

For Better or For Worse?: 21st Century Legal Education

Associate Professor Sally Kift
Assistant Dean, Teaching and Learning
Queensland University of Technology
AUSTRALIA

Significant positive change has occurred in legal education since the *Pearce Report* was published in 1987. This paper will canvass those changes and, in particular, discuss how legal education has responded to the various sectoral pressures that have impacted upon it since *Pearce*, while more recently also adjusting to a demanding new national research agenda and commercialisation imperative to generate soft income. In examining how legal educators have sought to manage the challenges of maintaining quality and academic integrity in the face of dynamic change, the paper will first consider the traditional transmission model of legal education, by way of a realistic appraisal of “how it was back then”, and then come forward to the 21st century to examine “where we have got to” with the reconceptualisation of learning and teaching in legal education. In so doing the paper hopes to provide the basis for an honest assessment of the state of modern Australian legal education.

“[T]here is a great deal of evidence about what constitutes good teaching in higher education. Almost every aspect of that evidence is at odds with the traditional model of legal education.”¹

1.0 Introduction - Welcome to our world

Despite significant impediments, most undergraduate law curricula have undergone significant change since the 1987 *Pearce Report*.² Just a moment’s reflection on the way the world has changed – continuously and dynamically – since the late 1980s suggests that this is no more than as it should be: legal education and the legal services industry are no more immune to change than the higher education sector and the changing world of work of which they are respective microcosms after all.

For two relatively traditional sectors, it is also unsurprising that most of this change has been driven by pressure from (largely common) external factors. Legal practice has been transformed by external drivers such as globalisation, competitiveness and competition reform, information and communications technology and by a determined move away from the adversarial system as the primary dispute resolution method. As a consequence, twenty-first century Australian legal graduates enter a complex, and quite structurally different, professional environment from that of their predecessors, even those of a decade ago. The content, methods and foci of legal knowledge are now also changing so rapidly that, in many areas of practice, the doctrinal law learnt at Law School is no longer current, even on graduation.

The tertiary sector in Australia has been similarly subjected to dynamic change from a range of external drivers. Information and communications technology has, and will

¹ M Keyes and R Johnstone, “Changing Legal Education: Rhetoric, Reality, and Prospects for the Future” (2004) 26 *Sydney Law Review* 537 at 547.

² D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, Canberra, ACT, Australian Government Publishing Service, 1987 (“Pearce Report”).

continue to have, a dramatic transformative influence,³ piggybacking on globalisation (or globalisation on ICT). There has also been significant growth in higher education participation, which has contributed to increasing student diversity (in terms of both demographics and preparedness for tertiary study).

Despite the *Pearce Report's* recommendation that there be no new Law Schools established beyond the 12 that then existed in 1987, between 1989 and 2001 the number of Law Schools grew from 12 to 28, with the 29th to commence operation at Edith Cowan University this year (2005). When set against a contemporary higher education agenda that demands institutions operate more like businesses, especially that they be cognisant of economic rationalism, management efficiency and the economic imperative to increase non-government funding, this expansion in legal education providers has forced many Law Schools to reinvent themselves and to seek competitive market advantage by actively differentiating themselves and their offerings, particularly as against their local competitors.⁴

Perceived points of distinction are many and cover class size, city/regional/international focus, and emphases on skills training, clinical programs, international exchanges and postgraduate programs.⁵

Just to add to the dynamic mix, the higher education sector increasingly presents as a paradox: on the one hand competitive, market-driven and deregulated, while simultaneously characterised by significant government intervention and regulation by agencies such as the Commonwealth Department of Education, Science and Training (DEST), the Australian Research Council (ARC), the Australian University Quality Agency (AUQA) and the soon to be formed Teaching and Learning Performance Fund. Amongst other things, this has meant that the nature of academic work has also changed significantly: so-called academic freedom (insofar as the latter still exists) is now encumbered with an array of accountabilities and responsibilities. Chief amongst these latter, as Coaldrake and Stedman point out, is that academics “understand [or at least are deemed to understand] more about teaching”⁶ as a profession –

Deeper understandings of the nature of student learning, and pressures to reposition the teaching and learning environment around learning outcomes, demand a more professional approach to university teaching. Academics are being asked to meet the needs of more diverse student groups, to teach at more flexible times and locations, to master the use of information technology in teaching, to design curricula around learning outcomes and across disciplines, to teach in teams, to subject their teaching to evaluation and develop and implement improvements, to monitor and respond to the evaluations made by students and graduates, to improve assessment and feedback, to meet employer needs, and to understand and use new theories of student learning.

However, public funding for legal education, as for higher education generally, has not increased correspondingly to match the impact that both massification and changed expectations and accountabilities have had on the sector. Under the most recent batch of reforms enacted by the Commonwealth's *Higher Education Support*

³ See, for example, M Bell, D Bush, P Nicholson, D O'Brien, T Tran, *Universities Online: A survey of online education and services in Australia*, DEST Occasional Paper Series 2002 02-A, available at <http://www.dest.gov.au/highered/occpaper.htm> (accessed Feb, 2003).

⁴ R Johnstone and S Vignaendra, *Learning Outcomes and Curriculum Development in Law*, AUTC, 2003, Canberra, at 454. Available at http://www.autc.gov.au/projects/completed/comp_projects_loutcomes_law.htm (accessed 28/02/05)

⁵ *Ibid* at 454-455.

⁶ P Coaldrake and L Stedman, *Academic Work in the Twenty-first Century Changing Roles and Policies*, DEST Occasional Paper Series 99-H, 1999. Available at <http://www.dest.gov.au/highered/occpaper.htm> (accessed 28/02/05), at 13.

Act 2003 (HES Act) – the “Nelson Reforms” – the new (2005) differential system of student contribution further entrenches law as a discipline being funded at the *lowest* cluster level for commonwealth contribution (now at \$1,509), but allows that legal education may be charged to students at the *highest* band level (see Tables A, B and C below). Pursuant to the *HES Act*, undergraduate fees may be increased by up to a further 25% for domestic undergraduate students (except in the national priority areas of education and nursing), with the addition flexibility to institutions to levy full-fees on domestic undergraduate courses. The inequitable end result – that law students pay a higher proportion of the cost of their education than students in any other discipline, based not on the cost of their course but on assumptions about law graduate destinations and earning capacity⁷ – remains unaddressed by these “reforms”, rather the plight of graduating debt-laden law students and the underfunding of law schools (the latter usually through internal institutional arrangements encouraged by the government’s placement of law in the lowest funding cluster since 1990) has been exacerbated in 2005. A related and not inconsequential issue under this head is the now ever-present dynamic of managing student expectations in a learning and teaching environment when the student is paying customer or client: our students see a very clear nexus between the quite considerable financial burden they are required to bear and the quality of their university education.

