as a particular vector of power-knowledge within the discursive field of Australian legal education.

What is a ‘Foucauldian discourse’? When Michel Foucault wrote about madness or medicine or sexuality, he was not interested in the truth or fallacy of statements made about these topics. Rather, he sought to understand how what was said and what was known about his topics had been produced. While he denied the universality of truth, he did not deny that truths were real and had real effects and his project was to discover how these truths emerged. Foucault would ask how it came about that a particular way of organising thinking, talking and doing about a selected topic took the form and content that it did. He sought to answer this question by studying the formation and emergence of discourses. A discourse,

---

1 Lawrence McNamara suggested that the increasing use of ‘flexible delivery’ and online teaching, for example, is driven primarily by concerns about efficiency and market share. Lawrence McNamara, ‘Flexible Delivery, Educational Objectives and the (Political) Importance of Teaching’ (2001) 35 Law Teacher 198.

according to Foucault, is a regular and systematic set of statements by institutionally privileged speakers, with no prior subject and in perpetual conflict with other discourses. Discourses designate the conjunction of power and knowledge; it is through discourses that the production of knowledge takes place and through which power is exercised and power relations are maintained. Discourses seek to both inform and influence, to both educate and dominate. Discourses tell subjects about themselves and about the world; they also construct that world and determine who the subjects are. Foucault coined the term ‘power-knowledge’ to indicate the close relationship between knowledge and power. He insisted that the production and dissemination of knowledge is always an expression of power and that the expression of power always involves the production and dissemination of knowledge. Discourses are more than the expression of particular truths, they actually produce those truths; they are ‘practices that systematically form the objects of which they speak.’ It is discourses that determine what is allowed to be said and thought within a discipline and ‘who can speak and when and with what authority’. A legal education

---

3 Statements include sentences, phrases, exclamations, non-verbal physical acts, practices and visual symbols. Legal education statements include: the written statements produced by legal education scholars and by law schools; the verbal statements produced by law teachers and by law students; the practices which take place within law classrooms; and even the physical structure of law schools and law libraries.

4 A discourse is the talk of a specific academic and professional discipline, issued from specific institutional sites by authorised speakers and distributed through specific institutional channels. A legal education discourse such as corporatism is a regular and systematic set of statements produced by law teachers, legal scholars, law school managers and legal professionals within their respective institutional contexts. A statement about legal education does not form part of a legal education discourse unless the person who made the statement has an institutional location; if the person has no institutional location it is merely an opinion.

5 A discourse is not merely the product of human endeavour, it is an autonomous entity. Subjects are not the initiators of discourse, they are simultaneously the products of discourse and a means by which discourses are propagated. The idea that the subject is created by discourse, rather than the other way around, is central to the Foucauldian theoretical framework. According to Foucault, the notion of a subject who exists prior to language and is the origin of all meaning is an illusion. Foucault wrote: ‘If there is one approach that I do reject [it is the one] which gives absolute priority to the observing subject, which attributes a constituent role to an act, which places its own point of view at the origin of all historicity — which, in short, leads to a transcendental consciousness. It seems to me that the historical analysis of … discourse, in the last resort, be subject, not to a theory of the knowing subject, but rather to a theory of discursive practice.’

6 There are multiple discourses within any discipline; there is no single, consistent discourse. As Foucault insisted, knowledge within a discipline is always discontinuous. Each discourse is in conflict with other possibilities of meaning. Discourses ‘must be treated as discontinuous practices, which cross each other, are sometimes juxtaposed with one another, but can just as well exclude or be aware of each other’. Foucault, The Will to Knowledge, above n2 at 67.

7 Id at 101.

8 He did not suggest, however, that power and knowledge are the same thing. Many believe that Foucault insisted that ‘power is knowledge’ or that ‘knowledge is power’ but, as Foucault remarked, if they were the same thing it would have been a waste of most of his scholarly life to analyse their relation. Gavin Kendall & Gary Wickham, Using Foucault’s Methods (1999) at 51.

9 Michel Foucault, The Archaeology of Knowledge (2002) at 54.

discourse such as corporatism, then, is both a body of knowledge about the teaching of law and an expression of power seeking to regulate the behaviour of law teachers, law students and others. In analysing corporatism as a Foucauldian discourse, this paper is concerned not with the validity of corporatism’s claims but with the conditions of corporatism’s emergence and the consequences of its persistence.

The first part of this paper is an analysis of corporatism as a body of knowledge. Corporatism is identified as a set of thematically similar statements about legal education located within works of legal education scholarship and law school texts. The success of corporatism within the discursive field of Australian legal education is shown to be a consequence of various social and historical contingencies. These include the history of intervention by the Australian government into legal education; the obligations imposed upon law schools in order to qualify for both public and private funding; the charging of student fees; the influence of management theory and scholarship; and the marketability of ‘law’ as an educational product.

The second part of this paper is an analysis of corporatism as an expression of power within the law school. Corporatism, more than any other legal education discourse, seeks to control, to govern and to discipline subjects within the law school in order to achieve its explicit objectives of accountability, efficiency and marketability. Corporatism employs certain disciplinary strategies by which it seeks to achieve these objectives, including the classically Foucauldian strategies of hierarchical observation, of normalisation and of systems of micro-rewards and micro-penalties.

The third and final part of this paper is a description of the resistance to corporatism within the law school. Foucault insisted that every expression of power inevitably prompts multiple resistances. While resistance, like power itself, is neither good nor bad, Foucault did suggest that close attention be paid to those who resist.11 This paper seeks, inter alia, to promote an awareness of the possible resistances to corporatism and hence to contribute to the ongoing dynamic interplay of truths and micro-powers within the law school.

Corporatism is certainly not the only legal education discourse: corporatism variously cooperates with, competes with or ignores alternative discourses such as doctrinalism, vocationalism, liberalism and critical and feminist discourses. Each of these discourses has something different to say about the nature, purpose and scope of legal education and knowledge within the discipline is consequently inconsistent, discontinuous and unstable. In this regard legal education is not unique. There are multiple discourses within every discipline and disciplines are characterised not by a simple, consistent world view but by the tension which exists between various perspectives, politics and positions.

Two important limitations are imposed upon the scope of the analysis conducted in this paper. The first limitation relates to the definition of ‘legal

education’. As William Twining has pointed out, legal education takes place in many contexts besides specialised law schools: ‘It occurs in law offices, government departments, plush hotels, schools, factories, villages and the home’ and law is taught ‘by non-lawyers and the media as well as by those who call themselves law teachers’. In this paper, however, the scope of analysis is limited to the teaching of law within the law school to those typically described as law students. Specifically, it is limited to coursework within the Bachelor of Laws (‘LLB’), Juris Doctor (‘JD’) and Master of Laws (‘LLM’) programs. The analysis does not include statements produced by and about postgraduate research students.

Secondly, the focus of the analysis is upon Australian texts and practices. This focus is justified by the direct relevance of Australian legal education to both the author and most readers of this paper and the fact that the uniquely Australian historical, social and political contexts which shape Australian legal education render direct comparisons with legal education in other jurisdictions such as the UK or the US difficult and potentially problematic.

2. Corporatism as Knowledge

Most authors who write about corporatism and its impact identify corporatism as either an ideology or a practice whereby the dominant values of private enterprise — such as profitability, efficiency, accountability and quality control — are adopted by governments and by public and non-profit institutions such as the academy. Simon Marginson, in Education and Public Policy in Australia, described corporatism generally as,

- strong central control associated with devolved responsibility for operations;
- separation of policy determination from the sphere of devolution; focus on outputs within input-output models of production; emphasis on selling the product. Other features are market-style competition, distribution and exchange;
- and closer management and measurement of outputs and performances.

13 Australian legal education differs from UK legal education in that UK law schools have never had as vocational an orientation as those in Australia. Generally, they have not accepted to the same extent responsibility for training people for the profession and do not seek to provide a range of subjects adequate for that purpose. Qualification to practise is obtained by passing final qualifying examinations set and controlled by the governing bodies of the profession.
14 Australian legal education differs from US legal education in a number of important ways. United States law schools never adopted the English model of apprenticeship training and law students normally proceed from university to practice without having to fulfil formal practical training requirements. Law is generally a graduate course in the United States, taken through a full-time course of three years after graduation in Arts or a similar discipline. US law graduates are still often required to take a separate set of professionally administered ‘bar’ examinations in each State before being admitted. For much of the last century, Australian legal education has been uniformly publicly funded whereas US legal education has seen a combination of private and public funding. Finally, doctrinalism and vocationalism were largely unquestioned in Australia while the Legal Realism movement was taking place in the US.
15 Simon Marginson, Education and Public Policy in Australia (1993) at 57.
Christopher Blake identified corporatism as the adoption by universities of the private sector business model:

It is required thinking in the administrative culture of today’s … university that we supplicate ourselves at the altar of modern corporate practices and values. The litany of customer-service, strategic planning, value-added and other economy-bound ideas provides the rhetorical framework for academic self-worth.\(^\text{16}\)

Richard Collier specifically described the consequences of corporatism for the teaching of law and in doing so identified its key features. First, it is associated with the ‘privatisation of process’ within the law school: a higher interconnection between the practices and goals of the corporate world and the university facilitated by partnerships between the law school and private practice; the ‘branding’ of the university and the packaging of the law school as a product. Secondly, it constructs the legal academic as the new, useful knowledge-worker. Thirdly, it emphasises the down-sizing of the law school; the streamlining and standardisation of internal processes; and the empowerment of a senior management elite.\(^\text{17}\) Finally, it is associated with a culture of audit-accountability and academic scrutiny.\(^\text{18}\)

Margaret Thornton equated corporatism with managerialism and increased accountability and criticised the impact of corporatism within the university:

[U]niversity governance practices have changed so as to comport more closely with those of corporatisation. Just as we see little in the way of consultation and collegiality within the typical company, these characteristics, long distinguishing features of the academy, have been significantly eroded. The collegiate model has been largely replaced with a new style of top-down managerialism, which allows little space for the voices of academics to be heard. Academics, like general staff, are now treated in the same way as workers within private corporations and subject to ever-increasing controls, surveillance and mechanisms of accountability.\(^\text{19}\)

Most writers about corporatism seek to discredit its assumptions, objectives and claims and to contrast them, either explicitly or implicitly, with a truer or a worthier set of values. Consistent with Foucault’s approach, however, this paper does not seek to uncover any universal truths about legal education. The question asked is not ‘Is corporatism right or wrong?’ but ‘How did it come about that this particular construction of legal education took the form that it did?’ The question is answered by analysing corporatism as a Foucauldian discourse.

\(^{16}\) Christopher R L Blake, ‘Beyond Corporatism: Why the Business Model Is Wrong for the Academy,’ \textit{Matrix: The Magazine for Leaders in Education} (June 2000).
\(^{17}\) Referred to by Collier as the ‘McDonaldisation’ of the law school.
\(^{19}\) Margaret Thornton, ‘Governing the Corporatised Academy’ (2004) 1 \textit{The Journal for the Public University} 1 at 1.
The definition of corporatism employed in this paper is the set of statements about legal education produced by law schools, law teachers and legal scholars which emphasise and prioritise the accountability of teachers and students, the efficiency of the teaching process, and the marketability of the law school.20

Corporatist statements are those which emphasise accountability, efficiency and marketability ahead of objectives such as the transmission of doctrinal knowledge; the inculcation of legal skills; the achievement of liberal ideals, pedagogical innovation or social reform. It is not the case that these other objectives are disregarded completely. Rather, they are permitted only to the extent that they are consistent with the satisfaction of corporatist objectives.

The specific texts within which corporatist statements are primarily located are law school policy documents and promotional texts. To a much lesser degree, corporatist statements are also located within works of legal education scholarship.

_Law school policies_ have a significant impact upon the teaching of law. Administrative policies address and seek to regulate all aspects of the legal education process in the names of efficiency, accountability and marketability. At the University of Queensland Law School, for example, law school policies address such matters as: the induction of new teaching staff; the setting of teaching objectives; the drafting of course materials, including course profiles and study guides; the development of course websites; the conducting of teaching surveys; the allocation of teaching hours; assessment procedures and grading; the addressing of student concerns and reviewing of assessment, assignment requirements and submissions; student enrolment and withdrawal; the conducting of examinations, exclusions and appeals; the appointment of casual tutors and the administration of tutorials; the development of new courses; the prescription of textbooks; and annual reviews of teaching performance.21 The day-to-day working lives of most Australian law teachers and law students are regulated not by legal scholarship or law textbooks but by the administrative requirements with which all within the law school are obliged to comply.

Promotional texts produced by and within law schools are mostly concerned with the explicit marketing and selling of the law school’s products to potential customers. Some statements within these texts point to evidence of customer satisfaction. The Bond University School of Law, for example, emphasises the fact that it "received the No 1 ranking of law schools for the overall satisfaction of its graduates in the Course Experience Questionnaires published by the Graduate Careers Council of Australia in 1996, 1997, 1998, 1999 and 2000."22 Griffith

---

20 Corporatism shares many of the characteristics of vocationalism and, as vectors of power, these two discourses often coincide. Vocationalism is the insistence that the law school exists as an adjunct to the profession or at least as a training school for future workers; corporatism is the insistence that the law school is, or should be, an efficient and profitable institution in its own right. Like vocationalism, corporatism is concerned primarily with utility but, instead of focusing solely upon the utility of the legal education, it is concerned with the utility of the law school itself.


University Faculty of Law describes how student surveys show that its graduates ‘rate their educational experience more highly than those of any other law school in Australia.’\(^\text{23}\) Monash Law School insists that it aims ‘to provide high quality service to students, who are the primary focus of our endeavours.’\(^\text{24}\) Other promotional statements emphasise the uniqueness of the law degree offered by the school.\(^\text{25}\) That ‘uniqueness’, however, is typically a practical, commercial focus. At the University of Canberra Law School, for example, ‘there is one respect in which our curriculum is different from most other law programs in Australia — our Commercial Law focus.’\(^\text{26}\) The School of Law at Deakin University seeks ‘to provide innovative and distinctive legal education rather than replicating the courses and approaches of other law schools across the country. The programs at Deakin have a distinctive orientation towards Commercial Law.’\(^\text{27}\) At the University of Notre Dame College of Law:

\[ \text{[i]} \text{t is a matter of real pride to us ... that we are genuinely different. Essentially, we do not just aim to give you a degree in Law. We aim to produce lawyers, in the sense of people who will enter the legal profession, or people who will be fully qualified to do so, but choose to utilise their lawyer’s skills in another context.} \]

These and other such statements demonstrate the concern by law school administrators to offer a degree which is appealing to the customers of the law school: the students and the employers.

*Legal education scholarship* seldom advocates an explicitly corporatist approach to the teaching of law.\(^\text{29}\) There are, however, many works which contain corporatist statements and which implicitly advocate the achievement of corporatist objectives. In ‘Alternative Learning Strategies for Legal Skills and Vocational Training’, for example, David Spencer and Geoff Monahan explore the notion that minimising and more efficiently using resources could achieve quality pre-admission legal skills and vocational training:


\(^{25}\) The Johnstone Report noted that over the last ten years, most law schools have increasingly emphasised their distinctiveness and sought to differentiate themselves, particularly in relation to their local competitors. Most first- and second-wave Australian law schools have ‘reinvented’ themselves (partly in response to the recommendations and suggestions in the *Pearce Report* and partly in response to the emergence of more law schools); and third-wave law schools have been set up to offer a different model of legal education than what they thought was offered by the ‘traditional’ model. Richard Johnstone & Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) at 454.


\(^{29}\) There are many works of scholarship, which explicitly oppose a corporatist approach: see the third part of this paper.
It is possible to produce high quality law graduates using alternative methods of educational delivery. Potentially, this learning can be achieved in the same time, or even in less time, than traditional face to face methods and with arguably fewer resources than are currently being expended.\(^\text{30}\)

What are the assumptions about legal education which characterise the various corporatist statements located within these policies, promotional texts and works of scholarship? Legal education is a quantifiable process which can and should be managed and controlled by a central authority in such a way that costs are minimised and quality, profitability and customer satisfaction are maximised. The success of a law school is determined by the extent to which these objectives are achieved. Law schools compete with each other to attract the highest quality students and enhance their reputation and to attract the most students and enhance their income. As one head of school explained:

There’s the local market and then there’s the broader Australian market. Now frankly one’s not concerned with the broader Australian market here, save in so far as an institution we try to maintain standards and put ourselves academically, in terms of general teaching and research, in the forefront of the group of Australian law schools. Everyone’s trying to do as well as they can. Everyone’s trying to have as high a reputation as one can. That’s the context in which one competes nationally it seems to me. You’re simply trying to develop a reputation and that might involve developing certain research strengths and, of course, winning a reputation in terms of teaching.\(^\text{31}\)

Corporatist statements go further than suggesting that legal education can be treated as if it is a commercial enterprise; they insist that legal education is a commercial enterprise. Administrators justify the application of principles and practises developed for profit-making organisations to non-profit institutions by arguing that regardless of whether the organisation is profit or non-profit, the goal of the manager is always to minimise costs and maximise results.\(^\text{32}\) Institutions such as the law school may not always have a ‘bottom line’ as such, but other performance measures, such as quality of services, are possible.\(^\text{33}\) Quality of services is defined in terms of customer satisfaction, the customers of the law school being perceived as either the law students or the employers.


\(^{31}\) Johnstone & Vignaendra, above n25 at 31.

\(^{32}\) In 400 BC, Socrates said about management during his discourse with Nichomachides: ‘… one should not despise a man skilful in managing a household; for the conduct of private affairs differs from that of public concerns only in magnitude; in other respects they are similar.’ This quote is from Lewis M Cyert, *The Management of Nonprofit Organisations* (1977) at 60–61 cited in Stuart Toddington, ‘Skills, “Quality” and the Ideologies of Managerialism’ (1994) 28 *Law Teacher* 243 at 248.