Table A⁸ below sets out the Commonwealth course contribution schedule for 2005 from Nelson’s *Our universities: Backing Australia’s Future*. Table B⁹ sets out student contribution levels under the previous scheme and as they were anticipated to apply from 2005 (modified from *Backing Australia’s Future*). Table C, which I obtained from my University, sets out the estimated 2005 contributions for a standard full-time year in a single degree program. Under the new arrangements, the contribution amount for any individual student cannot be determined until they commence their course and finalise enrolment.

Table A: Commonwealth Course Contribution Schedule 2005 ^(a)

Cluster	Discipline	Estimated Commonwealth Course Contribution ^(b)
1	Law	\$1,509
2	Accounting, Administration, Economics, Commerce	\$2,481
3	Humanities	\$4,180
4	Mathematics, Statistics	\$4,937
5	Behavioural Science, Social Studies	\$6,636
6	Computing, Built Environment, Health	\$7,392
7	Foreign Languages, Visual and Performing Arts	\$9,091
8	Engineering, Science, Surveying	\$12,303
9	Dentistry, Medicine, Veterinary Science	\$15,422
10	Agriculture	\$16,394
National	Education	\$7,278

⁷ This has existed since the Higher Education Contribution Scheme (HECS) came into being in the 1990s.

⁸ B Nelson, *Our universities: Backing Australia’s Future*, Policy Paper 2 – Support for Higher Education Institutions (2004). Available at http://www.backingaustraliasfuture.gov.au/policy_paper/2.htm (accessed 28/02/05)

⁹ Modified from B Nelson, *Our universities: Backing Australia’s Future*, Policy Paper 3 – Support for Students (2004). Available at http://www.backingaustraliasfuture.gov.au/policy_paper/3.htm (accessed 28/02/05): the initial 30% increase under the *HES Act* was subsequently reduced to 25%.

Priority		
National Priority	Nursing	\$9,733

(a) Figures are for Equivalent Full-time Students undertaking units in indicated discipline. The Commonwealth course contributions are for institutions that receive the 2.5 per cent increase in Commonwealth contributions through compliance with the National Governance Protocols and workplace relations policies.

(b) The Commonwealth contribution towards course costs represents the base amount provided to institutions for students in a particular discipline. The total Commonwealth funding that supports individual students is much greater than this and includes other funding provided for operating and research purposes.

Table B: Student Contribution Levels

Current arrangements

New arrangements from 2005

	2003 HECS levels	Projected 2005 HECS levels ^(a)		New student contribution range ^(b) [Universities will set student fees]
Band 3 (law, dentistry, medicine, veterinary science)	\$6,136	\$6,427	Band 3 (law, dentistry, medicine, veterinary science)	\$0 – \$8,033
Band 2 (accounting, commerce, administration, economics, maths, statistics, computing, built environment, health, engineering, science, surveying, agriculture)	\$5,242	\$5,490	Band 2 (accounting, commerce, administration, economics, maths, statistics, computing, built environment, health, engineering, science, surveying, agriculture)	\$0 – \$6,862
Band 1 (humanities, arts, behavioural science, social studies, foreign languages, visual and performing arts, education, nursing)	\$3,680	\$3,854	Band 1 (humanities, arts, behavioural science, social studies, foreign languages, visual and performing arts)	\$0 – \$4,817
			National Priorities (education, nursing)	\$0 – \$3,854

(a) Projected HECS rates for 2005 based on current indexation estimates.

(b) Maximum student contributions will be set at 25 per cent higher than estimated HECS contribution rates for 2005, except for teaching and nursing where the maximum will be set at the estimated HECS rates for that year. Universities will set student contribution levels.

Table C - 2005 Funding (Undergraduate)

Discipline	Govt. contrib.	Standard HECS	Max. HECS
Law	\$1,472	\$6,414	\$8,018

Business	\$2420	\$5,479	\$6,849
Humanities	\$4,078	\$3,847	\$4,808
Mathematics, Statistics	\$4,817	\$5,479	\$6,849
Behavioural Science, Social Studies	\$6,475	\$3,847	\$4,808
Computing, Built Env., Health	\$7,212	\$5,479	\$6,849
Languages, Visual and Perf. Arts	\$8,869	\$3,847	\$4,808
Engineering, Science, Surveying	\$12,003	\$5,479	\$6,849
Dentistry, Medicine, Vet Science	\$15,047	\$6,414	\$8,018
Agriculture	\$15,996	\$5,479	\$6,849
Education (National Priority Area)	\$7,116	\$3,847	\$3,847
Nursing (National Priority Area)	\$9,511	\$3,847	\$3,847

Against this background, this paper will examine how legal education has responded to the various sectoral pressures that have impacted upon it since the 1987 *Pearce Report* and how it has managed the challenges of monitoring and maintaining quality and academic integrity in the face of those pressures, while also adjusting to a demanding new national research agenda and the commercialisation imperative to generate soft income. I will move first to a realistic appraisal of “how it was back then” and then come forward to the 21st century to examine “where we have got to” with the reconceptualisation of learning and teaching in legal education so that I might provide the basis for an honest assessment of the state of modern Australian legal education.

2.0 What was it like back then?

If we could all go back to that place, however long, long ago, when we were an undergraduate law student or doing the Solicitors’ Board or Barristers’ Board, and without being overly nostalgic ask – what was that experience like? Honestly?