\(^{33}\) Ibid.
For most of its history, legal education in Australia has been dominated by doctrinalism (the approach to the teaching of law which emphasises the transmission of legal doctrine) or vocationalism (the approach to the teaching of law which emphasises employability and the inculcation of legal skills). What historical, social and political contingencies have now facilitated the emergence and growth of corporatism within Australian law schools? One such contingency is the rising level of state intervention into legal education in Australia. As corporatism has increasingly influenced and shaped government policy and decision making, so too has legal education been shaped by corporatism. Many of the most significant changes in the nature and character of legal education in Australia have been the consequence of deliberate government action and this action is often justified in terms of the government’s perceived need for ’improved budgetary and corporate management processes’. Judith Lancaster suggested, for example, that the change from part-time to professional law teacher after World War II was a result of state intervention. The approaches and practices of the Australian legal profession at the time were perceived as lagging behind those in comparable countries and the changes to university legal education were seen as a means of ‘modernising’ the legal profession. Lancaster also described how, in the early 1960s, the Commonwealth government sought to ensure the existence of skilled legal professionals capable of seizing the opportunities afforded by technological advances and thereby increasing the nation’s productive capacity. The Committee on the Future of Tertiary Education in Australia (the Martin Committee) regarded legal education ‘as a form of national investment in human capital’ and the goal of efficiency justified the phasing out of the apprenticeship system and centralising the training of lawyers within university law schools.

The publication of the Pearce Report in 1987 was another important state intervention. The Pearce Report was, according to Lancaster, an ‘attempt by the

---

34 Foucault referred to this type of work as uncovering the ‘conditions of possibility’. Drawing up such a list of contingencies involves some historical investigation, but it does not require an exercise in causal logic and the artificial designation of some items on the list as primary and others as secondary; or the placement of the contingencies into a scale of ascending or descending importance. Nor does it require the designation of those contingencies on the list to be in some subordinate relation to an item not on the list but which is assumed to be the primary cause, such as modernism, capitalism or patriarchy. Each contingency is in a contingent relationship with every other contingency. They may or may not relate in any way and if they do relate, the form of their relationships to one another is not dictated by any pattern or any outside force. Kendall & Wickham, above n8 at 8–9.

36 Id at 146.
38 Id at 6.
state to harness the higher education sector in the national interest’. It was an explicitly corporatist text, evidenced by the range of legal education issues it sought to address: the quality and economic efficiency of each institution providing legal education; the suitability and feasibility of the aims set and followed; the nature and quality of both undergraduate and postgraduate courses; the standards of teaching and research; the effectiveness of resource utilisation and the extent of unnecessary duplication; the community requirement for graduates; and selection and admission processes for law schools. The Report began with the following introduction:

The Commonwealth Tertiary Education Commission believes that the justification of appropriate levels of public funding for higher education carries with it an obligation on higher education institutions to demonstrate that their teaching and research is being carried out at suitable standards, avoiding waste and unnecessary duplication and in a manner that is responsive to community needs … In terms of effectiveness of resource utilisation, [the Pearce committee] will view their task not only as a matter of addressing inadequacies but also as a means of accounting for how savings could be made through redistribution of current resources.

Despite frequent use of liberal terminology, the Pearce Report was concerned primarily with the achievement of corporatist objectives: efficiency, accountability and marketability. Even though the Pearce Report explicitly criticised Australian law schools for neglecting the critical and theoretical dimensions of law, the Report:

… contradicted itself by seeing the legal curriculum as predicated solely upon satisfying professional admission requirements. The critical and theoretical dimensions of legal education would have to remain conditioned by the higher demands of a vocationalism defined by the practising profession and business consumers of legal services.

Vivienne Brand argued that the Pearce Report evidenced a shift in the relationship between legal education and government: law schools were no longer to be left largely to self-regulation but were to be viewed as instruments of economic policy, to be assessed against benchmarks of community expectation and fiscal responsibility. The Pearce Committee consulted with the ‘consumers’ of law

---


school services, including graduates and employers of those graduates.\textsuperscript{44} According to Brand, this move to a consumer-focussed review evidenced an underlying policy shift to a more economically rationalist framework within tertiary education in general and within law schools in particular.\textsuperscript{45}

Corporatism in Australian legal education is also a consequence of another form of state intervention, the public funding of universities. Following World War II, the Commonwealth government assumed complete responsibility for the higher education sector. Student fees were abolished and universities relied entirely upon Commonwealth funds for income.\textsuperscript{46} This lead to increased accountability to the government in relation to the ways in which these funds were used by universities. Government administrators insisted upon detailed information about the structure of university management and about the systems that universities had in place to measure performance. This in turn motivated the university administrators to themselves pay attention to these things. The threat of funding being withheld was a significant contributor to the adoption by university administrators of corporatist systems and practices. One such system was the recognition of each faculty or school within the university as a separate accounting unit with decentralised budgetary authority. Law schools were compelled to implement improved budgetary controls calling for much more sophisticated accounting practices and the introduction of complex annual reporting procedures.\textsuperscript{47}

\textsuperscript{44} Lancaster, above n37 at 48. An entire chapter was devoted to ‘Legal Education: The Consumer’s Perspective’: Pearce et al, above n41 at Ch 4.


\textsuperscript{46} Brand, above n43 at 118.

\textsuperscript{47} Ralph Simmonds, ‘Growth, Diversity and Accountability’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), \textit{New Foundations in Legal Education} (1998) at 64–65. According to Brand: ‘In addition to exercising its power over funding (the federal government’s key tool of economic reform in the university sector), the Commonwealth strengthened its policy reach in education in other ways. Growing cooperation between the States and Commonwealth in the early 1990s, through the auspices of organisations such as the Australian Education Council (AEC) and the Ministers of Vocational Employment, Education and Training (MOVEET), had the effect of raising the Commonwealth’s role in education policy and hence its ability to increase the influence of economic perspectives. The presence of economists at senior levels within the Department of Employment, Education and Training (as it then was) facilitated the economic imperatives driving the policy reforms. These reforms survived subsequent transitions of power within federal government, being generally supported by both the federal Coalition and Labour parties.’ Brand, above n43 at 117.
In recent years, economic reforms have dramatically altered the level of Commonwealth funding to universities. Despite increases in student enrolments, the Commonwealth government’s contribution to University funding has declined.\(^48\) The adoption of corporatist knowledge and practices consequently persists as law schools become more entrepreneurial in order to attract corporate sponsorship, compete for research funds and attract fee-paying students. Law schools are forced to an ever greater degree to seek funding from private organisations and these organisations are unlikely to be willing to risk investing in the law school unless the school has implemented the kinds of corporate governance practices commonly adopted in the private sector and in other bodies seeking funds. As law schools increasingly look to the generation of fee income from postgraduate coursework programs, international student recruitment and enrolment of full fee paying students to supplement the funding of their LLB courses, the marketability of their programs becomes a dominant concern, encouraging ever greater levels of corporatism.\(^49\)

Law students are increasingly obliged to bear the costs of their own education and a fundamental shift in the attitude of law schools towards students and of students towards law teachers has flowed from this change in relative funding. As student fees increase, students are more likely to be perceived by administrators as consumers of law school services and consequently accorded increased power in the debate about what law schools should teach.\(^50\) Students appear to expect more and more from their legal education as each year passes and to be increasingly willing to insist that these expectations be met. This shift in the attitude of law students has been exacerbated by the placement of law at the top of the HECS payments bands.\(^51\) Because they are paying substantial fees for their education, either directly or indirectly, many law students have an expectation that they should receive value for money.\(^52\) From the point of view of many students, the law degree is no more than an asset to be acquired and to be acquired quickly.

---


\(^49\) Johnstone & Vignaendra, above n25 at 4.

\(^50\) Brand, above n43 at 121.

\(^51\) As one law teacher quoted in the Johnstone Report explained: ‘I think student demands have changed very significantly since the differential HECS was introduced. I think that’s probably the biggest factor and students, no matter how you try to tell them, do not understand that we don’t get their HECS funds or anything that approximates them or is proportionate to them. The demands are mainly about resources – timetabling that suits them, which of course is increasingly difficult with combined degrees. They are all working. They don’t want classes at night, which is perfectly understandable. They will have significant demands for after-hours classes though, so in each core subject we offered a seminar group from 5.00–7.00 pm. But it was almost never full, you know, so there will be a demand but it will be from about five or six students and we can’t manage them around five or six students because we can’t afford it. So you end up not doing it. And it causes no end of trouble because students think they have a right to it and it’s really difficult to accommodate that demand.’ Johnstone & Vignaendra, above n25 at 317.

\(^52\) Including, apparently, an entitlement to unlimited access to teaching staff and a passing grade regardless of their actual performance.
cheaply and with a minimum of effort. This expectation has resulted in the movement by some schools towards offering a two-year LLB and the increasing emphasis by most schools upon the marketing of LLM courses to legal professionals and JD courses to non-legal professionals. It is an expectation exacerbated by the increasing tendency by many students to work while studying. As one law teacher quoted in the Johnstone Report explained:

University education used to be a thing students undertook on full time basis. Over the years, however, there has been an extraordinary increase in students working so that now the balance has shifted. Students do their jobs and fit in university education around their jobs. As a consequence students’ expectations in the classroom have changed. They want fast delivery and want to find out quickly what they have to do to get through. This is far removed from the idea that this is an opportunity to explore and have an intellectual experience in what we are doing. This new attitude to study comes through in the classroom in intangibles. For example, they have a less relaxed attitude. Every minute has to count; what used to occur over a long period of time now has to take place quickly.53

Andrew Goldsmith described how universities have become mass institutions and that the proliferation of universities and university places has resulted in a ‘crowded marketplace mentality’. He quoted Mackay, who wrote:

If [the universities’] constant challenge is to attract enough fee paying students to justify their existence, then universities will inevitably retreat from their twin ideals — encouraging the life of the mind and the life of service — and yield to the pragmatism that offers all qualifications as a passport to employment.54

The propagation of corporatism is also contingent upon the ongoing pressure exerted upon law schools by the practising profession to ensure that the law degree satisfies their requirements. Pressure by the profession is facilitated by the close relations between the law school and local law firms. Practitioners contribute to course planning; judges and senior practitioners contribute to academic teaching

53 Johnstone & Vignaendra, above n25 at 315.

54 Hugh Mackay, quoted in Andrew Goldsmith, ‘Standing at the Crossroads: Law Schools, Universities, Markets and the Future of Legal Scholarship’ in Fiona Cownie (ed), The Law School – Global Issues, Local Questions (1999) at 66. Similarly, Paul Havemann and Jacquelin Mackinnon describe how universities once aspired to pursue scholarship and education for their intrinsic worth and valued pure research and the development of moral character. But such universities have long since been displaced in most OECD countries by under-funded mass higher education systems. Although many universities aspired to offer greater equality of access; to provide education adapted to a great diversity of individual qualifications, motivations, expectations and career aspirations; to facilitate the process of lifelong learning; and to serve their local communities and the economy, these values and aspirations had been eroded by corporatism and the immediate need for market relevance: ‘While the 21st century student body is heterogeneous as to qualifications, motivations, expectations and career aspirations, most these days come to university to get ahead, to become the ‘clever people’ and ‘wired workers’ of the information age.’ Paul Havemann & Jacquelin Mackinnon, ‘Synergistic Literacies: Fostering Critical and Technological Literacies in Teaching a Legal Research Methods Course’ (2002) 13 Legal Education Review 65 at 66–67.
and writing; and an increasing proportion of full-time academics have recent or current professional experience.\textsuperscript{55} Law firms are regularly invited to sponsor events such as mooting competitions, academic prizes, scholarships and law school functions. The employers thereby occupy positions where they are able to influence the general direction if not the specific content of the law school curriculum. Pressure from the profession also manifests in the form of admission requirements. The ‘Priestly 11’ — the 11 areas of knowledge that law students are required to have studied successfully before they can be admitted to the legal profession\textsuperscript{56} — influence significantly the nature and characteristics of Australian legal education. While law schools are not compelled to offer all 11 areas of knowledge in their core curriculum, most schools nevertheless do so\textsuperscript{57} and most students prefer to take the 11 areas of knowledge during their university education. The shift away from public funding and towards private funding of law schools has given the practising profession an opportunity to exercise even more influence upon the law school and its curriculum. The fact that law firms are providing the money to fund some of the law schools’ activities obliges law school administrators to take heed of the profession’s demands.

The expectations of students and the demands of the profession combine to exert significant pressure upon the law school to offer vocationally orientated courses. This pressure, together with the law schools’ apparent willingness to concede to that pressure, encourages the perception that the law school exists primarily to serve its customers by being a source of employment training and of future legal workers.

The propagation of corporatist discourse within the discursive field of Australian legal education is also a consequence of the growth of a body of knowledge, theory and scholarship within the disciplines of accounting, economics, management and marketing.\textsuperscript{58} This scholarship influences legal education by a number of means: many law teachers have qualifications in both

\begin{quote}

56 Contract law, tort law, real and personal property law, equity (including trusts), criminal law and procedure, civil procedure, evidence, professional conduct (including basic trust accounting), administrative law, federal and state constitutional law and company law.

57 This is most apparent in the ‘third-wave’ law schools (the 16 law schools established subsequent to the 1987 \textit{Pearce Report}); given their need to maximise the employability of their graduates, most ensure that their compulsory curriculum includes the requisite areas of knowledge. Although the ‘first-’ and ‘second-wave’ law schools are less likely to include the 11 areas as part of their core curriculum, the elective law subjects that are required for admission effectively become compulsory law subjects because the students who do not intend to practise law are usually aware that, should they later decide to practise, they would otherwise be required to pass additional courses. Sam Garkawe, ‘Admission Rules’ (1996) 21 \textit{Alternative Law Journal} 109 at 110.

58 Marginson, above n15 at 57.
\end{quote}
law and one of these other disciplines and many Australian law schools have in recent years been relocated within the university structure to business faculties. As Toddington noted:

Most of us have been aware for some years of the growing influence of managerial theories, techniques and procedures in further and higher education. This is to be expected: for in speaking of educational policy (or indeed any policy) no reasonable person can avoid issues of quality, organisational rationality, or economic efficiency. Contemporary Management Theory presents itself as the natural language of this debate and it has been received with enthusiasm as such.59

The final contingency considered in this paper is the attractiveness of the law degree to university administrators as a marketable product. Andrew Goldsmith pointed to the appeal of law schools as a consequence of their ‘already providing strongly professional and vocational programs, operating with high student-staff ratios and being attractive in the student “market-place.”’60 Law schools are prestigious faculties which attract relatively bright students for comparatively low investment.61 In market terms, according to Goldsmith, law is ‘efficient’ and a ‘performer’.62 Law schools have even been described as offering a ‘cash-cow’ opportunity to vice-chancellors.63 University management structures, already dominated by corporatism, thus turn their attention to the marketing and management of law and impose corporatist procedures and practices upon the law school in order to maximise their returns. In fact, one of the most significant changes to Australian legal education was a consequence of this particular perception on the part of university management. The Pearce Report had recommended that no new law schools be opened, but this recommendation was not followed.64 In 1987, there were six ‘first-wave’ law schools and six post-war ‘second-wave’ law schools. Today, the existing law schools has massively increased their numbers and a ‘third wave’ of 16 new law schools have been established. As David Weisbrot wryly observed in 1991:

The central message of the Pearce Report on Australian Law Schools was that legal education in Australia is being run on the cheap and this is a Bad Thing. The moral for Vice Chancellors, University Councils and Governments, however, is that legal education in Australia can be run on the cheap and this is an Absolutely Splendid Thing.65

59 Toddington, above n32 at 243.
60 Goldsmith, above n54 at 71.
61 Craig McInnis & Simon Marginson, Australian Law Schools After the 1987 Pearce Report (1994) at 16. Law schools are cheap institutions to fund compared with other faculties within the university; staff-student ratios in law schools are typically high due to the traditional teaching model of large lecture classes supported by tutorials: Brand, above n43 at 119.
62 Goldsmith, above n54 at 73. By 1995, law had become the third-fastest growing discipline after health and business: Sumitra Vignaendra, Australian Law Graduates’ Career Destinations (1998). In a peak growth period between 1988 and 1992, growth in law and legal studies places (60.7 per cent) exceeded both business (50.4 per cent) and health (49.3 per cent), against a base in all disciplines of 33.9 per cent: McInnis & Marginson, above n61 at 15.
63 Brand, above n43 at 119–120.
64 McInnis & Marginson, above n61 at vii.
It is likely that in the coming years universities will increasingly rely upon non-government sources of funding. It is also likely that law schools will continue to attract students willing to pay substantial fees for a legal qualification. Given these two contingencies, the ongoing presence of corporatism within the discursive field of legal education appears assured.

3. Corporatism as Power

The historical, social and political contingencies described above facilitate the propagation of corporatism, but the success of corporatism in recent years would not have been possible without willing propagators within the law school. Corporatism privileges government agencies concerned with the efficient management of the education sector; universities concerned with the marketability and profitability of its faculties and departments; and employers concerned with the supply of employable graduates. Within the law school itself, however, corporatism privileges the administrators and it is these law school subjects who willingly collaborate in the exercise of corporatism as power.

The notion of power adopted in this paper is a Foucauldian one. The first point to note about Foucault's notion of power is that it is non-judgmental. The word 'power' often has a negative connotation: it is something possessed and used by the powerful at the expense of the powerless; it is used to repress and control; and it distorts truth and knowledge. According to Foucault, however, power is not only negative, it is also productive. Power produces subjects and determines what they do; it determines how subjects see themselves and the world; and it produces resistance to itself. Power leads to dominance and hegemony, but power also undermines dominance and hegemony. Legal education texts, including the books and articles written by legal scholars; the papers that they present; law school websites and course descriptions; administrative policies; and even classroom and meeting-room dialogues are all expressions of power seeking to achieve particular objectives. This need not be viewed as a controversial assertion.

66 In ‘Truth and Power’ Foucault wrote: ‘But it seems to me now that the notion of repression is quite inadequate for capturing what is precisely the productive aspect of power. In defining the effects of power as repression, one adopts a purely juridical conception of such power; one identifies power with a law which says no – power is taken, above all, as carrying the force of a prohibition. Now I believe that this is a wholly negative, narrow, skeletal conception of power, one which has been curiously widespread. If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn’t only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression.’ Michel Foucault, ‘Truth and Power’ in James D Fausion (ed), Power: Essential Works of Foucault 1954–1984 Volume 3 (2002) at 120. Foucault wrote: ‘We must cease once and for all to describe the effects of power in negative terms: it “excludes”, it “represses”, it “censors”, it “abstracts”, it “masks”, it “conceals”. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production’: Michel Foucault, Discipline and Punish: The Birth of the Prison (1991) at 194.
if it is understood that designating something as an exercise or as a technology of power is not a criticism. Power exists and is exercised within the law school but it is not necessarily exercised repressively or unjustly. Power is what keeps the engine of legal education functioning.

The second point to note about the Foucauldian notion of power is that it is non-subjective. A discourse may privilege or favour certain subjects and those subjects may appear to cooperate willingly in the achievement of the discourse’s objectives, but it is not an exercise of power by those subjects. As explained earlier, subjects are not the initiators of discourse, they are the products of discourse and the means by which discourses are propagated. Corporatism, then, is an exercise of power which favours administrators but is not a deliberate machination by those administrators.

The following analysis of corporatism as power is conducted in three steps. The first step is the identification of the systems of differentiations established by corporatism which create the space within which power is exercised. The second step is the identification of the objectives pursued by corporatism once power relations are brought into existence. The third and final step is the identification of the strategies employed by corporatism in the achievement of its objectives.

Two primary distinctions are established by corporatism which create the space within which power is exercised. The first distinction is between the administrator, responsible for monitoring and ensuring compliance and the administrated, that which is controlled or regulated. The administrator may be a person — such as a dean, a head of school, a law school manager, a senior member of general staff, a program director, a committee chair, or a course coordinator — but it may also be a rule, a regulation, a policy, a guideline or a standard practice. The administrated may be a person — anyone in the school subjected to administrative requirements or obligations — but it may also be a text, a practice, space or time. The undifferentiated mass of bodies, knowledge and practices within the law school is divided by corporatism into administrators and administrated and the former is then privileged over the latter. ‘Privilege’ here refers to the level of authority, prestige or recognition accorded to the administrator. The head of school is privileged over the legal scholar under their supervision; the course coordinator is privileged over the tutor; the program director is privileged over the program; and the curriculum committee is privileged over the curriculum.

Secondly, corporatism divides the administrated persons and practices into two categories: compliant and non-compliant. The compliant exist and behave in accordance with the rules and expectations of the administrators, the non-compliant deviate from those rules and expectations, and the compliant are favoured over the non-compliant. Corporatism judges everybody and everything:

---

67 The word ‘subject’ as used by Foucault has two senses: people are both subjects (self-conscious beings) but they are also subjected (power acts produce subjection). Hunt & Wickham, above n11 at 29.
68 See Foucault, above n5.
69 See Michel Foucault, ‘The Subject and Power’ in Faubion above, n66.
the compliant are rewarded for their loyalty and the non-compliant are punished for their betrayal.

Once these differentiations and spaces are established, what is it that corporatism-as-power seeks to achieve? The explicit objectives of corporatism are the enhanced accountability of teachers and students; the enhanced efficiency of the teaching process; and the enhanced marketability of the law school product.

The corporatist desire for accountability stems from the direct relationship between knowledge and power: by knowing what the administrated are doing — through the mechanisms of observation described below — the administrator is able to control the administrated. By compelling the administrated to continuously and rigorously disclose themselves to the administrator, the administrator is able to monitor the levels of cooperation and compliance practiced by the administrated and the administrated, conscious of their burden of accountability, learn eventually to regulate themselves.

An efficient person or practice satisfies the desires and expectations of the administrators without unnecessary cost, effort or excess. An inefficient person or practice either fails to satisfy the desires and expectations of the administrator or does so at a cost — financial or otherwise — unacceptable to the administrator. Efficiency is a status to which all within the law school must aspire and inefficiency must be identified, discouraged and eradicated. These categories change with time: once that which is inefficient has been abolished, that which remains is once again divided into efficient and inefficient and a new culprit is created.

The third explicit objective of corporatism-as-power is marketability. The discourse categorises courses, teachers, knowledge, texts, teaching spaces and reputations as either appealing or unattractive to prospective students and customers. The perceived desires of the consumer of the law school’s products are paramount and everything is judged as either consistent with those desires or as inconsistent and undesirable.

Enhanced accountability, efficiency and marketability lead to growth. Success for administrators, Heads, Deans and Vice-Chancellors is measured in terms of increases over time: increases in staff and student numbers; increases in private

70 Margaret Thornton described these hierarchical arrangements as follows: ‘In accordance with the corporatised script, the Vice-Chancellor has become the CEO of the university. He – and the corporatist culture is one that remains antipathetic towards the feminine – sits at the apex of what has become a rigid pyramidal structure. [He] is supported by one or more deputy vice-chancellors and a bevy of pro-vice-chancellors. This group of senior managers, rarely seen by the rank and file, is nevertheless able to induce a sense of domination of the entire organisation. At middle management level, a new layer of control has appeared in the form of mega-deans, who manage mega-faculties, then deans of faculties or schools, heads of departments, as well as heads of disciplines and sub-disciplines. There are also senior academics, who act as supervisors/appraisers of individual staff and whose role is to effect greater productivity, particularly in terms of research output and grant income. The network of relationships that criss-crosses the university is reminiscent of feudalism for every person owes fealty to someone above who, in turn, has a supervisory duty towards those below.’ Thornton, above n19 at 2.
grants and public funding; and increases in courses offered and degrees awarded. The emphasis upon ceaseless growth is a feature of corporatist discourses in all discursive fields, not just legal education. Growth, for corporatism, is life and success; reduction is failure and death.

In addition to these explicit objectives, corporatism also seeks to achieve certain implicit objectives. Corporatism, like all discourses, seeks its own propagation; it strives to dominate the discursive field of legal education. In order to facilitate this propagation, corporatism-as-power seeks not only the growth and replication of the corporate law school but also the enhanced status of the administrator within the law school and within the community. The administrator achieves status by being obeyed and by being associated with the success — the efficient performance — of that which is administrated and the status accorded the successful administrator encourages the propagation of corporatism itself.

Finally, corporatism-as-power seeks not only the achievement of the goals of accountability, efficiency, quality and marketability but also their acceptance. While the achievement of these goals may still be possible without their acceptance by the administered, it is certainly facilitated by acceptance and corporatism-as-power therefore seeks the universalisation of corporatism-as-knowledge and the establishment of a regime of truth. It seeks to ensure that notions that the law school is a manageable system and that legal education is a marketable product are accepted as incontestable and absolute rather than contingent and arbitrary.

Each of the forms of corporatism-as-knowledge identified in the first part of this paper is a strategy by which the discourse seeks to achieve these implicit objectives. Law school policies, promotional texts and corporatist scholarship are strategies for the propagation of corporatism, the enhancement of the status of the administrator and the universalisation of the corporatist ideology. Corporatism also seeks to regulate and control the personnel and resources of the law school using classically Foucauldian means: normalisation, hierarchical observation and systems of micro-rewards and micro-penalties. The achievement of corporatism’s explicit objectives depend upon compliance by most, if not all, of the subjects within the law school. Since the advocates of corporatism are more likely already to be located in positions of institutional authority, the strategies of corporatism are persuasive and powerful, backed by the threat of coercive sanctions.

*Normalisation* is the practice of ensuring that particular and subjective truths are accepted as universal and hence incontestable. Subjects accept these truths not because they are compelled but because it is normal to do so and to fail to do so would be abnormal. Corporatism has successfully normalised the notions of accountability, efficiency and marketability within many Australian law schools. It has become virtually unthinkable for legal education to be managed and regulated in a manner other than a corporatist manner. New academic appointees are indoctrinated to comply with existing administrative procedures and practices; they find it impossible to get valuable assistance from administrative staff unless they do so. Expressing desires in corporatist terms and carrying out practices in accordance with corporatist guidelines is normal and any alternative language or
approach is abnormal and consequently misinterpreted or ignored. Non-compliance with administrative obligations is categorised as deviant behaviour and penalised (a point explained further below). The connections between the perceived quality of legal education; the marketability of the law school; the cost of delivering its programs; and the stability of subjects’ ongoing employment are reinforced constantly and it has become inconceivable for customer — student and employer — satisfaction not to be a dominant concern of all law school subjects.71

As Todddington noted:

[T]he central strategy of [corporatism] is to claim universal application by exploiting the natural and wholly rational consensus which does not question the general desirability of securing effective and efficient employment of human and financial resources in pursuit of productive goals.72

The second type of strategy employed by corporatism in the achievement of its explicit objectives is *hierarchical observation*: the monitoring and review of teacher behaviour.73 Law school administrative requirements are enforced by way of continual observation of teachers and students. The enrolment process, the typical classroom layout, the law examination and other assessment procedures are all obvious examples of the surveillance of law students. Specific instances of surveillance of law teachers include: compelling law teachers to regularly seek student feedback,74 requiring law teachers to seek peer assessment; scrutinising law teachers during the process of applying for teaching awards; compelling law teachers to complete teaching portfolios in minute detail on a regular basis; placing teaching materials online and accessible to all; and recording and video-taping lectures and tutorials. Individual law teachers typically prefer that this scrutiny be favourable, as the outcome of these reviews impacts upon the decision of the university to appoint, reappoint or promote the law teacher. Law teachers thus willingly comply with corporatist administrative obligations.

According to Foucault, hierarchical observation leads eventually to self-monitoring and self-discipline. Members of the law school, after feeling endlessly scrutinised, internalise the corporatist agenda and behave in accordance with its objectives without the need for external prompting. The metaphor for modern surveillance used by Foucault in his book *Discipline and Punish* was Bentham’s panopticon, the prison constructed in the shape of a wheel around the hub of an observing warden who at any moment *might* have the prisoner under

---

71 Reinforcement which is typically verbal rather than textual, implied rather than explicit and conducted not only by administrators but by and amongst the administrated themselves.

72 Todddington, above n32 at 244.

73 See Brand, above n43 at 124.

74 From the *Johnstone Report*: ‘Many interviewees and focus group participants thought that student teaching evaluations are used as a stick to manage teaching quality in law schools. Some thought that staff’s attempts to be creative, innovative and experimental in their teaching were inhibited in order to obtain good evaluations from students. Some reported that under these conditions, this just encouraged teachers to stick to tried and trusted methods such as straight lecturing and other forms of spoon feeding in order to ensure that their student ratings were high enough to ensure their tenure or promotion.’ Johnstone & Vignaendra, above n25 at 335.
observation.\textsuperscript{75} Unsure of when authority might in fact be watching, the prisoners strive to conform their behaviour to its presumed desires. The corporatist law school is panoptic because law teachers are constantly watched and monitored by the administrators, by each other and by themselves. Every movement might be seen, every statement might be recorded. There is no need for an all-seeing external authority; because they feel watched, they internalise authority and regulate their own behaviour. Panoptic power achieves what overt power cannot: the transformation of members of the law school into self-regulating, self-disciplining and self-monitoring docile bodies.

The third type of strategy employed by corporatism-as-power is the imposition and enforcement of a system of micro-rewards and micro-penalties. The desired corporatist behaviour results in positive consequences and failure to engage in the desired corporatist behaviour leads to punishment. The emphasis upon ‘micro’ rewards and punishments is consistent with Foucault’s insistence that the most important examples and exercises of power are local and capillary: the fact that assault ing a colleague might lead to imprisonment does not have as important an influence upon the disciplining of a subject as the fact that showing up late for a meeting might lead to a supervisor’s disapproval.\textsuperscript{76} As many of corporatism’s privileged advocates — the administrators — are already in positions of institutional authority, they are able to establish systems which explicitly and implicitly compel law school subjects to comply with corporatist policies and work towards the achievement of corporatism’s objectives.

Examples of micro-rewards to which obedient law students are subjected include successful enrolment; praise from teachers; good results for assessment; good grades for courses; and ultimately graduation. Examples of micro-penalties imposed upon students who fail or refuse to comply with administrative requirements include rejection of their enrolment application; criticism from teachers; poor or failing results and grades; and, ultimately, expulsion from the university.

The system of micro-rewards and micro-penalties imposed upon teaching staff is more subtle but no less compelling. The law teacher who obediently complies with law school policy is rewarded with the praise of their supervisors and the cooperation of general staff. The teacher who dutifully arranges for their teaching to be regularly reviewed and assessed by students is rewarded with the possibility of positive student feedback and, more importantly, with the enhanced likelihood of success in their application for a teaching award, a pay increment, tenure or promotion. The teacher who satisfies the onerously detailed demands of funding agencies is more likely to have their grant application accepted. As Margaret Thornton observed: ‘The corporatised university is one that favours and rewards

\textsuperscript{75} Foucault, \textit{Discipline and Punish: The Birth of the Prison}, above n66.

\textsuperscript{76} Foucault wrote: ‘The analysis … should not concern itself with the regulated and legitimate forms of power in their central locations … On the contrary, it should be concerned with power at its extremities … with those points where it become capillary … one should try to locate power at the extreme points of its exercise, where it is always less legal in character.’ Foucault, \textit{The Will to Knowledge: The History of Sexuality 1}, above n2 at 96–97.
those who are docile, that is, the head-nodders and the forelock-tuggers.\footnote{Thornton, above n19 at 3. Thornton also observed that University codes of conduct ‘may be used to inhibit dissent. On their face, such codes appear benign with their references to fairness, rights and the non-discrimination principle, but the threat of initiating disciplinary proceedings against those who question university policy illustrates how such codes can be used as a sword rather than a shield. Codes of conduct, furthermore, are designed to deal with the conduct of employees rather than the broader institutional and ethical issues of governance. That is, their focus is directed downwards to the conduct of the managed, never upwards to that of the managers.’ Id at 3.} Corresponding examples of the micro-penalties imposed upon teachers for refusing to comply with the requirements of the administrators include criticism by supervisors; uncooperative general staff; negative student feedback; being passed over for pay rises and promotion; failing to receive awards; failing to receive funding and grants; and, ultimately, dismissal.

4. Corporatism and Resistance

In all probability, many advocates of corporatism genuinely and earnestly believe that the corporatist approach is one which results in benefits for all concerned. Administrators seek to enhance accountability, efficiency and marketability in order to maximise the returns, both financial and otherwise, to all of the participants in the legal education process, including the students and the teachers. By making law teachers more accountable, administrators ensure both the consistency and the quality of the teaching process. By minimising the cost of legal education, by making the teaching process more efficient and by emphasising the impact of decisions and practices upon the marketability of the law school, administrators enhance the likelihood that the law school will continue to exist and that school staff will remain employed.

While this paper has not sought to undermine these assertions, it is important to note that the rise of corporatism in Australian law schools has not been unopposed. It has been challenged by those teachers and scholars who value criticism, immeasurability and doubt, who question the escalating levels of accountability, who resent the perceived infringements upon their academic freedom, or who prefer to emphasise liberal, feminist or critical ideals in their teaching. Foucault insisted that every exercise of power engenders resistance.\footnote{Foucault wrote: ‘Where there is power there is resistance and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power … These points of resistance are present everywhere in the power network. Hence there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case; resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant or violent; still others that are quick to compromise, interested, or sacrificial; by definition they can only exist in the strategic field of power relations.’ Foucault, The Will to Knowledge: The History of Sexuality I, above n2 at 96.} Corporatism is always and inevitably contested.

Reference was made earlier to corporatism’s efforts to normalise and universalise the notions of accountability, efficiency and marketability. The
ongoing success of corporatism is largely contingent upon the acceptance by the administered of the importance, the inevitability and the necessity of these objectives. One of the most effective strategies of resistance, then, is the effort to de-normalise and de-universalise these notions. The opponents of corporatism seek to remind law school subjects of the existence and the validity of alternative objectives: doctrinal rigour, social justice, interdisciplinarity, effective learning and legal reform. They point out that some approaches to the teaching of law are not ‘profitable’ and may not contribute to the marketability of law school products to potential customers; they may even disrupt the efficient working of the law school as a commercial institution or be inconsistent with student or employer demand.79 Some approaches are time-consuming and require substantial effort on the part of both the teacher and the student; the rewards earned as a result of expenditure of this time and effort cannot always be measured in terms of cost and profit and corporatism may not recognise its value. These consequences should not necessarily make alternative approaches to the teaching of law less important or less desirable.

Resistance to corporatism has taken the form of scholarship explicitly critical of the corporatist worldview. Examples include Gil Boehringer’s ‘Resisting Pearce’;80 Andrew Goldsmith’s ‘Standing at the Crossroads’;81 Judith Lancaster’s The Modernisation of Legal Education;82 Richard Morgan’s ‘Pearce Report on Legal Education: Corporatist Strategy’;83 and Margaret Thornton’s ‘Law as Business in the Corporatised University’84 and ‘Governing the Corporatised Academy’.85 Resistance also takes the form of anti-corporatist attitudes and behaviours within the law school. Andrew Goldsmith referred to the ‘disenchantment among university academics about the perceived deterioration in their conditions of work, linked to the new talk of students as consumers and the view of education as a product, rather than as a process.’86 One law teacher quoted in the Johnstone Report complained that:

> [t]he life of the average academic has been made more stressful. When I started as an academic it was a relatively leisurely life, as compared with being in practice, because there was time and space for research and reflection. These days

79 As Andrew Goldsmith wrote in ‘Standing at the Crossroads’: ‘In terms of the consequences of new directions in law teaching and support for non-traditional forms of scholarship, there are signs that those committed to innovation or diversity will be hindered, rather than unleashed, by this ideological shift … It is crucial we do not lose sight of intellectual debates and especially the role of critical reflection in university education, among the demands for relevance, vocationalism and efficiency in the delivery of legal education.’ Goldsmith, above n54 at 63–64.
81 Goldsmith, above n54.
82 Lancaster, above n37.
83 Morgan, above n40.
85 Thornton, above n19.
86 Goldsmith, above n54 at 62.
I think because of the lack of resources — and that’s a key thing — the classes are larger, the assessment burden is greater, the accountability expectations are higher, so there’s more reporting, surveying, evaluating. Where students are paying fees there are expectations on the part of the students for professional service, as they see it. All of those things have put extra pressure on the teaching side.87

Despite the ceaseless observation by administrators, the attempted normalisation of the corporatist ideology and the micro-penalities imposed for non-compliance, many law teachers continue to stubbornly, even angrily, resist the call to be more accountable, more efficient and more consumer-focused.88

5. Conclusion

The law school is a complex disciplinary structure. The school regulates its subjects — legal scholars, law teachers, law students and administrators — sometimes through the explicit exercise of sovereign power but more often through the subtle exercise of disciplinary power. Norms, beliefs, texts and practices constitute a disciplinary framework which limits not only what subjects within the law school can do, but also what they can know. This disciplinary framework is not monolithic with consistent and stable conceptualisations of the nature of legality and of legal education. The discipline of law, like all disciplines within the university, is characterised by conflicts and tensions between discourses, each of which competes for status and dominance by propagating different knowledge and utilising different strategies of power.89 These multiple vectors of power-knowledge compete and collide within the discursive field of legal education.