For my undergraduate self, my first year Law School experience was many years ago, but I can still quite clearly recall the early days/weeks of social and intellectual isolation, the constancy of intellectual self-doubt that pervaded everything I did and the massively ill-conceived problem-based-learning exercise my degree seemed to be. From my 16 year-old, first-generation-university-student perspective, I can still remember –

- How I had no clear sense of overall direction or purpose;
- The lack of understanding about how *anything* (administratively or academically) all fitted together – *everything* from enrolment to teaching practices seemed to be specifically designed to obfuscate my progress;
- The lack of study, and other necessary academic, skills – for example, it took me months to find my way around the law library, while problem solving skills were never made explicit, rather something you were supposed to “intuitively” pick-up along the way;
- That I had no understanding whatsoever of the hierarchy of knowledge – if I knew and understood something that was enough (I thought) – it never occurred to me that my cognitive development might be driven towards such higher-order processes such as application, analysis, synthesis or evaluation.¹⁰

¹⁰ B Bloom, *A Taxonomy of Educational Objectives Handbook 1: Cognitive Domain*, 2nd ed, McKay, New York, 1965 as interpreted by A Bone, *Ensuring Successful Assessment*, National Centre for Legal Education, University of Warwick, 1999 at 6-7; see also Oxford Centre for Staff and Learning Development, *First Words on Teaching*, “3.3

- That mature age students knew everything (it seemed), while I could barely pronounce the words in the textbook, especially ones that had been abbreviated;
- (What I understand now to be) a lack of notion of mastery of the discipline;
- That I was scared witless by the fear of failure, though I was never quite sure what it was that I was required to do to ensure non-failure, let alone success.

Most fundamentally, I was completely disengaged from and uncritical about (what I now know to be) the traditional model of legal education delivery. My experience was much as the *Pearce Report* captured it a decade later –

- Long, two hour lectures given by undoubtedly expert practitioners (cf teachers) on dry, discrete, doctrinal subject areas, which at times seemed quite randomly chosen (for example: I learnt a lot in torts about American product liability law, even though that was not examined). I passively took pages and pages of handwritten notes which described detailed legal rules as case upon decided case had refined them. Of necessity, this transmission process went straight from lecturer's mouth to my pen; interposing my brain was problematic because that was when I started losing the robotic momentum of taking the dictation (many of my generation still evidence the middle finger bump from this extreme-writing):
The only thing which change[d] between subjects and between semesters in the student's progression through the degree is the substantive rules which form the content of the subjects.¹¹
- One hour tutorials where, if you kept your head down and avoided eye-contact, you also avoided any attempt (if there was one) at interactivity or engagement between yourself and the tutor; it helped that there was little to no prospect of the tutor knowing your name (or seeing any need to know it);
- Very little guidance about course and/or subject structure was provided – you got what you got (and were grateful for it) and most of it, possibly together with something that had never been mentioned, would be on the end of year 100% closed book exam. Such assessment practice (there was no other, so not “practice_s”), tested little more than my memory; it was certainly not a valid assessment of my understanding, let alone a cognitive higher-order outcome, nor a certification of anything other than that I could repeat what I had been told fairly accurately. I still tell my students today (and they don't believe it!) that, at my peak, I could rote learn an A4 page off in 15 minutes.

In sum, my experience was, as John Biggs has named it, a focus on “what the student is”¹² – a one-way transmission of vast amounts of information, which “once expounded from the podium [were] ‘covered’”. My job as student-receptor was to “absorb and to report back accurately” in the exam and then only in that one subject area – making connections was not encouraged. If there was any breakdown in the process, then clearly the failing was in me as student (after all I had been expounded to by an expert, therefore I should have learnt). If I was unsuccessful, I must have been any or all of “incapable, unmotivated, foreign or some other non-academic defect”.¹³

...the traditional legal education model has been preoccupied with the study of narrow legal rules...[and] taught the same thing – analysis of legal rules – repeatedly, with little evident recognition of students' intellectual development.¹⁴

Relating learning outcomes to level” Oxford Brookes University. Latter available at <http://www.brookes.ac.uk/services/ocsd/firstwords/fw33.html> (accessed 28/02/05)

¹¹ Keyes and Johnstone, above n 1, at 541.

¹² J Biggs, *Teaching for Quality Learning at University*, 2nd ed, Open University Press, 2003 at 22: cf “what the teacher does” and “what the student does” at pp 22-25.

¹³ *Ibid* at 22.

¹⁴ Keyes and Johnstone, above n 1, at 558.

I know that many of my teaching colleagues had similar undergraduate experiences and it is problematic that most “uncritically replicate the learning experiences that they had when students”.¹⁵

3.0 Is there anything wrong with the traditional “transmission” model of legal education?

3.1 *The traditional approach is obviously not contemporary*

Interestingly, while there has been a plethora of reports produced both nationally and internationally (eg, United States,¹⁶ England,¹⁷ Scotland,¹⁸ Canada,¹⁹ Hong Kong²⁰) exhorting a re-orientation of traditional approaches to legal education (*from* a content focus *towards* skills and values acquisition and training), the more recent of which analyses have criticised the reluctance of many legal educators to embrace change, as Keyes and Johnstone point out, not much has been said in any of these reports about “the teaching and learning *implications* of the traditional model (added emphasis)”: “that is, *how* students should be taught in law schools”.²¹ My Law School is one of a number that have sought to address this latter issue by reference to educational theory and research, to which I shall turn in the next part.

At the national level, following the expansion in legal education provision in Australia, a number of reviews have been undertaken to assess learning and teaching in law and the efficacy of legal curricula development. The 1987 *Pearce Committee* focussed to a large extent on resourcing, quality and efficiency:

Perhaps most important, the Pearce Report generated a climate of debate, discussion, critical thinking, self-evaluation and continuous improvement which has served law schools well since 1987 – especially given that such an approach has become mandatory throughout higher education.²²

Pearce was followed in 1994 by McInnes and Marginson, *Australian Law Schools after the 1987 Pearce Report*, which sought to analyse the impact of the *Pearce Report* on Australian law schools. McInnes and Marginson reported that all law schools surveyed had “embraced aspects of theory, reflection and the law in action” and that, “consistent with an increased focus on skills acquisition across universities, law schools were paying more attention to skills teaching”. They further reported that “the impact of the *Pearce Report* was considerable, although no greater than concurrent factors such as the “1988 ‘Dawkins revolution’ in higher education”, and that it “generated critical reflection on the nature and content of courses and a commitment to skill development and quality teaching”. Particularly, McInnes and Marginson found that *Pearce* had encouraged small group teaching, an outcome

¹⁵ *Ibid* at 539

¹⁶ Eg, 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, ABA, Chicago, 1992 (the “MacCrate Report”).