In the dynamic clash and competition between discourses, corporatism often prevails over competing approaches such as doctrinalism, liberalism, and feminist and critical discourses. This is because of the range of historical, social and

87  Johnstone & Vignaendra, above n25 at 322.
88  Dissatisfaction with and opposition to the rise of corporatism is certainly not limited to the law school. The National Tertiary Education Union’s Occupational Stress in Australian Universities: A National Survey 2002 concluded that the overall level of strain reported by Australian university staff generally was very high by comparison with national and occupational norms. Half of the university staff surveyed were identified as being at risk of developing a psychological illness such as anxiety or depression. This is compared with a corresponding rate of 19 per cent amongst the general adult population: Winefield et al, above n48 at 10. The overall job satisfaction reported by academic staff was low. Only 61 per cent of academic staff were satisfied with their job as a whole, while 33 per cent were dissatisfied: Id at 10. Features of the job that staff were most dissatisfied with were the way their university is managed; their chance of promotion; their rate of pay; and industrial relations between managers and staff. A significant proportion of staff were also dissatisfied with their working hours; recognition for good work; and attention paid to their suggestions. Nearly a third of staff were dissatisfied with their immediate boss; their opportunity to use their abilities; their job security; and their physical working conditions. Id at 37.
89  It is not suggested, however, that the law school is cleanly divided into warring tribes of teachers and students, each allied to a distinct discourse. An individual may sometimes be influenced by a single discourse but more often individual law teachers and law students are influenced by more than one legal education discourse and these discourses either compete or cooperate within the individual’s subjective experience and actions.
political contingencies which support corporatism and the range and efficacy of the strategies employed by corporatism in the achievement of its objectives. This is not to say that the competing discourses always fail. There are locations where they dominate: legal education scholarship, for example, is dominated by liberalism. When a broader, discipline-wide perspective is taken, however, it becomes possible to see that the conception of legal education produced and propagated by corporatism generally prevails and that the wider, deeper, more complex, more self-reflective or more socially consequential possibilities for legal education are made conditional upon their consistency with corporatist objectives, if not abandoned altogether.

‘Corporatism’ is one of the many stories told within the law school and like all such stories, it needs to be told repeatedly, remembered clearly and believed enthusiastically. It is a story which will continue to be simultaneously propagated and opposed within the law school. The efforts to achieve and to normalise the goals of efficiency, accountability and marketability will persist, as will the efforts to de-universalise and destabilise these notions. This paper ultimately seeks to offer benefits to both the advocates and the opponents of corporatism: the advocates will better understand their choices and the opponents will better understand their adversary.
Before the High Court
On Technology Locks and the Proper Scope of Digital Copyright Laws — Sony in the High Court
KIMBERLEE WEATHERALL*

Abstract
The High Court has granted special leave to appeal from the Full Federal Court’s decision in Kabushiki Kaisha Sony Computer Entertainment v Stevens, a case which raises important issues concerning the application of copyright law to a digital environment, and the interpretation of those provisions in the Copyright Amendment (Digital Agenda) Act which introduced ‘paracopyright’ — laws which make it illegal to circumvent technologies used by copyright owners to control digital copies of their material. In this piece, Kimberlee Weatherall examines the case and its policy implications, and considers the various possible interpretations of the anti-circumvention provisions. She argues that, in light of the tortured legislative history of Digital Agenda amendments and current reviews, the unprecedented and expansive nature of these laws, and some of the comments about statutory interpretation in The Panel case, the High Court should take a cautious approach to interpreting these new laws.

1. Introduction
On 6 August 2004 the High Court granted special leave to Mr Stevens to appeal from a decision of the Full Federal Court, Kabushiki Kaisha Sony Computer Entertainment v Stevens (hereinafter Sony).1 The case concerns the exceedingly popular Sony PlayStation system, and more specifically, the selling of ‘mod chips’ which are used to overcome technological measures employed by Sony to limit and control the use of PlayStation consoles. These technological measures allow owners of PlayStation consoles to play only authorised copies of Sony’s games, and only those which are sold for use in the same geographical region where the console was bought. The ‘mod chips’ sold by the appellant allow the consoles to be used to play both infringing copies, and authorised copies sold in other regions.

* Lecturer, Faculty of Law, University of Melbourne; Associate Director (Law), Intellectual Property Research Institute of Australia. I would like to note my thanks to Ben Kremer for some useful thoughts and discussions on this case.

Sony is a case that arises under the Copyright Act 1968 (Cth) (hereinafter Copyright Act). But it is not about copyright as we traditionally know it. The questions that arise in Sony concern the interpretation and application of anti-circumvention laws, introduced around the world in the wake of the two Internet Treaties negotiated in the World Intellectual Property Organization (WIPO) in 1996. In Australia, anti-circumvention provisions were introduced after an extensive legislative process by the Commonwealth’s Copyright Amendment (Digital Agenda) Act 2000 (hereinafter the Digital Agenda Act).

Anti-circumvention laws are directed against circumvention of the technological protection measures (TPMs) which copyright owners use to protect and control their copyright material in a digital environment. In light of the very rapid development of digital communication and reproduction technologies, copyright owners have sought ‘the answer to the machine … within the machine’. They are looking, increasingly, to use technological means — digital rights management or DRM — to prevent unconstrained, and uncompensated, copying and distribution of their valuable works. Encryption to prevent copying, encoded usage rules, and access limitations on digital content are examples. The problem for copyright owners is that any protective technology they are likely to come up with is equally likely to be ‘cracked’. Someone will come up with ‘electronic secateurs for cutting through the encryption’. Copyright owners have therefore sought, and obtained, laws against the manufacturers and traders of such secateurs.

2 Sony also sued Mr Stevens for infringement of trade mark under the Trade Marks Act 1995 (Cth). These claims were successful at first instance and were not appealed: Kabushiki Kaisha Sony Computer Entertainment v Stevens (2001) 116 FCR 490. Sony also failed before Sackville J on claims for misleading and deceptive conduct under the Fair Trading Act 1987 (NSW); these findings were also not appealed.

3 Two treaties were negotiated: the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT). Both were aimed at updating copyright law to cope with the challenges posed by digital technologies and the Internet.

4 The relevant provisions are now found in Pt V, Div 2A of the Copyright Act 1968 (Cth). On the consultation process, see below nn80–86 and accompanying text.

5 In Australia, the laws do not currently ban the act of circumvention; rather, they ban preparatory acts — broadly speaking, ‘trafficking’ in devices or services that enable circumvention. The absence of a proscription on circumvention was the result of a deliberate policy decision by the Australian Government. In many countries, anti-circumvention laws are more literally ‘anti-circumvention’ — they actually make it illegal to circumvent TPMs: see eg 17 USC §1201(a)(1)(A) (US) and Copyright, Designs and Patents Act 1988 (UK) s296ZA, introduced by the Copyright and Related Rights Regulations 2003 (UK). In Australia, the government made a policy decision not to ban the act of circumvention, on the basis that the real damage was done by the distribution of circumvention devices. This position will be reversed as a result of the Australia–United States Free Trade Agreement, 18 May 2004 [2004] ATNIA 5 (hereinafter AUSFTA) Art 17.4.7(a)(i).


Anti-circumvention laws have been highly controversial around the world, in part because the technological mechanisms they protect are not necessarily limited to enforcing the kinds of rights historically granted to and exercised by copyright owners. They can act as a kind of ‘supercopyright’, or ‘paracopyright’, enabling copyright owners to exercise far more fine-grained and extensive control. This has raised fears of ‘digital lockup’ and the loss of fair dealing and consumer rights. Just how far anti-circumvention laws end up conferring rights which extend beyond traditional copyright is one of the key issues the High Court will have to confront in Sony.

In granting special leave, the High Court has not only taken on the mantle, as it did in another case not long ago,9 of being the first court of ultimate appeal to consider difficult applications of legal principle to the digital communications environment. More controversially, the High Court has also thrust itself into the midst of an extremely heated debate on digital copyright, at a very interesting time. The anti-circumvention provisions have been ‘very much at the heart of recent “copyright wars”’.10 The provisions which will be considered by the High Court are currently subject to a government review.11 The two key issues which the court will consider — what counts as a ‘copy’ in the digital environment, and what kind of TPMs are enforceable at law — are both affected by the Free Trade Agreement recently concluded with the United States (AUSFTA).12 As a result of AUSFTA, the definition of ‘material form’ has already been amended,13 and the anti-circumvention provisions must be rewritten within the next two years.14

Digital copyright is in turmoil, and the actual legislative provisions on which the High Court will be deliberating are a moving target. Nevertheless, whatever result the court reaches is going to be very closely watched and widely reported, and the findings and comments of the court have the potential to add another

8 See further nn75–79 and accompanying text.
11 The undertaking of a review was announced at the time the original legislation was passed: see Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth) 18. A report from the review process was recently released: Phillips Fox, Digital Agenda Review, Report and Recommendations (January 2004, released 28 April 2004). At the time of writing, the government was ‘considering the report as part of the broader review of the digital agenda reforms’: Commonwealth Attorney-General’s Department, ‘The AGD e-News on Copyright’ (2004) Issue 33: <http://www.ag.gov.au/AGD/WWW/enewsCopyrightHome.nsf/Page/eNews_Issue_33__July_2004#4> (18 October 2004).
12 AUSFTA, above n5. This assumes, of course, that AUSFTA comes into force. This will occur 60 days after an exchange of diplomatic notes between the parties: ibid, Art 23.4.1. At the time of writing, the exchange of diplomatic notes between the parties had not been completed.
13 US Free Trade Agreement Implementation Act 2004 (Cth), Sch 9 Item 186, amending the definition of ‘material form’ in s10(1) of the Copyright Act 1968 (Cth). The new definition excludes the requirement that a copy be in a form from which the work ‘can be reproduced’.
14 AUSFTA, above n5, Art 17.12.
perhaps influential perspective on this ongoing, passionate debate about the future of digital copyright law.

In this brief article I will consider only one of the issues before the High Court: how to interpret the anti-circumvention provisions, and in particular, the definition of ‘technological protection measures’. I will argue that the history of the Digital Agenda Act argues in favour of a cautious approach by the High Court. The provisions the court will be required to consider were very fiercely contested, internationally and within Australia, and the final text of the provisions represents a heavily negotiated compromise. In this context, principles of statutory interpretation suggest that the court should be careful about applying the provisions to anything beyond those cases demonstrably intended to fall within their scope.

2. **The Sony Case: Facts and Findings**

A. **The Facts in Sony**

Companies in the Sony group (hereinafter Sony) manufacture and sell PlayStation consoles and PlayStation games embodied on CD-ROMs and capable of being played on those consoles. As part of its strategy in the manufacture and sale of PlayStation consoles and games, Sony adopted a system consisting of two parts:

- an ‘access code’ embodied in a track on each PlayStation game CD-ROM;\(^\text{15}\) and
- a ‘boot ROM’ chip located on the circuit board of the console.

When a CD-ROM embodying a PlayStation game is inserted into a PlayStation console, the boot ROM performs an electronic check to see whether it has the required access code. If the correct access code is not present, the PlayStation console will refuse to load and operate the game.

The access codes used by Sony protect and control the market for copyright games in two ways. First, when an unauthorised copy of a PlayStation game is made, at least on readily available devices such as ordinary CD-ROM copying devices (CD-burners), the access code is not reproduced. As a result, the burned copies will be rejected by PlayStation consoles. In this way, while not directly preventing infringement of copyright, it can be argued that the combination access-code/boot ROM mechanism ‘deters’ infringement, by ‘rendering the exercise pointless’.\(^\text{16}\)

Second, the access code acts as a means of market control, or rather, market segmentation. Sony has divided the world market for PlayStation consoles and games into three broad ‘regions’, and applies different access codes to each of these regions. PlayStation consoles from one region will look for the access code for that region only. Hence, a person who purchases a console in Australia will not

---

\(^{15}\) Actually constituted by an encrypted string of characters: see Kabushiki Kaisha Sony Computer Entertainment v Stevens (2002) 55 IPR 497 at 508 [46].

\(^{16}\) Kabushiki Kaisha Sony Computer Entertainment v Stevens (2002), id at 506 [29]
be able to play even authorised, non-infringing copies of games purchased in the US: their Australian ‘boot ROM’ will search in vain for an Australian ‘access code’.\textsuperscript{17}

Mr Stevens sold and installed ‘mod chips’. These mod chips overcome Sony’s protective mechanism, in effect instructing the console that the validity and territorial codes are acceptable for operation.\textsuperscript{18} Sony sued Mr Stevens under s116A of the \textit{Copyright Act}. That section confers on a copyright owner or exclusive licensee a right of action where:

1. a work or other subject matter;
2. is protected by a TPM; and
3. a person;
4. without the permission of the owner or exclusive licensee of copyright in the work;
5. sells or distributes a circumvention device;
6. capable of circumventing or facilitating the circumvention of the TPM; and
7. the person knew or ought reasonably to have known that the device would be used to circumvent or facilitate the circumvention of the TPM.\textsuperscript{19}

At trial, Sackville J found that on each Sony PlayStation game CD-ROM there was both a cinematograph film\textsuperscript{20} and a computer program, and both were protected by an access code. His Honour also found that Mr Stevens was selling mod chips which he knew could be, and would be used to circumvent this access code.\textsuperscript{21} The real issue, at trial and in each appeal, is whether the mechanism applied by Sony — the access code and/or boot ROM, is a technological protection measure within the definition contained in s10(1) of the \textit{Copyright Act}:

\begin{quote}
\textbf{technological protection measure} means a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means:
\begin{itemize}
\item[(a)] by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption,
\end{itemize}
\end{quote}

\begin{footnotes}

\item[18]\textit{Kabushiki Kaisha Sony Computer Entertainment v Stevens} (2002), above n15 at 509–510 [54].

\item[19]This summary of the elements of the claim under s116A was set out by David Catterns QC and quoted by Lindgren J, \textit{Sony}, above n1 at 179 [56].

\item[20]A cinematograph film, defined in the \textit{Copyright Act} s10(1) as ‘the aggregate of the visual images embodied in an article or thing so as to be capable … of being shown as a moving picture’, is protected by copyright under s86. It has been recognised that this definition can cover computer games: \textit{Galaxy Enterprises Pty Ltd v Sega Enterprises Ltd} (1997) 75 FCR 8.

\item[21]Strictly speaking, because he found the mechanism used by Sony was not a TPM, Sackville J did not need to consider whether the mod chip was a circumvention device; he indicated, however, that he would have so found: \textit{Kabushiki Kaisha Sony Computer Entertainment v Stevens} (2002), above n15 at 537 [167].
\end{footnotes}
unscrambling or other transformation of the work or other subject matter) with the authority of the owner or exclusive licensee of the copyright;

(b) through a copy control mechanism.

Clearly, Sony’s protective mechanism — the access code and/or boot ROM — is not a ‘copy control mechanism’, it is a mechanism for ‘ensuring that access … is available solely by use of an access code or process’, within paragraph (a) of this definition. The question is, therefore, whether the Sony mechanism ‘prevents or inhibits infringement’.

B. The Issues and Arguments

At the heart of the Sony dispute lies a quite fundamental ambiguity in the legislation: it is not at all clear when an access control device prevents or inhibits infringement.22 The answer to this question is by no means self-evident.23 ‘Access’ is not, in itself, infringement of copyright. Infringement occurs through the doing of an act comprised in the copyright, without permission or defence.24 And while it has been argued that the exclusive right to control access should be a right — or even the primary right — of the copyright owner in a digital environment,25 the terms of our Copyright Act do not currently grant such a right.26

Accepting that ‘access’ is not itself infringement, we need to identify some act, occurring before, after, or simultaneously with access, which is infringement and which is prevented, or inhibited by the TPM. Now, it seems evident that access controls which prevent or make more difficult subsequent infringing acts must be covered: a review of the debates on the Digital Agenda Act reveal that such access

22 This problem in the legislation was not suddenly ‘discovered’ when the Sony litigation began: Miranda Forsyth, ‘The Digital Agenda Anti-circumvention Provisions: A Threat to Fair Use in Cyberspace’ (2001) 12 AIPJ 82 at 93, noting that ‘[a]lthough this provision was subject to many amendments before its final form was decided upon, it remains problematic. In particular, it is not clear how a means which prevents access to a work can be designed to prevent or inhibit the infringement of copyright in a work because, as outlined above, merely accessing a work does not breach copyright in that work.’

23 Indeed, it is interesting to note that during the negotiations that led to the Digital Agenda Act, some copyright owners were arguing that there was no such thing as an access control which prevents or inhibits infringement of copyright: see Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, 30 September 1999 (International Intellectual Property Alliance (IIPA)). The IIPA were very influential in the Standing Committee hearings; Steven Metalitz appeared extensively in the Committee hearings.

24 Copyright Act ss36, 101.


26 Lindsay, ibid. Recent amendments to the Copyright Act as a result of the AUSFTA may have the effect of granting an ‘access right’ — particularly through the amendment of ‘material form’. See Kimberlee Weatherall, ‘Fudging the Question: the FTA and the future of digital copyright in Australia’, paper given at the IPSANZ Conference, Noosa, 10–12 September 2004 at [3.3.1].
controls are, in fact, a clear case which the legislation was explicitly intended to cover. One example frequently given during those debates was an access control consisting of a device or process to limit access to an online database — for example, an access control mechanism requiring those seeking access to produce an appropriate technological ‘key’. It was argued, during the debates, that the law should prevent the circumvention of technology designed to limit access to such a database, as someone who circumvents such protection will be in a position to download chapters, or articles, without paying the fees. In this example, infringement — the reproduction which occurs when chapters or articles are downloaded — is subsequent to, and made possible by the circumvention of the access controls.

The prevention of subsequent infringement, then, is the easy case, where the definition clearly applies. But Sony did not argue that its mechanism prevented that kind of subsequent infringement. Instead, Sony argued that its mechanism prevented prior infringement, and infringement through mere use of the copyright material, submitting that the access code and/or boot ROM:

1. by making the fruits of infringement unplayable, ‘inhibited’ prior infringement, by deterring it, or rendering it impracticable;
2. prevented an infringing use — ie the reproduction of a computer program in the temporary memory (‘random access memory’, or RAM) of the console, generated when an infringing CD-ROM was inserted. This argument depends on accepting that the temporary copy in RAM — a necessary part of use of the CD-ROM — is a reproduction ‘in material form’ as defined in s10;
3. prevented an infringing use — being the copy of the cinematograph film in the temporary memory of the console, made when an infringing CD-ROM was inserted in the console. This argument depends on accepting that the RAM is an ‘article’ in which a copy of a substantial part of the film is ‘embodied’.

Sony only needs to succeed on one of these theories to establish a breach of s116A. At trial, Sony failed on all three arguments. In the Full Court, Sony was successful in the first argument, but failed on the other two, because a majority of the Full Court did not accept that the instantiations in RAM were ‘reproductions’ or ‘copies’ within the meaning of the Copyright Act. All three theories will need to be examined in the Sony appeal assuming, as foreshadowed in the special leave hearing, a notice of contention is filed.

27 Eg, see the comments of Mr McClelland MP in the final debates in the House of Representatives: Commonwealth of Australia, House of Representatives, Parliamentary Debates (Hansard), 26 June 2000 at 18344. See also the comments of Mr Baird MP, Commonwealth of Australia, House of Representatives, Parliamentary Debates (Hansard), 27 June 2000 at 18363. Mr Baird MP gave the example of ‘people [who] can hack into commercial databases and download a chapter or an article for study or research even if the copyright owner is making the work available for a fee. This is equivalent to theft and should be treated appropriately’.
28 Finkelstein J dissented on this part of the judgment, holding that the temporary copies were infringements: Sony, above n1 at 212–223.
Note, however, that each of the arguments made by Sony requires broadening the application of the anti-circumvention provisions beyond the clear case of the example given above. The first argument requires us to accept a broad reading of ‘inhibit’, extending to infringements that occur before the technical mechanism ever actually operates. The second and third arguments go a long way towards accepting that copyright now gives copyright owners the exclusive right to control all access and every use of a copyright work, despite the absence of such an exclusive right from the provisions of the Copyright Act which define the copyright owner’s exclusive rights.\(^\text{30}\) The ‘access right’ arises effectively by chance — because certain temporary copies happen to be made.

In a short piece, it is not possible to deal with all three of these arguments in detail. The second and third arguments depend on an issue of long standing in copyright law — namely, ‘which copies count’. I will not engage in this debate in detail, which has been considered elsewhere. Instead, I will focus for the remainder of this paper on the first of the three arguments, as it is this argument which requires us to interpret the new amendments made by the Digital Agenda Act, and delve a little into their tortured legislative history — something which has been less comprehensively dealt with in the existing Australian academic literature. I will then offer some thoughts on the proper approach to statutory interpretation in light of that history.

3. **Interpreting ‘Technological Protection Measure’**

As noted above, the first key issue for the High Court in Sony will be how to interpret the definition of TPM. With respect to French J,\(^\text{31}\) the only thing which is clear about the statutory definition of a TPM is its ambiguity.\(^\text{32}\) To borrow a phrase from a famous writer describing US copyright law, the provisions have a ‘maddeningly casual prolixity and imprecision’.\(^\text{33}\) In resolving this ambiguity, and divining (or perhaps, retro-fitting) a meaning to the text, the High Court has at least three alternatives.

**A. The Available Alternatives**

(i) **The Mechanically Focused Approach of Sackville J**

One alternative would be for the High Court to reinstate the interpretation of the trial judge. According to Sackville J:

> The definition is intended to be confined to devices or products that utilise technological processes or mechanisms to prevent or curtail specific actions in

\(^{30}\) See above nn22–26 and accompanying text.

\(^{31}\) French J held that it was possible to interpret the definition by reference only to its ‘ordinary meaning’. That ordinary meaning, according to his Honour, was broad, and unconstrained by anything in the text, and ‘it is for the legislature to spell out the limiting words ... It is not for the court to cage the ordinary meaning of the words which have been adopted by reference to policy considerations of its own divining’: Sony, above n1 at 174.

\(^{32}\) Sony, above n1 at 186 [85] (Lindgren J).

\(^{33}\) Benjamin Kaplan, *An Unhurried View of Copyright* (1967) at 40.
relation to a work, which actions would otherwise infringe or facilitate infringement of copyright in that work.34

Another way of putting this would be to say that the definition is intended to cover access controls the circumvention of which either is infringement (in the sense that the same act which ‘circumvents’ also constitutes an infringement), or puts the person circumventing in a position to infringe. Sackville J justified his interpretation by relying on the nature of the definition, the ‘focus’ of which, he said, ‘is on a technological device or product that is designed to bring about a specified result … by particular means’ — in other words, on the physical operation of the device, not its antecedent effects.

On Sackville J’s interpretation, Sony’s first argument failed, as it relied on the deterrence of prior infringement. It is worth noting however how well Sackville J’s interpretation covers the ‘clear case’ given above. A technological measure which limits access to an online database to those who possess the right key and password curtails an act — the act of ‘access’ — which would facilitate infringement subsequent to access — the downloading of chapters and articles. The mechanism thus is an access control, which prevents — or perhaps better, inhibits, since the process is indirect — infringement of copyright.

Sackville J’s interpretation would also cover another example given in the legislative history that preceded the Digital Agenda Act — the AutoCAD lock.35 AutoCAD was an expensive computer program used to draft architectural and engineering plans. For the AutoCAD program to run, a physical device, the AutoCAD lock, had to be plugged into the computer. A key purpose of the AutoCAD lock was to make pirated copies unusable. The Copyright Law Review Committee (CLRC), in its 1995 Report Computer Software Protection, noted the AutoCAD was an appropriate means to protect copyright rights.36 It should be noted, however, that the CLRC’s reasoning assumed the AutoCAD lock did not just ‘deter’ infringement — it also prevented subsequent infringement, because the CLRC accepted that use of a computer program involves making a reproduction in material form, and such a reproduction is only legitimate when made from a legitimate copy.37 So, where the AutoCAD lock prevented use of ‘pirated’ copies of the AutoCAD program, it was ‘preventing infringement’ in this direct way, and arguably would be covered by Sackville J’s interpretation.

Sackville J’s interpretation has some clear advantages. Software program locks and access controls on databases are the two main examples of access controls most frequently cited in the legislative history that preceded the Digital Agenda Act. Both are arguably captured by Sackville J’s interpretation. Sackville

35 Issues surrounding the AutoCAD lock were litigated in Autodesk Inc v Dyason (No 1) (1992) 173 CLR 330; see also Lindgren J’s description of the lock: Sony, above n1 at 188 [95].
36 Copyright Law Review Committee, Final Report, Computer Software Protection (1995) at [10.90]. The use of these reports in the debates that preceded the Digital Agenda Act is traced by Lindgren J in Sony, above n1 at 191 [103], 192 [107]. The AutoCAD lock is also relied on as an example by Lindgren J: id at 201 [138].
37 Id at [10.10]–[10.12] and Recommendation 2.15.
J’s interpretation has a further advantage. By focusing on direct causal relationship between the TPM and infringement, Sackville J’s approach frees the court from the possibility that it will have to engage in a broad, uncertain investigation of when infringement will be ‘deterred’ by a technological lock. Sackville J’s interpretation also, arguably, has some disadvantages. It would mean that mechanisms adopted by Sony which are clearly aimed, in part, at preventing copyright infringement are not protected by the anti-circumvention laws.

(ii) The Broad Interpretation of the Full Federal Court

A second alternative for the High Court is to adopt the view of the Full Federal Court. This would mean reading the definition of TPM broadly, so as to include ‘a device which [has] the practical effect of discouraging infringement of copyright’. The trial judge had found that the protective devices used by Sony did have this practical effect.

On this argument, ‘inhibit’ is read in accordance with its dictionary definition of ‘restrain, hinder, arrest or check’ — read broadly to cover not only physical restraints or checks, but also deterrence. It does not matter that the infringement restrained or hindered occurs prior to the operation of the actual protective device. It is enough that the knowledge of the protective device, and how it will work, acts as a disincentive for infringement.

The advantages of the Full Federal Court approach are clear. It is an interpretation that is at least arguably open on the text of the provision, even if it is also the broadest possible interpretation of that provision. It will also ensure that the statute captures a set of mechanisms — the access control system used by Sony — which are clearly aimed, in part, at copyright enforcement, and which, according to the trial judge, actually have this effect. The interpretation does, however, also have its disadvantages: it means that Sony can use its TPMs for non-copyright related purposes, like region-coding. It is also uncertain in its effects — just how ‘indirect’ a deterrence of infringement will be sufficient is unclear.

(iii) A Third Alternative: A Sole or Dominant Purpose Test

A third alternative is also available to the High Court: one which was presented to the trial judge and Full Federal Court by the Australian Competition and Consumer Commission (ACCC). According to the ACCC, a mechanism ought to be

38 Kabushiki Kaisha Sony Computer Entertainment v Stevens (2002), above n15 at 522 [109] (describing the argument); for the acceptance of this argument see Sony, above n1 at 201 [138]–[139] (Lindgren J); 171 [17] (French J).
39 Id at 523 [111].
40 The ACCC were given permission to appear at trial as amicus curiae: Kabushiki Kaisha Sony Computer Entertainment v Stevens (2001), above n2, and were given leave to make written submissions before the Full Federal Court: Sony, above n1 at 175 [33]. The ACCC also appeared at a hearing in Chambers where directions were made regarding Mr Stevens’ legal representation, and indicated their intention to seek leave to appear as amicus curiae, depending on what written submissions were made to the High Court: Stevens v Kabushiki Kaisha Sony Computer Entertainment & Ors, above n1.
considered a TPM within s10(1) only where it is designed solely to prevent or inhibit infringement of copyright.42

Both the trial judge,43 and the Full Federal Court44 gave this argument very short shrift, and no wonder: this interpretation is the hardest to reconcile with the text of the s10 definition. This is unfortunate, because this interpretation is actually one of the most attractive from a policy perspective: it could achieve the objectives of the Act — better copyright enforcement — without leading to a de facto right to control (all forms of) access.

The policy problem with which the ACCC is concerned reflects a general tension that exists between two important policy aims. On the one hand, the goal of copyright is to promote innovation and creativity by providing protection for new works. Copyright works by temporarily granting certain exclusive rights to deal with copyright material. On the other hand, there is the policy goal of promoting competition — the process of rivals striving for advantage in the supply of goods and services in the market. The exploitation of the exclusive rights granted by copyright can, in some circumstances, unduly restrict or distort competition.45 One such situation relates to geographical segmentation of markets. The importation of copies of copyright works produced overseas with the consent of the copyright owner in the country of production (that is, non-infringing copies) is known as parallel importation. Where copyright owners may prevent parallel importation, they may use this power to geographically segment markets and charge different prices in those markets. The Intellectual Property and Competition Review Committee in 2000 concluded that this kind of geographical segmentation of markets was unlikely to advantage Australian consumers, concluding that because Australia is a small market, with high per capita incomes, copyright owners are likely to set higher prices in the Australian market than elsewhere.46 In recent discussion of the AUSFTA, there has been some evidence that prices in Australia are, indeed, higher.47

Around the world, some countries allow parallel importation of copyright goods, and some do not. While US copyright law does not allow parallel importation, within the European Union restrictions on parallel importation were held contrary to the principle of free movement of goods.48 In Australia, some restrictions on parallel importation have been relaxed or removed over the last few years.49

42 See Kabushiki Kaisha Sony Computer Entertainment v Stevens (2002), above n15 at 521 [103]–[104] (rejecting this argument).
43 Ibid.
44 Sony, above n1 at 181 [69].
46 IPCRC, id at 62.
The concern of the ACCC and others is that TPMs may be used, or are being used, to re-impose geographical segmentation. As noted above, the mechanism used by Sony on its PlayStation games also operates to restrict use of games purchased in a different region. Where Sony uses region-coding in a situation where parallel importation is allowed, the effect is that Sony is able to leverage legislative protection for TPMs to give it broader powers of control over pricing and distribution than copyright law would provide. Similar region-coding is also applied, currently, to DVDs, and the ACCC has expressed concern that it will be applied to other digital media systems. Considerable concern has also been raised that TPMs may be used for still further purposes, even beyond geographical segmentation. For example, the open source community is concerned that copyright owners will use TPMs in a way that will prevent the manufacture of open source digital media players.

On an interpretation which required that the sole purpose of a TPM be to prevent infringement, if Sony used its access control system only to prevent the use of infringing copies — if, for example, the same access code was used in every geographic region — it would be a TPM. It would be the attempt by Sony to grab a broader monopoly than copyright allows, leveraging the legal protection of TPMs, by incorporating regional playback control, which would take the mechanism outside the protection of s116A. This would provide copyright owners with an incentive to use anti-circumvention law only for the purposes for which it was provided in the first place: better copyright enforcement. To the extent that we would like our design of the law to discourage leveraging which adversely affects consumers, this is a desirable outcome.

There is some international precedent for such an approach. A sole purpose interpretation is also arguably the interpretation which most accords with what the legislature thought they were doing — giving copyright owners better mechanisms for enforcing their copyright rights. Throughout the legislative history of the anti-circumvention provisions, they are referred to as enforcement mechanisms —

48 Musik-Vertrieb Membran v GEMA Joined Cases 55 & 57/80 [1981] ECR 147, 2 CMLR 44; Sir Hugh Laddie, Peter Prescott, Mary Vitoria, Adrian Speck & Lindsay Lane, The Modern Law of Copyright and Designs Vol 2 (3rd ed, 2001) at [31.12]–[31.22]. This does not apply to goods first put on sale outside the European Union: parallel importation from outside the EU may be restricted.

49 Copyright Amendment (Parallel Importation) Act 2003 (Cth) (software and certain electronic publications); Copyright Amendment Act (No 2) 1998 (Cth) (sound recordings, accessories to imported goods); Copyright Amendment Act 1990 (Cth) (books).

50 ACCC, above n17 at [10]. The Australian Consumers Association has raised similar concerns: see Australian Consumers Association, Submission to the Digital Agenda Review, above n17.

51 The concern is that copyright owners will use a TPM and refuse to grant a license of the TPM in open source implementations. This would mean open source players, or open source desktop systems, would not be able to play digital media encrypted using the relevant TPM. See Mr R Russell, Supplementary Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Submission No 165a: <http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sublist.htm> (26 October 2004).

52 The adverse effects of geographical zoning are explained in the ACCC Submission to the Digital Agenda Review, above n17.
giving copyright owners better means for enforcing copyright. And in the existing legislative history, there is some, very limited support for such a view. In particular, there is the fact that the Australian Government chose not to adopt the approach from the European Union, and the United States, pushed by certain copyright owners, which bans not only devices designed to circumvent, but also those which:

- have only a limited commercially significant purpose or use other than to circumvent a TPM; or
- are marketed … with for use in circumventing a TPM.

It could be argued that the legislature was here taking a cautious approach, aimed at ensuring that these new and controversial copyright provisions did not capture too many forms of technology. By refusing to extend the definition of circumvention device, the government avoided capturing a wider range of technologies which might conceivably be used to circumvent technological locks. By parity of reasoning, it could be argued that the legislature only intended to protect TPMs which were for enforcing copyright — not for any other purpose the copyright owners might come up with, in addition to enforcing copyright. It could also be argued that the wording ‘in the ordinary course of its operation’ gives some support to a view that mechanisms which do more than simply prevent infringement may not be TPMs.

Unfortunately, however, the reality is that this interpretation may require more ‘reading in’ than the High Court is prepared to undertake. This approach should, however, be seriously considered by the legislature in its rewriting of the anti-circumvention laws, in light of the concerns that have arisen about region-coding.

---


54 In the Second Reading Speeches on the Digital Agenda Act, the anti-circumvention laws are consistently referred to as ‘new enforcement measures in response to the problems posed by new technologies’: see Commonwealth of Australia, Senate, Parliamentary Debates (Hansard), 17 August 2000 at 16580 (Senator Bolkus), 16593 (Senator Alston).


56 17 USC §§1201(a)(2), 1201(b); Information Society Directive above n53, Art 6.2.

57 It is also, arguably, subject to a criticism that no device can be ‘solely’ designed to prevent infringement, since this would require the device to differentiate between, eg, infringing and non-infringing uses — eg, uses which are and are not fair dealings: David Brennan, ‘Technological Measures in the New Copyright Law’ (2000) 11 AIPJ 83 at 87. There are probably ways around this particular criticism, however, were it otherwise open on the text.
B. Which Alternative is Consistent with the Legal and Historical Context?

Both the first and second alternatives outlined above are available on the text of ss10(1) and 116A of the Copyright Act. As Lindgren J noted in the Full Federal Court, the issues of construction here are ‘finely balanced’. 58 What turned the issue for Lindgren J, with whom Finkelstein J agreed, was his Honour’s reading of the legislative and contextual history of the anti-circumvention laws. Given the importance of this history to Lindgren J’s final conclusion, it is worth re-examining some of the key points on which his Honour relied, 59 before turning to some more general comments on how the courts should approach the interpretation of these kinds of provisions in this fast-moving area of the law.

First, Lindgren J relies on the references, in the legislative history, to the concept of ‘unauthorised access’, and comments that copyright entitles an owner to deny access even for lawful use. 60 It is certainly true that this is a constant theme in the legislative history. But it is worth noting that the concept of ‘access’ in this area of digital copyright law is a rather amorphous one. ‘Access’ can mean all kinds of things. It can mean access in the sense of the ability to apprehend or perceive the copyright work in some form or other, digital or analogue for the first time. It is clear that, as a historical matter, copyright owners have the exclusive right to grant ‘access’ to their work in this sense; in other words, copyright law and policy do not require a writer to publish their work. Indeed, in Australian law the ‘right of first publication’ is one of the exclusive rights granted to a copyright owner. 61 There is also a distinction between ‘access to a work’ and ‘access to a copy of a work’, which is often not properly recognised or acknowledged. 62 When I purchase a DVD, I have gained lawful access to a copy of a work. But have I gained lawful access to the work? Or does that only occur when I play the DVD? These distinctions can be important but are not always clearly stated. Furthermore, the control over access to an online database is a very different matter from controlling each act of ‘access’ to a legally purchased copy of a work. One may be more justifiable than the other, and it is not at all clear that the frequent references to ‘access’ in the legislative history were intended, or foreseen, as covering all of these acts. Finally, ‘access’ appears to have been very broadly interpreted, on occasion, in the United States, to include even the process of one computer program ‘querying’ another. 63 Given all the possible meanings and understandings of access, we need to be careful about reading too much into the general comments.