¹⁷ Eg, The Lord Chancellor’s Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training*, London, 1996

¹⁸ *Scottish Legal Education in the Twenty-first Century: A report to the Joint Standing Committee on Legal Education in Scotland* (April 2000)

¹⁹ Canadian Bar Association Systems of Civil Justice Task Force, *Final report* Canadian Bar Association Toronto 1996; see also Committee Responding to Recommendation 49 of the Systems of Civil Justice Task Force Report *Attitudes-skills-knowledge: proposals for legal education to assist in implementing a multi-option civil justice system in the 21st century*, Discussion Paper Canadian Bar Association, Ottawa, August 1999.

²⁰ The Steering Committee on the Review of Legal Education and Training in Hong Kong, *Legal Education and Training in Hong Kong: Preliminary Review*, Report of the Consultants, August 2001, (the “Hong Kong Report”) available at <http://www.hklawsoc.org.hk> (accessed Feb 2003).

²¹ Keyes and Johnstone, above n 1, at 543 and 545.

²² C McInnis and S Marginson, Department of Employment, Education and Training, *Australian Law Schools after the 1987 Pearce Report*, AGPS, Canberra, 1994 at viii.

confirmed in the latest 2003 review.²³ Unfortunately, in the current funding-deficit environment, contemporary staff:student ratios across the sector tend to mean that small groups are sometimes not quite as small as might be desirable; intensive small class teaching coupled with heightened curricula expectations have been a significant drain on resources (further challenging the “law is cheap to teach” assumption). How Law Schools have sought to assure quality learning environments for their larger student numbers in cost effective ways is an ongoing challenge for legal education and has required some innovative pedagogical solutions, many of which involve the harnessing of technology affordances for course delivery.

In 1997 the ALRC, as part of its broader review of the adversarial system, produced an issues paper, *Rethinking legal education and training*,²⁴ which canvassed a series of educational changes recommended as necessary to give effect to its larger reform proposals for civil litigation. The Commission, in its final reporting on these matters (ALRC 89 in 2000),²⁵ called for an extension of the range of generic skills to be acquired during the academic stage of legal education and recommended that –

[Rec 2] In addition to the study of core areas of substantive law, university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility.

The ALRC examined the national uniform requirements for admission to practice – the 11 prescribed “areas of knowledge” (cf skills and values) set in 1992 by the Consultative Committee of State and Territory Law Admitting Authorities (the “Priestley Committee’s” “Priestley 11”) – and strongly urged a “moving away from” the Priestley Committee’s “solitary preoccupation with the detailed content of numerous bodies of substantive law.”²⁶ It was critical of the Priestley straightjacket’s inability to accommodate the changing nature of the legal profession for which law students were being prepared and also of its largely local focus. Further, the ALRC challenged the Priestley Committee’s assumption of a rigid divide between law school education, which teaches legal rules, and professional legal training (PLT) courses, where practice and skills are taught. The Commission recommended that admitting authorities “should render practical legal training requirements sufficiently flexible to permit a diversity of approaches and delivery modes”. ALRC 89 concluded on this aspect with the catchphrase that contemporary legal education should focus on what lawyers need “to be able to do”, rather than on what lawyers “need to know”; exhorting Law Schools to accommodate the dynamic change in professional practice and to counter the critical and “relative stasis in legal education, which appeared frozen in time”.²⁷

Again, it is important to make clear that, properly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility. The Commission agrees with the view of the Lord Chancellor’s Advisory Committee on Legal Education and Conduct in the United Kingdom that an undergraduate law degree course “should stand as an independent liberal education in

²³ Johnstone and Vignaendra, above n 4.

²⁴ Australian Law Reform Commission *Review of the adversarial system of litigation: Rethinking legal education and training* (Issues Paper 21) 1997; see also Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Discussion Paper 62), AGPS, Canberra, 1999.

²⁵ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89), AGPS, Canberra, 2000 (ALRC 89)

²⁶ *Ibid* at 2.82.

²⁷ Professor David Weisbrot, President, Australian Law Reform Commission, Conference Paper entitled “What lawyers need to know, what lawyers need to be able to do: An Australian Experience” at *Erasing Lines: Integrating the law School Curriculum* held July 26-28 2001, at the University of Minnesota Law School in Minneapolis, MN at 15, citing ALRC 89.

the discipline of law, not tied to any specific vocation', and its warning that a good legal education should not be 'highly instrumental' or 'anti-intellectual'.²⁸

Also integral to this approach is that, as mandatory continuing legal education regimes throughout the country are now enforcing, learning in a profession (if not generally) is a lifelong process. In order that our graduates might engage effectively in long-term knowledge management and knowledge generation in their diverse and globalised workplaces, they need to be equipped with the skills, values and attitudes necessary to manage their own learning engagement for the future. The traditional teaching-as-transmission model simply *cannot* inculcate those abilities – for example, it is not possible to teach, and students will not learn, teamwork skills or critical thinking ability in a passive large group lecture on substantive law. Nor does the traditional approach equip students for current professional reality, where research has consistently shown that only 50%-60% of law graduates will remain in longer term legal practice²⁹ and that in any discipline (law being no exception), graduating students will now routinely go through several changes of career in their working lives:³⁰ again, a doctrinal-heavy education does not equip graduates with many of the necessary generic skills needed to perform effectively in the modern global workplace.

The President of the ALRC, Professor David Weisbrot, speaking in America in 2001, noted that:³¹

Over the same period in which the organisation of legal work in Australia has changed radically, there has been an emerging awareness of the importance of skills training and some growth in the development of clinical programs, but doctrinal law still dominates law school teaching and curriculum, and there is disappointingly little reaction to the changing environment or reflection about the implications of all of this for education and scholarship.

I suspect that if Professor Langdell walked into a contemporary law school in the US or Australia – and the rapid advances in genetic technology and cloning may soon make this possible – he would feel right at home. Although the elective programs at modern law schools have expanded enormously and become ever more specialised, and clinical electives are now available, the nature of the core curriculum, the dominance of doctrine, and the basic approach to pedagogy have changed very little. (Contrast with this the likely bafflement of a 19thC professor of medicine, architecture, engineering or chemistry who strayed into a modern program in their discipline.)