58 Sony, above n1 at 186 [85].
59 These are listed in Sony, id at 201 [138].
60 Ibid.
61 Copyright Act 1968 (Cth) ss31(1)(a)(ii) (literary, dramatic and musical works), 31(1)(b)(ii) (artistic works); Avel Pty Ltd v Multicoin Amusements Pty Ltd (1990) 171 CLR 88 at 93 (stating that the right to publish a work is the right ‘to make public that which has not previously been made public in the copyright territory’).
63 See, eg, The Chamberlain Group, Inc v Skylink Technologies, Inc 381 F 3d 1178 (2004), where the US Federal Circuit Court of Appeals appears to accept that there is ‘access’ where a computer program ‘talks to’ another computer program, triggering its internal programming to do something — in that case, open a garage door.
to which his Honour refers. We can rely better on specific examples of ‘access control’ that was intended to be allowed, but, as is evident from the examples given in Lindgren J’s long excursus, Sony’s particular case was never endorsed in any government document.

More generally, however, there is little sense, from Lindgren J’s description, of the passion with which this particular battle in copyright law has been fought, and the battles which have been fought in numerous fora over the scope of TPMs which should be covered by anti-circumvention laws, both internationally and within Australia. There are occasional hints, in his Honour’s judgment, about the fierce contest that accompanied the drafting of these provisions — the references, for example, to the number of submissions made during the process — but these fail to capture the extent to which the final drafting represented a heavily negotiated compromise.

In my submission, it is not at all clear that the government intended, or foresaw, a broad application of the anti-circumvention laws. I will argue further below that there is reason, in the case where legislation represents a hard-fought, negotiated compromise, to avoid giving an overly broad interpretation of the terms of that compromise. Adopting a narrower interpretation will avoid unintended consequences. But first, we need some appreciation of how that compromise came about.

Lindgren J rightly points out that an original source of the anti-circumvention laws at an international level is the provision of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Article 11 of the WCT provides:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Lindgren J notes that this provision was intended to provide a ‘broad kind of protection’. Certainly some commentators, and some countries, including notably the United States, have taken the view that Article 11 of the WCT and the corresponding provision (Article 18) are intended to give very broad, strong protection to copyright owners. Uncritical acceptance of this view, however, underestimates the extent to which the provision was itself a compromise, drafted deliberately vaguely to allow flexibility and overcome objections during the Diplomatic Conference to the original proposal which was stronger and more specific.
Comments in the Draft Proposal which preceded the WCT emphasised the flexibility of the provision and the ability of contracting states to ‘choose appropriate remedies according to their own legal traditions’, and, particularly, to ‘design the exact field of application of the provisions envisaged … taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain’. Even with these statements, the original draft proposal had little support at the conference: many delegations expressed deep concerns about the implications of such a regulation for the public domain. The European Union emphasised the importance of a ‘knowledge of infringement’ requirement in any provision regulating devices and services possessing technology-defeating purposes. The Australian delegation at the Conference noted that the Article could restrict access to public domain material and uses of copyright material sanctioned by law, and preferred an approach focused on the use of devices for the purposes of infringement. The provision which emerged from the Conference was less specific, and more watered-down, than that in the Basic Proposal.

As a result, while it is true, therefore, that as Lindgren J notes, Article 11 is broad enough to cover devices like Sony’s, it is also true, as commentary from the time of the treaties indicates, that Article 11 is vague enough to allow Sackville J’s approach, or other similarly narrow approaches that would exclude Sony’s devices from protection.

Nor has the provision, even once accepted in the WCT, had an easy road to implementation around the world. On the contrary, the introduction of anti-circumvention laws has been very fiercely contested. In the United States, negotiation of the Act which led to the Digital Millennium Copyright Act 1998

---

67 Art 13 of the original proposal for the WCT required parties to ‘make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law’. ‘Protection-defeating devices’ were defined as ‘any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty’. WIPO Secretariat, Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference, CRNR/DC/4 (30 August 1996) (hereinafter Basic Proposal).

68 Basic Proposal, id at Notes 13.04, 13.05. As Jamie Wodetzki has put it, ‘[t]he treaty was drafted almost deliberately ambiguously so that different countries could go away and have this battle in their own domestic legislatures’: Mr Jamie Wodetzki, Australian Digital Alliance, Commonwealth of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, Parliamentary Debates (Hansard), 21 October 1999 at 178.


70 Id at 414.


72 Samuelson, above n69 at 414–415.

73 Sony, above n1 at 190 [101].

74 Samuelson, above n69; Vinje, above n71.
(US) (known as the DMCA) has been described as a ‘battle between Hollywood and Silicon Valley’, characterised by ‘high rhetoric, exaggerated claims, and power politics from representatives of certain established but frightened copyright industries’. Intense lobbying led to a plethora of exceptions which ‘betray their origins in interest-group lobbying’ and have ‘no coherent vision of appropriate limits’. Europe, too, saw similar battles over its Information Society Directive, Article 6 of which introduced anti-circumvention laws into Europe. Professor Hugenholtz has described ‘the unprecedented lobbying, the bloodshed, the vilification, the media propaganda, the constant hounding of EC and government officials’ that accompanied the multiple stages of negotiations over that Directive.

In Australia, the Digital Agenda amendments were the subject of very extensive debate. The process perhaps began in 1994 with the report of the Copyright Convergence Group. In 1995, the CLRC released its Computer Software Protection report, which mentions anti-circumvention laws. In 1997, following the conclusion of the WIPO Copyright Treaties in December 1996, the Attorney-General’s Department and the Department of Communications and the Arts released a discussion paper, Copyright Reform and the Digital Agenda. Seventy-one submissions were made in response to this discussion paper, and 13 face-to-face consultations were held. In April 1998, the Attorney-General and the Minister for Communications and the Arts announced that the government would implement the digital agenda copyright reforms. An Exposure Draft of the Copyright Amendment (Digital Agenda) Bill 1999 was released in February 1999. This led to over 80 submissions and numerous meetings with stakeholders. An amended Bill was introduced into Parliament on 2 September 1999. The Bill was then sent to the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Andrews Committee), which received some 98

75 Ginsburg, above n62 at 148.
77 Ginsburg, above n62 at 148.
78 Information Society Directive, above n53.
80 Copyright Convergence Group, Highways to Change — Copyright in the New Communications Environment (August 1994).
81 CLRC, above n36, discussed by Lindgren J, Sony, above n1 at 188–190 [96]–[99].
83 Explanatory Memorandum accompanying the Copyright Amendment (Digital Agenda) Bill 1999 (Cth) at 16–17.
85 Explanatory Memorandum accompanying the Copyright Amendment (Digital Agenda) Bill 1999 (Cth) at 18.
submissions and held four days of public hearings, and which reported in December 1999, making 38 recommendations, some 21 of which were accepted by the government in one form or another. Following these amendments, the Bill was re-introduced into and passed by both Houses. Even at this final stage, a brief review of the various second reading speeches given reveals very different perspectives on the legislation: some Members suggested it did not go far enough; others suggested it might go too far, many recognised the need to ‘wait and see’. Given this history, we need to recognise that the final form of the anti-circumvention provisions was a compromise; the result of brokering by the Australian Government between many competing stakeholders.

A further interesting point about the history of the anti-circumvention provisions, which is perhaps not conveyed by Lindgren J’s detailed excursus, is the way in which successive drafts of the legislation started with a narrow drafting of the anti-circumvention provisions, and gradually broadened during the process of negotiation, but notably without ever adopting the full, broad interpretation which copyright owners sought.87

When the Exposure Draft of the Digital Agenda legislation was first published in February 1999, the provision was quite limited: it focused on technological protection measures which ‘prevent or inhibit the infringement of copyright subsisting in any work or other subject-matter’.88 It also included a key limitation on liability: the requirement that a seller of circumvention devices knew, or was reckless as to whether, the device would be used for the purpose of infringing copyright.89 This mental element — consciously adopted in contradistinction to the (at that time draft) European Directive,90 was included ‘to ensure that the enforcement measure provisions do not limit the operation of the exceptions to the exclusive rights of copyright owners’.91

When a revised Bill was presented to Parliament in September 1999, the definitions of ‘technological protection measure’ and ‘effectiveness’ were retained. In response to copyright owner concerns, however, the mental element was removed and, in effect, the onus switched.92 Now, instead of copyright owners

87 The broad view may have been obtained through the AUSFTA, above n5, Art 17.4.7. However, even here, it appears, from comments in the Senate Select Committee, that the government may take a narrower view of this Article than the United States: Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Parliament of Australia, Final Report on the Free Trade Agreement between Australia and the United States of America (2004) at [3.133]–[3.175].
88 Copyright Amendment (Digital Agenda) Bill (Cth), Exposure Draft, February 1999, Item 14.
89 Id, Items 85, 88.
90 Id at [91]–[92].
91 Id at [92].
92 Submission to House of Representatives, Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, 30 September 1999 (Attorney-General’s Department and the Department of Communications, Information Technology and the Arts) at [2.25]–[2.26] (explaining the purposes behind the change).
having to prove knowledge or recklessness as to infringement, which was said to be impracticable, those seeking a circumvention device would have to declare they had a legitimate purpose (or ‘permitted purpose’, in the parlance of the Act).93

The Andrews Committee recommended still further adjustments. The Committee, apparently in response to concerns that protecting ‘access controls’ would lead to an extension of copyright owner’s rights, tentatively suggested that TPMs be defined only as ‘copy controls’ — that is, devices (etc) ‘designed to prevent or inhibit the infringement of copyright subsisting in a work or other subject matter’.94 On this approach, no access controls — including the type used by Sony — would have been TPMs.95

Lindgren J makes much of the fact that this tentative suggestion was not accepted by the government: that, instead, a reference to ‘copy controls’ was inserted into the Bill which finally went before the Parliament in 2000. However, there is good reason to beware of drawing too strong an inference here. First, there is a gap in the recorded legislative history. There is no clear explanation, in the final explanatory memorandum, or in the various speeches given to Parliament, as to why the Andrews Committee recommendation was not accepted. Second, its rejection did not represent a broad endorsement by the government of a view that all access controls should be protected. It should be recalled that, at this time, the publicly stated position of some powerful copyright owner interests was that access controls did not prevent or inhibit infringement.96 They pushed, instead, for the following definition of technological protection measures, which would effectively mirror the US legislation:97

‘Effective technological protection measure’ means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, sound recording, or other subject matter, or protects any copyright as provided by this Act.

By retaining the concept of ‘preventing or inhibiting infringement’, the Australian Government showed some reluctance to give broad access control to copyright owners.

93 The permissible exceptions were also cut back — under the Exposure Draft, owing to the requirement of proving a knowledge of infringement, any exception to copyright infringement would have sufficed to negative the mental element. Under the new Bill, fair dealing was not included as a ‘permitted purpose’.

94 House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999 (1999) at [4.19]. Strangely, this preference was not proposed as a formal ‘recommendation’ of the Committee. The Committee was only prepared to go so far as to suggest that this solution ‘may be preferable’: ibid.

95 It is worth noting, at least in passing, that in other respects the Andrews Committee suggested that the protection be strengthened, eg, by implementing a ban on the act of circumvention: Recommendation 14.

96 IIPA, Submission to House of Representatives, Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, 7 October 1999 at 5.

97 17 USC §1201.
What conclusion should we draw from this? I do not seek to argue that the legislative history cannot support Sony’s position, or Lindgren J’s conclusions. The purpose of this exploration of the legislative history has been to show that the picture is not as clear as it might appear from his Honour’s judgment. This is not a criticism of his Honour. It would simply not be possible to present all the legislative history on anti-circumvention laws in Australia and around the world in a judgment of reasonable length. It was a long, drawn out, complicated, and closely negotiated process, and even on the very extensive documentary material that does exist, our picture is inevitably only partial, because much happens outside the formal proceedings of a Committee.

The question then for the High Court is — how should the question of statutory interpretation be approached, in the face of this extensive history, and a legislative provision which is a heavily negotiated compromise? In the next part, I will argue that the High Court should take a cautious approach, and avoid extending the interpretation of the provision beyond its clear application.

4. General Comments: The Proper Approach to Statutory Interpretation in Sony

The appeal in *Sony* will be the second copyright case to reach the High Court in three years. The last copyright case, *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*98 (referred to hereinafter by its colloquial name, *The Panel*)99 concerned rights to broadcast material, and turned exclusively on questions regarding the interpretation of provisions in the *Copyright Act* which defined the rights of broadcasters. *Sony*, too, will require the court to consider difficult and ‘finely balanced’ questions of statutory interpretation.100 A focus on statutory interpretation, while sometimes baffling to the media to whom academics try to explain the decisions, is not surprising to copyright initiates: copyright is, as courts have continuously affirmed, ‘a creature of statute’.101 In *Sony* the High Court has the opportunity to apply views expressed on statutory interpretation in *The Panel*.

Certain principles of statutory construction are well known, even unquestioned. In *The Panel*, members of the High Court were unanimous in affirming that the proper approach to statutory construction is a purposive one:102

---

99 The case concerned the use of ‘snippets’ of broadcasting material used in a humorous late night commentary/current affairs/entertainment television show called ‘The Panel’.
100 *Sony*, above n1 at 186 [85].
that the court may consider the intention of the legislature and the ‘mischiefs’ the legislation was intended to remedy, in determining the meaning of the words used.\textsuperscript{103} They were also unanimous in considering that courts can and should consider the legal and historical context of an Act, in the process of giving meaning to the words of the statute.\textsuperscript{104}

Nevertheless, as Lord Steyn has noted, statutory interpretation is an art rather than a science.\textsuperscript{105} Intonations of these very general principles of interpretation only take us so far. On the particular question of the approach to interpreting the rights granted by copyright law, there are two key issues in the \textit{Sony} appeal:

1. First, to the extent that there are two or more plausible interpretations, should the court favour an interpretation which leads to a more liberal construction of the rights of copyright owners?

2. Second, how should the Court deal with the legal and historical context in which the anti-circumvention provisions were adopted?

It is submitted that both principle, and the legal and historical context support a more wary, incremental approach in reading the anti-circumvention provisions.

\textbf{A. Principle}

Australian courts have sometimes stated that copyright owners’ rights should be interpreted beneficially. Certain comments of Kirby J in \textit{The Panel} summarise this view:

[B]ecause … the Act afforded new and larger copyright entitlements in Australia, it would be contrary to basic principle and the ordinary canons of statutory construction to restrict those entitlements in a way that conflicted with the language of the Act or that unduly narrowed its operation. Normally, an amendment of an Act to provide new rights of such a kind will be given a beneficial construction so as to ensure that the purpose of the legislature is truly attained.\textsuperscript{106}

\textsuperscript{103} \textit{Mills v Meeking}, id at 30 (Dawson J). See \textit{The Panel}, above n98 at 3–4 (McHugh ACJ, Gummow & Hayne JJ), 24–25 (Kirby J), 39 (Callinan J).

\textsuperscript{104} \textit{The Panel}, above n98 at 3–4 (McHugh ACJ, Gummow & Hayne JJ), citing \textit{Newcastle City Council v GIO General Ltd} (1997) 191 CLR 85 at 112; \textit{Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd} (1970) 124 CLR 262 at 283 (Windeyer J). ‘Extrinsic materials’ are allowed to be consulted under s15AB of the \textit{Acts Interpretation Act} 1901 (Cth).

\textsuperscript{105} Lord Steyn, above n102 at 8.

\textsuperscript{106} \textit{The Panel}, above n98 at 25 [89]. Callinan J was evidently favourably inclined to an interpretation that would prevent the kind of ‘blatant appropriation’ that he saw in the case: id at 39–40 [143]. This is consistent with the views expressed by Callinan J in previous cases: see also his Honour’s judgment in \textit{Australian Broadcasting Corp v Lenah Game Meats Pty Ltd} (2001) 208 CLR 199, where he advocated consideration of property rights in ‘a spectacle’, motivated by the same kind of impulse against appropriation. For a similar ‘beneficial’ approach to construing intellectual property rights, and in particular copyright, see the judgment of Burchett J in \textit{Sega Enterprises Ltd}, above n101 at 523–524, also \textit{Computer Edge Pty Ltd v Apple Computer Inc} (1986) 65 ALR 33 at 42.
It is possible that, before the High Court, counsel for Sony may seek to rely on this kind of approach.

Any such attempt should be rejected. The first point to note is that the majority in The Panel appear implicitly to have rejected the straightforward beneficial approach in interpreting copyright provisions. According to the majority, the ‘context’ which must be taken into account in interpreting the Copyright Act includes ‘well-established principles of copyright law’.107 Reading the majority judgment, it is apparent that these well-established principles include a concept of balance — that the proprietary rights of copyright owners must be set against the ‘loss of freedom of action’ resulting when copyright rights are enlarged.108 It is also worth noting that the approach of the majority appears to be more in line with approaches being developed by other courts of final appeal around the world. Recent decisions of the Canadian Supreme Court have placed significant emphasis on the need for a ‘balanced’ approach to copyright.109 And the reference to ‘well-established principles of copyright law’ bears some resemblance to references, in the US Supreme Court decision in Eldred, to ‘the traditional contours of copyright protection’.110

In any event, even if the majority in The Panel has not rejected a ‘beneficial’ approach, it is submitted that it cannot be apt here. It should be confined, at most, to those cases where the court is interpreting the provisions of the Copyright Act which identify copyright subject matter where the way that subject matter is expressed has changed. As Kathy Bowrey has noted, ‘the objects of intellectual property law resist effective definition in terms of essences or principles. A consequence of this is that intellectual property laws rely on a high level of legal abstraction’.111 It might arguably make sense therefore to interpret these ‘abstractions’ in a way that can accommodate new technologies and new ways of storing work. It may be appropriate, for example, to read a definition of ‘cinematograph film’ which refers to ‘visual images’ as being satisfied where

107 The Panel, above n98 at 4 [12].
109 CCH Canadian Ltd, above n101 at [23]. In this case, McLachlin CJ for the court noted that ‘the purpose of copyright law [is] to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator’, and used this as a factor tending to support a higher standard of originality — noting that ‘[w]hen courts adopt a standard of originality requiring only … industriousness … they tip the scale in favour of the author’s or creator’s rights, at the loss of society’s interest in maintaining a robust public domain that could help foster future creative innovation.’ The Chief Justice also used this principle in rejecting a broad interpretation of authorisation, stating that it would ‘[shift] the balance in copyright too far in favour of the owner’s rights and unnecessarily [interfere] with the proper use of copyrighted works for the good of society as a whole’: ibid at [41]. See also Theberge v Galerie d’Art du Petit Champlain inc (2002) 210 DLR (4th) 385 at [30]–[31] (Supreme Court of Canada).
visual images may be generated from digitally stored material. The same argument may apply when interpreting the exclusive rights granted to copyright owners to new technologies of distribution.