Similar concerns were also expressed in another of the more recent reviews of legal education, that prepared by The Steering Committee on the Review of Legal Education and Training in Hong Kong. In its 2001 Report *Legal Education and Training in Hong Kong*, the Committee stated:³²

The pace of change in legal practice – in the range of legal services provided, the mode of delivery and the mode of organisational and structure of the law firm units – is

²⁸ ALRC 89, above n 25, at 2.85.

²⁹ See, for example, the *Hong Kong Report* above n 20, at 27, citing *Scottish Legal Education in the Twenty-first Century: A report to the Joint Standing Committee on Legal Education in Scotland* (April 2000), para 4; M Karras & C Roper, *The Career Destination of Australian Law Graduates*, Centre for Legal Education, Newcastle, 2000: 58% of those who completed their legal education in 1997 in Australia were still working in private legal practice three years later.

³⁰ UK Centre for Legal Education, *Benchmark Standards for Law Degree in England, Wales and Northern Ireland*, November 1998, Warwick, UK at <http://www.ukcle.ac.uk/resources/ldn/index.html> (accessed Feb, 2003); and J Bell and J Johnstone, *General Transferable Skills in the Law Curriculum*, 1998 reproduced at <http://www.leeds.ac.uk/law/lawdn/survey.htm> (accessed Feb 2003).

³¹ *Ibid.*

³² The Hong Kong Report, above n 20.

dramatic. What is less clear is the necessary adjustment that needs to be made to thinking about legal education, its foci and methods.

In response to a further recommendation in ALRC 89 that there should be another national discipline review of legal education (in the style of *Pearce*, and McInnis and Marginson), Richard Johnstone and Sumitra Vignaendra were commissioned by the Australian University Teaching Committee (AUTC) to produce the 2003 Report *Learning outcomes and curriculum development in law*.³³

Johnstone and Vignaendra reported evidence of encouraging changes to legal education which, amongst other things, included that –

- Law school curricula are now routinely subject to regular review and quality assurance mechanisms by both internal learning and teaching committees and by external advisory committees, the latter usually including eminent members of the legal profession (Chapter 8);
- Stakeholders are consulted more often (including students and the profession); while students are frequently called upon to evaluate the efficacy of their learning environments and teachers through formal evaluations of courses and teaching;
- Curriculum development has centred around the “dominance” of the 11 Priestly “areas of knowledge” and “the inclusion of legal ethics/professional responsibility; legal theory and general and legal skills”;³⁴
- The ALRC’s 2000 concerns regarding the Priestly 11 were reiterated: that –
 - the focus on “knowledge areas” was at the expense of skills and capabilities (Chapter 4);
 - the “areas” themselves were outmoded (international law is the area most frequently mentioned, but reference was also made to comparative law and IT law); and
 - there is a limiting “preoccupation with local law”, inappropriate for an increasingly globalised sector (Chapter 7).

In essence, these factors are all considered to be antipathetic to the production of graduates who will be “globally portable”, can manage their own learning into the future and will generally (and also in legal employment) have the types of transferable (ie, as between contexts) generic skills that employers demand.

As an aside, it is also quite clear now what constitute these desirable transferable skills: they include oral and written communication; time management and document management; creativity and flair; problem solving; and teamwork.³⁵

Relevantly to the legal context, in 1998 Vignaendra³⁶ identified that the most frequently used skills by law graduates in any type of law-related employment were those of communication (both oral and written), time management, document management and computer skills. Legally specific skills, while important to private professional practice, were not the most frequently used.

³³ Johnstone and Vignaendra, above n 4.

³⁴ *Ibid* at 457.

³⁵ Most recently see C Ryan and L Watson, *Skills at Work: Lifelong Learning and Changes in the Labour Market*, EIP 03/14, 2003. Available at <http://www.dest.gov.au/highered/eippubs.htm> (accessed 01/03/05); see also Evaluation and Investigations Programme, Department of Education, Training and Youth Affairs (EIP DETYA), *Employer Satisfaction with Graduate Skills: Research Report*, 99-7, Canberra, February 2000. Available at <http://www.dest.gov.au/highered/eippubs1999.htm> (accessed 01/03/05).

³⁶ S.Vignaendra, *Australian Law Graduates Career Destinations*, Centre for Legal Education, Sydney, May 1998 at 39.

- There is an elevated awareness amongst Schools of the desirability of reconceptualising teaching as the “facilitation of active student learning”, though it was also reported that “it would not be accurate, however, to claim that the scholarship of teaching is given importance by all law school or by most teachers within some law schools”.³⁷
- In line with general sectoral trends, Law Schools suffer from an increasingly casualised work force and the year long units that many of my generation were subjected to have been semesterised;
- The patterns of student engagement in their learning have changed significantly: for example, it is now well documented that students spend less time on campus, that they do not “play and learn” their way through university together as many of my generation did and that, even full time students, work an average of 14 hours per week, with a large number of students working in excess of 20 hours per week;³⁸
- Greater attention is paid to the use and efficacy of assessment (see further below), particularly in terms of providing feedback to students on their progress and in the care now taken to specify to students the assessment criteria (and performance standards for those criteria) they must address for a good performance of an assessment task.
- Closer attention is being paid to the use and purpose of teaching materials, including the appropriate blending of online and face-to-face teaching;
- On the curriculum imperative of internationalisation:
 Australian law schools, like their United States counterparts, have not developed coherent and systematic strategies to address the demands that globalisation could impose on lawyers in the near future.³⁹
 While this is true of the majority of Schools, educating lawyers for the challenges of transnational legal practice is not completely off the radar: many academics, particularly those invited to an international conference of legal educators (150 from 50 countries) in Hawaii in 2004, are working hard on infusing this further aspect of contemporary professional reality into core curriculum.⁴⁰ Nationally, the Commonwealth International Legal Services Advisory Council (ILSAC, a part-time advisory body that reports to the Attorney-General on matters relevant to Australia's international performance in legal and related services) has recently produced a 2004 Report, *Internationalisation of the Australian Law Degree*, examining the extent to which law curricula have embedded internationalised foci.⁴¹
- Information technology skills, in terms of information literacy and retrieval and online legal research skills, are now commonly addressed in core curricula, though online course delivery is at a fairly basic and uneven level of development. Indeed the conclusion that the 2003 AUTC Report reaches in this later regard is not particularly flattering: while the authors comment that Law

³⁷ Johnstone and Vignaendra, above n 4, at 460.