On the other hand, it would not be appropriate to apply this beneficial approach to the interpretation of anti-circumvention laws. First and foremost, anti-circumvention laws are not copyright laws. Rather, as noted above, they are ‘paracopyright’ laws, which sit above, and beyond, the ordinary rights of copyright owners.

Copyright law grants to copyright owners exclusive rights in subject matter created by them. These rights act as constraints on every person who wants to do certain acts in relation to that copyright material. If I want to publicly show a film, I must obtain the permission of the copyright owner. Paracopyright — anti-circumvention law — goes even further. It gives the copyright owner the right to injunct the distribution of technologies, created by others, which threaten to allow infringement of the copyright owner’s rights. The circle of people constrained by such laws is broader even than the circle of people constrained by copyright, for it now includes non-infringing technology producers. It is no longer possible for a technologist — say, a computer programmer — to avoid the effects of the Copyright Act by avoiding copying ‘other people’s stuff’. Indeed, a technologist may be constrained from exploiting her or his undeniable copyright rights by distributing her or his computer program.

Thus unlike copyright law ‘proper’, which is aimed at encouraging and rewarding creativity and innovation, such laws are deliberately designed to ‘prevent or inhibit’ certain technological innovations.

112 Sega Enterprises Ltd, above n101, affirmed by the Full Court in Galaxy Electronics Pty Ltd, above n20.
113 See, eg, the judgment of Kirby J in Telstra v Australasian Performing Right Association Ltd (1997) 146 ALR 649 at 686, noting that the original target of the diffusion right was that most unlikely of copyright-infringing technologies, the ‘theatrephone’. As Kirby J noted, ‘[t]here is … nothing in the legislative history of the diffusion right to suggest that its operation was intended to be limited to the particular technological circumstances prevailing at the time the Act was enacted’: ibid at 688.
114 As Gummow J noted in the special leave hearing in this case, ‘[i]t is not really copyright legislation as traditionally understood at all. It is something new that is going on.’ Stevens v Kabushiki Kaisha Sony Computer Entertainment & Ors, above n1 at 4.
116 Or, of course, the person from whom the copyright owner purchased the material, or the employer of the person who created the material. Copyright ‘creators’ are not the same as copyright ‘owners’, but this distinction, although too often forgotten, is not germane to this discussion.
This is not to argue that anti-circumvention laws are in all cases unjustified. The Australian Government, and indeed the international community have decided that some such laws are justified. What I would argue is that the effects of paracopyright are broad — broader even than copyright. Thus accepting, contrary to my argument above, that a beneficial approach is appropriate in construing copyright rights, it is not appropriate to these laws. Anti-circumvention provisions should be narrowly interpreted, to avoid undue constraint on too many people and too many new technologies.

In addition, one of the justifications for adopting a ‘beneficial reasoning’ is that the government cannot be expected to update the law every time a new means of creation or exploitation of copyright material arises. Again, such a rationale would be singularly inapt in relation to the anti-circumvention laws. The provisions are currently under review, as a result of the three year review process announced when the legislation was first passed. What more, the provisions will have to be reviewed, and rewritten, as a result of the Australia–United States Free Trade Agreement. There is no need, in other words, for the court to ‘step in’. To the extent that a narrow interpretation is disfavoured by the legislature, it can (and likely will) be readily fixed. On the other hand, it is a political reality that broad rights, once granted, are much harder to amend or limit.

B. Legal and Historical Context

In The Panel, the High Court accepted that the legal and historical context of copyright law is relevant to interpreting copyright provisions. The legal and historical context of the Digital Agenda Act outlined above also justifies a circumspect approach to interpreting the rights granted. In particular, two aspects of this context of the Digital Agenda Act must be borne in mind.

First, even a brief survey of the legislative history shows that neither the government, nor the legislature generally, saw the Act as being the ‘final word’ on digital copyright law. At the time the legislation was drafted, the members of Parliament recognised that they were, in a sense, attempting to prognosticate future technological developments at a time when Napster was in the process of further revolutionising an already unstable electronic and digital environment. There are extensive references to the fact that the Bill is ‘transitory’, and ‘just another stage as the social trends and business models develop over a period of time’, and


119 See above n11.

120 AUSFTA, above n5, Art 17.12.

121 Note that this kind of justification is, in any event, weak given the capacity of the legislature to react to interpretations they consider too narrow. When in Apple Computer Inc v Computer Edge Pty Ltd (1983) 50 ALR 1 a court at first instance declared that certain computer programs were not protected by copyright, the reaction of the Parliament, in extending copyright protection, was almost immediate: Copyright Amendment Act 1984 (Cth). The legislature did not even wait for the case to progress through the various levels of appeal.

122 Commonwealth of Australia, Senate, Parliamentary Debates (Hansard), 17 August 2000 at 16585–16586 (Senator Lundy), see also 16588 (Senator Stott-Despoja).
that, after some time, further amendments might be necessary. These attitudes are, of course, further supported by the existence of the three year review. This strongly suggests that the court should take a view equally cautious to that adopted by the legislature in passing the legislation.

Second, in reading the anti-circumvention provisions, the court confronts a particularly interesting, and difficult problem of statutory interpretation: what is the proper approach to interpreting a statutory provision which embodies a heavily negotiated compromise? The general rule is that a statute must be interpreted in accordance with its "purpose".

Now, to some extent, the concept of a legislative ‘intention’ or purpose is always something of a myth. The legislature is a composite, complex body and it does not have one legislative intention that can be divined by reading the debates and the extrinsic materials. But the problems faced when legislation is a negotiated compromise are particularly acute. As Gummow J has pointed out in his extrajudicial writings, ‘statutes which on their face do speak directly to their subject may well be the result of compromise’, forged in a process of negotiation between different political parties, which ‘may be responding wholly or partly to private representations by a range of interest groups’. This means, as his Honour points out, ‘[t]he final text of a Bill may be the product of a compromise made outside the legislative chambers and not fully disclosed by public debate in the legislature or elsewhere.’ As already noted above, that is exactly our problem, in relation to the Digital Agenda Act provisions. The definition of ‘technological protection measure’ is a compromise, which was neither as restrictive as some copyright users had hoped, nor as broad as copyright owners sought — and parts of the legislative history are opaque.

What are the implications of this for statutory interpretation? It means that identifying one ‘purpose’ in such cases may end up privileging one party or set of interests involved in the negotiation over the other. In other words, the court can end up ‘picking a winner’ where the legislature consciously refrained from so doing. There is a serious risk, in these circumstances, of unintended consequences. The proper approach is to read, and apply, only the strict terms of the legislative provision — to enforce the ‘bargain reached’, and not try to extend it to any area that is even arguably not covered.

What does this mean in Sony? It means that, on balance, on both a principled basis, and in light of the complex legislative history, a narrower interpretation proposed by Sackville J should be favoured. It is consistent with the language of the statute, and consistent with the proper approach to statutory interpretation in

---

123 Mr McClelland MP, Commonwealth of Australia, House of Representatives, Parliamentary Debates (Hansard), 26 June 2000 at 18343, 18346 (suggesting that ‘we have to taste it and see what happens for the future’).
124 See references above n119
125 See above nn102–104 and accompanying text.
126 Lord Steyn, above n102 at 14.
128 Ibid.
this difficult case. It avoids possibly unintended consequences in allowing copyright owners to leverage legal protection for TPMs to broader control than copyright law would allow. It is consistent with the principle underlying copyright law of encouraging technological and creative innovation. And to the extent that the legislature does not favour the result, the remedy is very readily at hand.

5. Conclusions

The High Court took on a difficult task when it decided to grant special leave in Sony. Of course, the task is also a fascinating one. And despite the ‘moving target’ nature of the legislation in this area, the findings of the court will likely have significant implications and a telling impact on the process of drafting new anti-circumvention laws following the AUSFTA.

The court will be presented with several different, plausible interpretations of the definition of ‘technological protection measures’. It will be forced to a choice. What I have sought to argue, in this piece, is that everything in the legislative history, and principles of statutory interpretation, urges caution. The legislative history is by no means clear on exactly what was intended to be covered — an inevitable by-product of the attempt to ‘forecast’ in a rapidly changing area of technology. The final provision was a compromise — neither as narrow, nor as broad as the various stakeholders sought. And the court can be confident that the matter will be back before the legislature — soon. In these circumstances, there is no justification for a beneficial interpretation. Given the implications of extending rights unduly in this field, and given the fierce debate in the area, I would urge that the court take a narrower view. To the extent that this leaves copyright owners unsatisfied, a legislative remedy is readily available.

Whichever way the decision of the High Court ends up falling in this case, we at least know that the story cannot end here. We will, in the next two years, see the drafting of new anti-circumvention laws as a result of the AUSFTA. In any event, copyright owners are highly likely to develop technological protections in ways that are shaped by the High Court’s interpretation. As MP and then Deputy Chair of the Legal and Constitutional Affairs Committee, Nicola Roxon put it during the debate on the Digital Agenda Act:

I think the saying “There are only two things that are certain in life: death and taxes” might need to be changed. I think there might need to be three: death, taxes, and an ongoing debate about the right balance in copyright matters.

129 Above n5, Art 17.12.
131 Ms Nicola Roxon, Commonwealth of Australia, House of Representatives, Parliamentary Debates (Hansard), 27 June 2000 at 18353.
Notes and Comments

Purvis in the High Court Behaviour, Disability and the Meaning of Direct Discrimination

SAMANTHA EDWARDS*

Abstract

The central issue before the High Court in Purvis was whether treatment of a person based on their behaviour amounts to unlawful disability discrimination, in circumstances where that behaviour is directly connected with an underlying disability. The determination of this issue required consideration of a number of issues, primarily matters of statutory construction, including whether, or in what sense, there exists under the Disability Discrimination Act 1992 (Cth) an obligation to accommodate the effects or characteristics of a person's disability — in the instant case, the disturbed behaviour — in order to avoid a finding of unlawful discrimination.

In this paper, an outline of the relevant facts and litigation history is followed by a detailed examination of how each of the major issues were dealt with in the High Court, with regard to the separate judgments delivered. The author concludes that the majority's determination of the issues, and their construction of the Act, was in reality heavily influenced by the inability to directly take into account the broader effects of the disturbed behaviour, due to the specific statutory context in which the claim arose. In failing to qualify its reasoning either with respect to the specific legislation in issue, or even to discrimination on the particular ground of disability, the decision, at least in principle, sets a precedent of broad and general significance on the meaning of discrimination.

* Final year student, Faculty of Law, University of Sydney. The author sincerely thanks Belinda Smith for her valuable comments and suggestions on the draft of this article. All opinions, and any errors, are the author's own.
1. Introduction

The decision of the High Court in *Purvis v New South Wales (Department of Education and Training)*\(^1\) has been highly anticipated and represented an opportunity both to test the correctness of the Federal Court’s narrow approach to the issues in the case and to provide authoritative guidance on the meaning of direct discrimination on the grounds of disability where a person’s behaviour is a manifestation of an underlying condition.

The case arose, primarily, from the decision of a state high school to expel a student, Daniel Hoggan, who had engaged in various acts of anti-social and violent behaviour during the months in which he had attended the school. The critical factor was that a connection existed between the behaviour Daniel exhibited and his underlying disabilities. In the Federal Court, the primary judge found that the Human Rights and Equal Opportunity Commission had erred in a number of major respects in its decision to award damages, and found that Daniel had not been unlawfully discriminated against. An appeal to the Full Court was dismissed.

A majority of the High Court dismissed the appeal, disapproving of the Federal Court’s reasoning only in limited respects. Five members of the Court rejected the finding of the Federal Court that the definition of disability under the *Disability Discrimination Act 1992* (Cth) (Hereinafter *the Act*) required a distinction to be drawn between behaviour and the underlying condition giving rise to that behaviour, and the leading majority judgment found that it was not even necessary to decide whether the behaviour itself could be identified as the disability. The issue on which fundamental differences of opinion emerged was the construction of the hypothetical comparator for the purpose of determining whether Daniel had been subjected to less favourable treatment. Concurring with the finding of the Federal Court, a majority found that the proper comparator had engaged in like conduct to Daniel. Although providing somewhat more cogent reasoning than the Federal Court, the majority’s reasoning suggests a principle of general application that the characteristics of an aggrieved person related to the proscribed ground can be attributed to the comparator. If the case is treated as authority for such a principle, it marks an extremely regrettable development in anti-discrimination law jurisprudence.

McHugh and Kirby JJ, in a joint judgment, dissented on the comparator issue, concluding that the comparison was between Daniel and a student who did not behave in a similar way. McHugh and Kirby JJ agreed that s5(2) of the Act, which provides that the fact that a person with a disability requires different accommodation or services does not make that person’s circumstances materially different for the purpose of determining whether that person was subjected to less favourable treatment, did not impose an obligation as such to accommodate a person’s disability. However, their Honours’ construction of that subsection gave it a beneficial operation, and it was regarded as having considerable bearing on the

---

\(^1\) (2003) 202 ALR 133 (hereinafter *Purvis*).
proper construction of the comparator. It appears, however, that the majority construed s5(2) as having virtually no role in making operational the objects of the Act.

2. Background to the High Court’s Decision

A. Material Facts
The case concerned the treatment of Daniel Hoggan by South Grafton High School, at which Daniel had commenced as a student in April 1997. Daniel had suffered brain damage as an infant, which had given rise to intellectual disabilities, visual impairment and epilepsy, and resulted in various forms of anti-social behaviour, including physical violence against others. Daniel’s application for enrolment in the school was in fact initially refused, but after a change of principal and several months of negotiations, and the making of certain preparations, the school agreed in February 1997 to accept his application. Between his commencement and the formal exclusion in December 1997, Daniel was suspended on several occasions following his difficult behaviour, which included swearing and physical violence against staff and other students. After the fifth suspension, the principal notified that he would exclude Daniel from the school, due to Daniel’s unresolved behaviour problems, concerns for the safety of other students and staff, and the school’s duty of care.

B. The Claim
In March 1998, Mr Purvis, Daniel’s foster father, lodged a complaint of direct discrimination under the Act with the Human Rights and Equal Opportunity Commission (hereinafter the Commission). Applying the definition of direct discrimination as provided by s5(1) of the Act, it was argued that the State had treated Daniel ‘less favourably than, in circumstances that are the same or are not materially different’, the person (the discriminator) would treat another person without the disability.

The proscription of discrimination in the area of education is provided by s22 of the Act. A defence of unjustifiable hardship is available to respondents in certain limited circumstances in the field of education, namely in relation to refusal or failure to admit a student. Had the defence been available to the State in Purvis, considerations such as the safety and wellbeing of other students and staff, and the school’s associated legal responsibilities, could have been directly factored into the equation in determining whether the treatment of Daniel

---

2 The appellant was Daniel’s foster father.
3 The facts are set out in Purvis, above n1 at 142–144 (McHugh and Kirby JJ) and a chronology of events is also appended to the reasons of Callinan J.
4 Discrimination is unlawful in relation to a broad range of situations in education, including refusal or failure to admit a student, denial of benefits, expulsion and subjectation to detriments s22(2) of the Act.
5 Unjustifiable hardship is defined in s11 of the Act.
6 See s22(3) of the Act.
amounted to unlawful discrimination. It can readily be inferred that the claim was not brought under the *Anti-Discrimination Act 1977* (NSW) for the reason that the respondent in the case could then have raised unjustifiable hardship as a defence, since under that Act the defence is available to a respondent in relation to a decision to expel a student as well as to refusal or failure to enrol.\(^7\)

### C. History of Litigation

At the relevant time, disputes under the Act were first brought before the Commission.\(^8\) The Commission’s inquiry was conducted by Commissioner Innes, who found that the complaint had been substantiated and awarded $49,000 compensation.\(^9\) Commissioner Innes accepted that, based on the medical evidence, Daniel had no control over his behaviour and that it was a direct result of his brain damage. By comparing the treatment of Daniel to that of a hypothetical student who did not exhibit similar behaviour, it was found that Daniel had been treated less favourably. It was further held that, in the circumstances, less favourable treatment ‘because of’ Daniel’s behaviour was ‘because of’ his disability since the two were so closely connected. The Commissioner also found that the school had an obligation to make a ‘reasonably proportionate response’ to Daniel’s disability, which it had failed to do, and which led to the suspensions and expulsion.\(^10\) Compensation was awarded for the suspensions and expulsion, and the failure to provide accommodation required by Daniel was, in the circumstances, treated as separate grounds for relief.

The Department applied for review of the Commission’s decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Federal Court (Emmett J) found that the Commissioner had erred in law in several important respects and set aside the decision.\(^11\) The proper comparator was a student who exhibited similar conduct to Daniel, not one who did not engage in such conduct. It was further held that treatment on the ground of Daniel’s behaviour was not necessarily treatment on the ground of his disability, since such behaviour did not ipso facto represent a manifestation of a disability.