³⁸ C McInnis and R Hartley, *Managing study and work: The impact of full-time study and paid work on the undergraduate experience in Australian universities*, Canberra, AGPS, 2002.

³⁹ Johnstone and Vignaendra, above n 4, at 464.

⁴⁰ See Association of American Law School (AALS) *Conference on Educating Lawyers for Transnational Challenges*, Oahu, Hawaii, 2004. Available at <http://www.aals.org/international2004/>

⁴¹ International Legal Services Advisory Council (ILSAC), *Internationalisation of the Australian Law Degree*, Canberra 2004: see (eg) at 22 “The law school at QUT is a national leader and model in the development of an internationalised curriculum”.

Faculties are using *more* IT, it is not always being used in a “sophisticated way” for learning and teaching purposes though, as also acknowledged in the Report, there are clear resourcing issues which may be moderating the more innovative adoption of technological affordances –

The use of IT in teaching, in particular, was seen as one way of promoting communication with students about the subject matter and thereby enhancing their learning...⁴²

That is not to say that there are not some very innovative and quite excellent online delivery exemplars available: for example, in my Faculty every unit has an active online presence to complement more tradition and other face-to-face teaching. Each online site provides students with electronic access to (*minimally*, as prescribed in Faculty’s *Online Teaching Policy*)–

- Regular communications (to keep the site “live”) via Notices posted;
- Study guides (which students can cut and paste into larger study documents);
- Lecture materials and PowerPoints in advance of the teaching presentation;
- Assessment requirements;
- Feedback on assessment items;
- Responses to frequently asked questions;
- Direct links to cases, legislation and other useful resources freely available on the Internet and through library databases; and
- Links to other digital course materials via the Course Materials Database (CMD).

In practice, a growing number of online sites also feature integrated learning environments that incorporate more advanced teaching and learning tools such as streaming media, skills training materials, multi choice quizzes for formative feedback on student progress, project management tools, reflective journals, student profiles, student outlines of seminar topics (so that other students may learn by the example of their peers), online assessment tasks, and discussion forums and chat rooms.

What this part (3.1) has sought to demonstrate therefore, is that the task of preparing graduates for the challenges of the 21st century legal services workforce has required more than just tinkering with the traditional model of legal education.

Universities need to carve out a new model for the undergraduate curriculum – conceived broadly so as to embrace what is taught, how it is taught, and how learning is assessed – based on sound educational principles and an understanding of the new realities of the social context for higher education.⁴³

The traditional focus on “what the student is”, which is a very teacher-centred model, will just not produce the range of complex learning outcomes that all employers, including legal employers, are now demanding and that our graduates wish to acquire (eg, critical thinking; ethical reasoning; lifelong learning; creative problem solving etc). In the various ways evidenced by the 2003 AUTC Report, Law Schools are seeking to respond to this curriculum challenge.

3.2 A transmission model of teaching is just not effective.

There is a significant amount of educational research (this is what Education Faculties in universities do, amongst other things) that renders quite explicit *how* people learn. When content is simply transmitted from the lecturer to the student (the

⁴² Johnstone and Vignaendra, above n 4, at 461.

⁴³ R James, “Students’ Changing Expectations of Higher Education and the Consequences of Mismatches with Reality” in *Responding to Student Expectations*, Paris, OECD, 2002 at 81.

latter sometimes described as an empty vessel waiting to be filled)⁴⁴ little is learnt. For those who are skeptical about this, try doing what Professor Ron Oliver from Edith Cowan University has suggested to prove it to yourself: watch the news, intently; after the 30 minute broadcast (unless you're watching Channel 10) try to recall as many of the news stories as possible. Can't remember them all? If you remember about one-third you will be doing well. For all your attention (for students, for all their scribbling), this information has been transmitted to you with limited cognitive engagement on your part: in the traditional law teaching model – from lecturer's mouth to student pen, with no brain intervention. The lecture content can be as up-to-date (with today's new case or legislative enactment), as relevant and as beautifully rendered as possible, but unless learning design thought is given to the next stage – of *how* the students are going to be assisted to *learn* with this information, or how to *process* the information – there will be no substantive learning outcome, whatever the teacher does.

The types of questions that an educator (cf a lawyer who lectures) would ask in approaching his/her day job as a “facilitator of student learning” are – How do my students *interact* with the inputs with which they are provided (inputs such as, information, lectures, videos, PowerPoints, library resources *etc*) to *construct* their own new knowledge? What is it that they are required *to do* with those resources and how can I support student knowledge construction by directing utilisation and/or manipulation of the various inputs? How can I *design* what I deliver to students in my courses/subjects so that they will be challenged by and engaged in their learning? Importantly, at the end of the learning, I need to be able to report on the outputs of this process – the learnings – to certify that learning has occurred. Therefore, what integrated, or “aligned” (per Biggs), assessments can be designed to *meaningfully* assess, not just a regurgitation of the inputs, that students have acquired the understandings, behaviours, skills, capabilities that they need on graduation (for example) to practice in contract law effectively x number of years later?

Educational research tells us that teacher-focused, sage-on-the-stage, didactic transmission of large amounts of content, where students are passive in their learning, is largely ineffective: students will learn best and have higher quality learning outcomes when they are actively (individually) engaged or *interactive* and collaborative (with others), for example when they are *doing* something. While there are numerous theoretical approaches to teaching and learning, “constructivism”, particularly when the learning occurs through engaging in or doing an experience (“experiential learning” as might occur when you learn to drive or to dance, for example, when the student is instructed and *forms ideas* about the task, *plans* how to do it, *does* it, and then *reflects* on what they did),⁴⁵ seems to be most successful.⁴⁶ This is especially so when the learning embeds a process of practice and reflection in reasonably authentic learning environments (ie, learning situations which seek to replicate the real world of professional work).

Diana Laurillard provides us with a simple explanation of constructivism as an educational theory as follows:⁴⁷

⁴⁴ P Ramsden, *Learning to Teach in Higher Education*, London, Routledge, 1992.

⁴⁵ D Kolb, *Experiential Learning: Experience as the Source of Learning and Development*, New Jersey, Prentice Hall 1984 - “learning by doing”: see, for example, discussion in S Kift, “Lawyering Skills: Finding their Place in Legal Education” (1997) 8(1) *Legal Ed Rev* 43 esp at 59-71.

⁴⁶ See generally, R Oliver and J Herrington, *Teaching and Learning Online: A beginner's guide to e-learning and e-teaching in higher education*, Centre for Research in Information Technology and Communications, Edith Cowan University, WA, esp Chapter 6.

⁴⁷ D Laurillard, *Rethinking University Teaching: A conversational framework for the effective use of learning technologies 2nd ed*, London, Routledge Falmer, 2002 at 67, citing T M Duffy and D J Cunningham, “Constructivism: implications for the design and delivery of instruction”, in D Jonassen (ed), *Handbook of Research for Educational Communications and Technology*, New York, Simon & Schuster Macmillan, 1996 at 171.

Constructivism is a broad church, encompassing all educators who reject the 'transmission' model of teaching or anything that sounds non-cognitive. A recent overview of current views of constructivism corrals the wide range of ideologies into two common tenets, that:

- (1) learning is an active process of constructing rather than acquiring knowledge, and
- (2) instruction is a process of supporting that construction rather than communicating knowledge.

In this learning situation, it is what the student *does* (cf *is*)⁴⁸ with the various resources/inputs they are given – how they construct their own understandings and new knowledge – that is critical. The most educationally aware teachers conceptualise their professional teaching role in this context as that of “designers of learning environments” in a *learning*-centred model. They may be the guide-on-the-side or, as my colleague Professor Erica McWilliam has more provocatively put it, “meddler in the middle”⁴⁹ –

...the idea of teacher and student as co-creators of value is compelling. Rather than teachers delivering an information product to be consumed by the student, co-creating value would see the teacher and student *mutually involved in assembling and disassembling* cultural products. In colloquial terms, this would frame the teacher as neither sage on the stage nor guide on the side but *meddler in the middle*. The teacher is *in there doing and failing* alongside students, rather than moving like Florence Nightingale from desk to desk or chat room to chat room, watching over her flock, encouraging and monitoring.

It is in this type of carefully designed learning environment, where the learning is central to the student experience and is carefully structured through strategic, aligned and targeted learning activities, that students are most likely to have “transformational” learning outcomes and where their understandings and ways of dealing and interacting with knowledge will have shifted. This is what a number of us in legal education are now striving for, having long-ago recognised that the teacher-centred, transmission model just will not produce significant qualitative changes in students learning or learning outcomes that are any more complex than short-term memorisation and superficial reporting back.

However, this is not to say that all, or even a majority, of legal educators have embraced these ideals of good learning and teaching practice –

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.⁵⁰

Even so, in some Schools, even in the face of the “disinterested majority”, and admittedly from a fairly low base,⁵¹ it has been possible to embed significant advances at different levels of teaching practice; from policy development through to closing the loop on student evaluations of teaching by reporting back to the students lecturer-action on student feedback. Routinely at my institution, casual professional

⁴⁸ Biggs, above n 12.

⁴⁹ E McWilliam, *Unlearning Pedagogy*, Invited Keynote Paper for *ICE2: Ideas in Cyberspace Education Symposium* at Higham Hall, Lake District 23-25 February 2005 at 10.

⁵⁰ Keyes and Johnstone, above n 1, at 555-6.

⁵¹ *Ibid* at 564.

staff members are provided with teacher-training – some teaching tips and tricks – before they face their first class. In my Faculty, we have engaged with the literature on the well-known difficulties that students face in their transition to tertiary study in a new discipline, whatever their background, and now attempt to provide the learning support and other resources these, mainly first year, students require to be successful in their chosen area of study. We are also grappling with the imperative to embed Indigenous content and perspectives into core law curriculum; a quite challenging task that requires both teachers and students to explore their own positions on the universality, invisibility and inherent privilege of whiteness with a view to informing an approach to learning and teaching that will move beyond problematising and/or essentialising Indigenous people and their experiences.

Most significantly, through careful learning design and embedded quality assurance practice in relation to subject outlines (our “contract with the students”), systemic improvement has been possible to ensure that, before their learning commences, students are made explicitly aware of teacher expectations for both the individual subjects of study and also for the entire program of study. In “eduspeak”,⁵² we engage in constructive alignment of the curriculum we deliver: students are made aware of what *learning outcomes* they may expect from a subject; what *teaching and learning approaches* will be adopted to deliver those outcomes; *how they will be assessed*, how that assessment relates to the learning outcomes (for example, assessment of oral communication as a learning outcome can not be validly done by way of 100% closed book examination, but rather by tutorial participation, oral presentation or advocacy or negotiation exercise, *etc*), how they will receive feedback on their assessment tasks in aid of their learning in addition to the grade/mark allocated, *etc*.

This last point in relation to aligned assessment is a quite significant advance for legal education –

It is now well accepted that assessment is one of the most important elements of subject design (Johnstone, Patterson and Rubenstein, 1998; Hinett and Bone, 2002). Assessment has changed in law schools, partly driven by university requirements, and partly by greater understanding of how good assessment strategies can influence student learning....The view of assessment in the traditional model of law teaching – a single end of year written examination after “teaching” was completed – no longer dominates law schools as much as it did in the past. This, in part, is due to a more thoughtful approach of some law teaching academics, and in part to the “top down” influence of university teaching and learning policies.⁵³

As intimated above, and as also referred to in the AUTC 2003 Report,⁵⁴ this more sophisticated approach to assessment has produced other “notable improvement[s] to law school assessment regimes” including:

- the diversification of assessment methods;
- dissemination of information to students about assessment criteria; and
- greater attention to providing feedback to students on their performance against those criteria.