Mr Purvis appealed the decision to the Full Court of the Federal Court, which dismissed the appeal, affirming the decision and reasoning of Emmett J.\(^12\) The Full Court (Spender, Giles and Conti JJ) was particularly critical of the Commissioner’s apparent finding that the Act imposed a positive obligation to accommodate a

---

7 See s49L(4) of that Act.
8 The Commission no longer hears complaints of unlawful discrimination, as a result of the *Human Rights Legislation Amendment Act No 1 1999* (Cth), which came into effect on 13 April 2000. The legislation came about as a result of the High Court’s decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.
10 Id at [6.3].
person’s disability, and even suggested that providing special measures to Daniel may have offended s22.13

Mr Purvis was subsequently granted special leave to appeal to the High Court.

3. **Purvis in the High Court**

There were essentially three issues before the High Court: the ‘disability issue’, the ‘comparator issue’ and the ‘causation issue’.14 The first issue concerns the proper application of the definition of disability under s4 of the Act to Daniel’s situation, and in particular, whether the Federal Court was correct in finding that the definition required a distinction between conduct and the underlying cause of the behaviour. The comparator issue involves the construction of the hypothetical comparator: what circumstances should be attributed to a person without the disability, in the same or not materially different circumstances? The important related issue is the proper construction of s5(2) of the Act, which provides that a need for different accommodation or services by a person with a disability does not constitute a material difference. In particular, does s5(2) imply a positive obligation to provide accommodation or services? Thirdly, if there was less favourable treatment, was it ‘because of’ Daniel’s disability?

The majority of the Court dismissed the appeal.15 The leading joint majority judgment was delivered by Gummow, Hayne and Heydon JJ, with Gleeson CJ and Callinan J agreeing on the outcome. McHugh and Kirby JJ, in a joint judgment, disagreed with the leading majority judgment in a number of important respects and would have allowed the appeal.16

A. **General Approach to the Issues and Construction of the Act**

The major legal issues before the High Court were largely matters of statutory construction. However, it is important to identify the way in which the interpretation and application of such legislation is a result of choice and the particular attitude taken towards the issues.17

---

13 Id at [26].
14 See Purvis, above n 1 at 178 (Gummow, Hayne & Heydon JJ).
15 By operation of the Human Rights Legislation Amendment Act (No 1) 1999 (Cth) and the Human Rights Legislation (Transitional) Regulations 2000, the original complaint was deemed to have been terminated and the appellant entitled to commence new proceedings in the Federal Magistrate’s Court, which it did.
16 Their Honours would have ordered that the appeal to the Federal Court be allowed and the complaint remitted to the Commission, in accordance with the Human Rights Legislation Amendment Act (No 1). Costs would also have been awarded against the State: see Purvis, above n 1 at 174.
17 Gaze has pointed to the need to acknowledge the extent to which choices are available to the Australian judiciary in interpreting and applying anti-discrimination laws, and that in understanding the cases it is important to make these choices visible, since ‘judicial neutrality is often not what occurs when courts construe anti-discrimination legislation’: see Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ [2002] MULR 18: <www.austlii.edu.au/cgi-bin/disp.pl/au/journals/MULR/2002/18.html> (2 August 2004).
The joint judgment of McHugh and Kirby JJ was critical of the judicial approach commonly taken towards construction of anti-discrimination legislation, of which the Federal Court’s decision was viewed as an example, whereby ‘judicial intuition’ that a finding of unlawful discrimination would be unfair or lead to ‘draconian consequences’ is used as a basis for narrowly construing the legislation.18 In a particularly insightful observation, it was stated that not only may such an approach lead to injustices in future cases, but it may itself ‘be based unconsciously on the very attitudes that the law is designed to correct and redress’.19 The joint judgment therefore emphasised the need to ensure that the Act is not construed on the basis of what the particular judge thinks is a ‘fair’ outcome or to prevent the Act from operating in a way that he or she considers harsh. The proper approach was to ‘construe the Act in a manner that furthers the goal of truly equal treatment for disabled persons’, so far as possible, and to give full effect to the language and purpose of the Act.20

In comparison, and like the approach of the Federal Court and the Full Court, the judgments of both Gleeson CJ21 and Callinan J J22 leaned towards a ‘perpetrator perspective’.23 The need to avoid unfairness to the school in construing the Act is clearly emphasised, foreshadowing a clear view as to the desirable resolution of the issues in the case.

The approach taken in the leading majority judgment is considerably more conservative than that of McHugh and Kirby JJ, although not as overtly dominated by a particular view as to a desirable outcome as are the judgments of Gleeson CJ and Callinan J. The leading majority judgment identifies ‘ensuring equality of treatment’ (ie formal equality) as ‘the principal focus of the Act’,24 and constructs various arguments in defence of a conservative approach.25

---

18 Purvis, above n1 at 139.
19 Ibid.
20 Purvis, above n1 at 146.
21 Gleeson CJ emphasises the ‘seriousness’ of the conduct in question and the need to construe the Act in the context of the ‘legal background’ constituted by the school’s other obligations: see Id at 136.
22 The particular issue guiding the construction by Callinan J is the dimension of Commonwealth/ state relations, and the notion that Parliament is unlikely to have intended to unduly interfere with the proper administration by the State of the provision of education or the administration of criminal law, both of which are essential state functions: see Id at 191–195.
23 This term is used in Gaze, above n17 at 7.
24 Purvis, above n1 at 180. It is also a particularly acute reflection on what has been referred to as the ‘reluctance to depart from same treatment as the ideal of equality’: Gaze, above n17 at 2.
25 In particular, the judgment warns of the need to take care that in construing the Act, the aims and effect of anti-discrimination legislation in other jurisdictions are not applied, and also that ‘aspirational statements’ (as in international agreements and the Act’s objects) are not used to resolve particular construction issues. The implication is that anti-discrimination legislation should not be construed any differently from other statutes, and that only ‘textual methods’ may be used to interpret and apply statutes: see for example Gaze, above n17 at 5.
B. Definition of Disability in the Act

Five members of the High Court expressly concluded that the Federal Court had erred in adopting a narrow construction of the definition of disability, and concluded that a distinction between ‘conduct’ and the condition or disorder was not required. Of the remaining two members of the Court, Gleeson CJ’s finding on this point was equivocal,26 whereas Callinan J did not need to consider the issue.27

McHugh and Kirby JJ concluded not only that the definition of disability did not require the distinction found by the Federal Court, but also expressly stated that ‘the behavioural manifestations of an underlying disorder or condition is itself a disability for the purposes of the Act’.28 The joint minority judgment took a contextual and purposive approach,29 finding that unless the definition was construed as enabling the behaviour to be considered the disability, its utility in cases of functional limitations and ‘hidden impairments’ (as in Daniel’s case) would be removed.30

The leading majority judgment also concluded that the ‘sharp distinction between cause and effect’ made by the Federal Court was erroneous,31 and found that no distinction was required but, unlike McHugh and Kirby JJ, the majority seemed to indicate that it was not necessary to decide whether the behaviour should be regarded as the disability. The reasoning adopted shows a more strictly textual approach to construction. Thus although it was acknowledged that the resulting behaviour was what made Daniel ‘different in the eyes of others’, the reasoning for this conclusion was located in the specific provisions of the Act.32

---

26 See Purvis, above n1 at 135, where his Honour seems to imply that the definition would not extend to cover disabilities which pose a serious threat to others whether or not the definition required a distinction between conduct and the underlying condition.
27 His Honour held that Daniel’s situation would not be covered regardless of which approach was taken as the definition could not be construed as extending to ‘behaviour which constitutes criminal or quasi-criminal conduct’: Id at 196.
28 Purvis, above n1 at 141.
29 In particular, the judgment considered that the broad definition contained in the Act was influenced by the meaning given to disability in the international community, which includes both the concepts of ‘impairment’ and ‘disability’. In Daniel’s case, his impairment is ‘hidden’ because it is not apparent until it results in a disability, so it is Daniel’s ‘inability to control his behaviour, rather than the underlying disorder, that inhibits his ability to function in the same way as a non-disabled person’. Id at 152–153.
30 Ibid.
31 Purvis, above n1 at 182–183.
32 Id at 182. The judgment also considered that the distinction was not required because it is framed as an inclusive definition, and that because the clauses overlap and are not mutually exclusive, ‘the particular grammatical structure’ used in one clause should not be given decisive effect. The need to give effect to the whole of the definition rather than to construe each paragraph separately was also considered a factor: Id at 182.
C. The Comparator Issue and the Effect of s5(2) of the Act

The majority agreed with the determination of the Federal Court that the proper comparator was a person with similar behaviour to Daniel, and s5(2) was apparently seen as having no bearing on the issue.33 McHugh and Kirby JJ dissented on these issues, concluding that the proper comparator did not engage in like conduct and that s5(2) had a substantial effect on the construction of the comparator.

(i) McHugh and Kirby JJ

McHugh and Kirby JJ were the only members of the Court to hold that the Commissioner had been correct in finding that the comparator was a person without the behaviour. Their Honours regarded as being firmly established the principle applied by the Commissioner that the circumstances of the aggrieved person which are related to the proscribed ground are excluded from the circumstances of the comparator.34 Authority for the principle was found in Sullivan v Department of Defence35 and the judgments of Toohey and Kirby JJ in IW v City of Perth,36 the latter of which had in fact been applied in relation to the Commonwealth Act,37 which undermined the reasoning of the Full Court in deciding to reject that reasoning on the basis that it had been decided under a different Act.38 Further authority was found in the definition of disability in the Act, which, by allowing the disability to be defined as the behaviour itself, aimed to ensure that such characteristics could not be used as ‘proxies’ for discriminating on the proscribed ground. Aside from the principle that circumstances relate to the proscribed ground cannot be attributed to the comparator, it was also noted that the comparator could not be a person with the behaviour, since the free will of the comparator over the behaviour constituted a material difference to the circumstances facing Daniel.39

According to the joint judgment, the focus of s5(2) is on whether the disabled person requires different accommodation or services. If such were required, in the sense that providing them would make the circumstances not materially different by overcoming the effects of the disability, then to treat the person on the basis of the effects of having not provided such accommodation would constitute less favourable treatment.40 The effect of s5(2) is therefore to recognise that it may be necessary to ‘inject into the equation’ the things that the disabled person would need in order to compete on equal terms with an able-bodied comparator. On the

33 Callinan J concurred on the reasoning of Gummow, Hayne and Heydon JJ on these issues, although on his analysis of the case it was not necessary to decide those issues to dispose of the case.
34 Purvis, above n1 at 141–142.
36 IW v City of Perth (1997) 191 CLR 1 at 33–34 (Toohey J) and 66–67 (Kirby J).
38 See Purvis, above n1 at 163–164.
39 Id at 164.
40 Id at 165.
findings of the Commissioner, Daniel would not have behaved in the way he did if certain accommodation had been provided. The required comparison was therefore based on the circumstances if Daniel’s disability had been accommodated, in particular, that the difficult behaviour would not have arisen.

The joint judgment also considered the various cases in which an obligation to provide reasonable accommodation had been found to arise from the Act, having been located in various sources. It was concluded the Act did impose a prima facie requirement to accommodate the disabilities of a disabled person, ‘in order to achieve real – not notional – equality’, but that it contained a ‘recognition’ to provide accommodation, as distinct from an obligation to do so.

The joint minority judgment also directly considered the utility of the unjustifiable hardship exemption in the legislation, its limited operation and the implications for the instant case. Particularly in regards to cases involving difficult behaviour, the unjustifiable hardship exemption was recognised as potentially providing a flexible mechanism by which competing interests could be taken into account, and its restriction to decisions involving enrolment was regarded as anomalous. However, their Honours were careful to point out that this was not a basis for concluding that the recognition of accommodation was limited by a reasonableness standard in the present case, or as a reason for narrowly construing the definition of disability.

(ii) Gummow, Hayne and Heydon JJ

The leading majority judgment analysed the comparator issue as a two-step process. The first step was to identify the circumstances in which the disabled person was treated less favourably, with the relevant ‘circumstances’ being ‘all the objective features which surround the actual or intended treatment’. The second step was then to ask how a person without the disability in those circumstances would be treated. In Daniel’s case, one of the circumstances attending his treatment was his behaviour, and it was said to be ‘artificial’ to exclude this circumstance because it is connected with his disability. Three advantages or implications of the preferred construction of the comparator were discussed. First, it was said to allow for a ‘proper intersection’ between the obligations under the

41 Id at 159–164. The case was regarded as comparable to the situation in McNeill v Commonwealth (1995) EOC 92–714 at 78,367.
42 Id at 166.
43 Id at 157–158.
44 Id at 154. The meaning of ‘accommodation’ in this context is also discussed at 154.
45 Id at 159.
46 Where the unjustifiable hardship defence applied, it was that standard which qualified the obligation to provide accommodation, but there was no basis for finding a limiting concept of reasonableness: Id at 157.
47 Id at 185.
48 Ibid.
49 Id at 185–186. Curiously, the judgment also stated that ‘to strip out of those circumstances any and every feature which presents difficulty to a disabled person would truly frustrate the purposes of the Act’: id at [222].
Act and the operation of criminal law. Second, it did not depend on distinguishing between the underlying condition and behaviour and was therefore consistent with the construction of the definition of disability, which did not require a distinction to be made. Finally, it was said to maintain the separation between the comparator question and the causation question. These issues would effectively be combined if the comparator was a person without the behaviour. Gleeson CJ adopted similar reasoning to reach the same conclusion on the comparator issue, but emphasised in particular that unless such a construction was made the requirement of a comparison would be meaningless and ‘purely formal’.

In considering the circumstances that should be attributed to the comparator, the leading majority judgment dealt in a cursory way with the effect of s5(2), stating only that the subsection specifies ‘one circumstance which does not amount to material difference’ and that ‘it does not explicitly oblige the provision of that different accommodation or those different services’.

D. The Causation Issue
In the Federal Court, the approach to the issue of whether treatment was ‘because of’ the disability had significant bearing on the finding that the definition of disability was confined to the underlying condition. It was held that treatment ‘because of’ behaviour did not amount to treatment ‘because of’ the disability, since such behaviour was not a necessary manifestation of a disability. The correctness of this reasoning was not examined in the leading majority judgment, dealing only briefly with the causation issue because the comparator issue was regarded as fatal to the appellant’s case.

Gleeson CJ gave some consideration to the causation issue, making the rather unusual finding that because the Act did not prohibit the desire to remove threats to safety as a legitimate basis of decision making, the subjective and stated intention or motivation of the school should be accepted as the relevant cause of the decisions. This approach clearly favours giving substantial weight to the subjective intent of the discriminator, and it is notable that the leading majority judgment did not directly disapprove of such an approach.

The causation issue was subject to the most careful scrutiny by McHugh and Kirby JJ.

50 Id at 186.
51 Ibid.
52 Ibid. This is open to the criticism that in constructing a hypothetical comparator, it is inevitable that the two questions are combined because the best or ideal comparator necessarily removes from the equation all reasons for the decision other than the proscribed ground. This is referred to in a footnote in the judgment of McHugh and Kirby JJ, citing Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER 26.
53 Id at 137–138.
54 Id at 184.
55 Id at 187.
56 Id at 138–139. Again such a conclusion is closely related to the approach his Honour took to the issues and thus to construction of the Act.
From an analysis of the relevant case law, their Honours concluded that the proper test focuses on ‘the mental state of the alleged discriminator’ and the ‘real reason’ for the act. Although the ‘mental processes of the discriminator will often be relevant, the test was not subjective, and neither is it a ‘but for’ test, since such an approach would focus incorrectly on the consequences for the aggrieved person.’ Most importantly, it was stated that where, on applying the proper test, it is found that the reason for the act was the manifestation of a disability, this will be sufficient to conclude that the act was ‘because of’ the disability. The implication is that even if Daniel’s disability was defined as the underlying condition and not the behaviour, and the reason for the act was the behaviour, the act would still be ‘because of’ the disability, so that the Federal Court had erred even if its determination of the disability issue had been correct.

4. Implications and Conclusion
The High Court’s decision has two major implications. The first implication arises from the majority’s finding on the comparator issue, which appears to establish the principle that the characteristics of the aggrieved person related to the proscribed ground can be attributed to the comparator, apparently regardless of the closeness of their connection with the proscribed ground. The conclusion on this point was stated in general terms, and it is not clear whether it can be read down as confined to the facts of the case in terms of the ground of disability or disabilities in the nature of dangerous conduct. However, even if it is possible to narrowly confine the principle to disturbed behaviour, it still implies an erosion of the protection of people with such disabilities and ignores the fundamental difference between situations where the behaviour is uncontrolled and where it is an act of free will. If the principle is to be regarded as of general application, it sets an extremely dangerous precedent and would seriously undermine the purposes of anti-discrimination law on a broad scale.

The second major implication of the case is the guidance it provides on the effect of s5(2). The leading majority judgment seemed to take a narrow approach; it is not clear whether or in what way the subsection was seen as having any operative effect. The judgment of McHugh and Kirby JJ provides much clearer and practical guidance on the effect of s5(2) on the comparator issue. However, it may be doubted whether their consideration of the issue is consistent with the approach of the majority, and it may be that the latter’s narrow reading prevails, the concern being that it provides no apparent role at all for s5(2) in furthering the objects of the Act.

57 Id at 171–172.
58 Ibid. It was held that the Commissioner had wrongly characterised the test he applied as a ‘but for’ test although he had in fact applied the proper test.
59 Authority for this point was found in the decision of X v McHugh (Auditor–General (for the State of Tasmania)) (1994) 56 IR 248 at 257; followed in Y v Australia Post (1997) EOC 92–865 at 77,068.
60 The principle was said to be equally applicable to disabilities that manifest in ‘harmless’ characteristics, such as the difficulty with spelling as a characteristic of dyslexia, as to dangerous conduct: Purvis, above n1 at 172.
It is difficult to deny the role that the unavailability of the unjustifiable hardship defence in the case had on the construction of the Act in the joint majority judgment. Yet the precise failure to acknowledge this as being a relevant and important factor in their interpretation creates major implications for the scope of the precedent which is set by *Purvis*, at least on its face. Thus it is not clear whether the implications of the case can be confined to complaints brought under the Commonwealth Act; it may be that, regardless of differences in the availability of the unjustifiable hardship defence, the implications of the case extend to complaints of disability discrimination under anti-discrimination laws of other Australian jurisdictions. Even more troubling is the very real possibility that elements of the decision could be treated as extending to complaints of discrimination on other grounds, such as sex or race, regardless of the fact that the unjustifiable hardship exemption has no place within the prescription of discrimination on such grounds.