⁵² D Tomazos, “What do university teachers say about improving university teaching?” in R. Pospisil and L. Willcoxson (eds) *Learning Through Teaching*, Proceedings of the 6th Annual Teaching Forum, Murdoch University, February 1997, Perth: Murdoch University at (pp 333-340). Available at <http://cea.curtin.edu.au/tlf/tlf1997/tomazos.html> [accessed August, 2003].

⁵³ Johnstone and Vignaendra, above n 4, at 363 citing R Johnstone, J Patterson and K Rubenstein, *Improving Criteria and Feedback in Student Assessment in Law*, London, Cavendish, 1998; and K Hinett and A Bone, “Diversifying Assessment and Developing Judgment in Legal Education” in R Burrridge, K Hinett, A Paliwala and T Varnava (eds), *Effective Learning and Teaching in Law*, London, Kogan Page, 2002.

⁵⁴ *Ibid* at 390-1.

In summary, this part (3.2) has sought to demonstrate that the traditional transmission model of legal education, so dominant at the time of *Pearce*, which was allegedly certified by 100% closed book examination, has been shown to be ineffective as a learning and teaching model – educational research can inform us how we might best go about teaching for learning, or more accurately, designing for active learning engagement.

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.⁵⁵

4.0 An irony

The persistence of the view that doctrine is the centre of legal research also has an inhibiting effect on our ability to perceive of different ways of conceiving legal education.⁵⁶

It is ironic now that, one of the greatest threats to the not insignificant gains that have been made in moving legal education towards, and reconceptualising it for, the 21st century, is the response that avowed traditionalists (in both legal educational and research) are now being forced to make to engage with the new research agenda that has been set by the federal government and by their institutional colleagues.

Traditionally, legal research in the vast majority of Law Schools has been professionally-focused and largely doctrinal (similar to the traditional teaching model); the need to engage with other disciplines or even to collaborate internally has not previously been recognised as desirable to any great extent. Until quite recently, traditional legal researchers have been highly skeptical of the value of such external engagement and, frankly, have considered that the insular discipline of law would have little to gain by stepping outside its quasi-scientific domain area. By comparison, the very essence of scholarly teaching and engagement in learning and teaching research, is to embrace educational theory, whatever the teacher's home discipline. Scholarly teachers have appreciated and been very open to the influences and advantages that extra-discipline exposure can provide, particularly when they work collaboratively with colleagues whose perspective is quite "other" to their own.

The research-side of the Nelson tertiary agenda has now forced a complete about-face by doctrinal legal researchers to safeguard the continuing relevance (and indeed existence) of their funded legal research. For any research to be "valued" in the contemporary tertiary sector, it must achieve Department of Education, Science and Training (DEST)-rated research outcomes, with an emphasis on being collaborative, interdisciplinary and highly strategic. In short, to be supported legal research must bring in research quantum: for example, through external competitive grants obtained, through increased Higher Degree Research (PhD, SJD) students enrolled; through refereed publications output; and through research consultancies secured. There is little value now placed on the traditional paradigm of the sole doctrinal researcher who eschews the perspective of different models of thinking, disciplines and/or collaborators.

The irony is that, just as the legal traditionalists are being forced out of their comfort zones and are embracing (and, to the majority's delight, learning from!) these new models of practice – just as this broadening of perspective might have a beneficial impact on bedding down a pedagogical base for legal education – the research agenda has become all-consuming. In any new binary sector, a number of

⁵⁵ Biggs, above n 12, at 25, citing R W Tyler, *Basic Principles of Curriculum and Instruction*, University of Chicago Press, Chicago, 1949 at 63.

⁵⁶ Keyes and Johnstone, above n 1, at 555.

Universities fear they might sink to the unattractive position of “teaching-only”, though they all aspire to be within the elite “top ten research institutions” (and there are more than ten aspirants, not counting the ten incumbents, so the future is not looking rosy). In this environment, big-moneyed research is the only game in town. Research-inactive staff will become research-active or will be punished by being required to teach more. Money is being directed, if not away from, then definitely not at, teaching but towards building research capacity. One of the few counters committed educators have – the push for “R&D in T&L” (research and development in teaching and learning or higher education learning) – is not well or widely understood and, despite recent government injections of funds,⁵⁷ is not seen as sufficiently remunerative by many of the very powerful DVCs and PVCs Research.

5.0 Conclusion: A model of legal education where learning is valued.

Since the 1987 *Pearce Report* much positive change has occurred in legal education. While Law Schools have been starved of adequate resourcing in the decades since *Pearce*, a number of them and many of their teaching academics have worked tirelessly to understand what good (scholarly) learning and teaching might look like and how student learning outcomes might be thereby improved. I know, for example, that my Faculty is committed to and has invested heavily in providing quality learning and teaching environments for its students and has embedded QA processes by which it seeks to assure and to evaluate the efficacy of its programs and ongoing curriculum improvement.

As legal educators come to understand more about teaching as a profession, the learning opportunities we offer our students are designed to encourage a shared responsibility between teacher and learner and aim to produce graduates who are able to practise as reflective practitioners in a dynamic workplace. Such graduates should have acquired the necessary skills, knowledge, understanding and sense of community responsibility that they will need to function effectively and ethically in the diverse and globalised discipline that law has become.

The traditional, one-way transmission, model of legal education, which is still prominent in areas throughout the tertiary sector, is simply no longer appropriate to prepare graduates for modern professional practice. It has also been proven to be not educationally sound. These deficiencies are slowly being rectified but require the continuing support of all stakeholders so that the momentum for change is maintained. Change management in any area requires strategic leadership and also an unlearning and consequent re-learning of desirable approaches. The legal services industry has had to do this in response to the drivers that have forced change on it and legal education is doing the same. The strategic leadership for this change should be a responsibility shared by us all – the judiciary, the academy and practicing professional alike – for the betterment of our profession’s future.

⁵⁷ The new federal *Learning and Teaching Performance Fund* has been allocated funding over three years of \$54M in 2006; \$83M in 2007; and \$113M in 2008. The Carrick Institute, which has replaced the Australian University Teaching Committee (AUTC) from 2005 and has been charged with a national focus for the enhancement of learning and teaching in Australian higher education providers, has an allocation, beginning in 2006, of \$21.9 million (with an additional sum of \$3.15 million dedicated to a new national awards program annually).