

PACKING THEM IN THE AISLES: MAKING USE OF MOOTS AS PART OF COURSE DELIVERY

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INTRODUCTION

Post-Pearce Report,¹ many Australian law schools have moved to embrace the teaching of legal skills with an enthusiasm that few could have foreseen prior to 1987, or indeed, in the immediate aftermath of that Report.² In many instances, it has been the fourth-wave³ law schools which have been at the forefront of this development.⁴ The incorporation of skills into the undergraduate curriculum has always been a source of great concern and debate.⁵ The teaching of skills “on the run” as it were, is often seen to necessitate a corresponding lack of attention to the teaching of substantive law or theoretical perspectives⁶ and, as a result, true “integration of skills development, skills theory and practice, into a holistic and effective educative process has proceeded slowly”.⁷ A dismissive attitude to the old liberal education versus skills training debate has been adopted by those who now argue that the “existing challenge that confronts legal education ... is the integration of doctrine, theory and practice into a unified, coherent curriculum”.⁸ Accepting this as the task presently facing legal educators, the underlying purpose of this paper is to demonstrate, by reference to an example of the use of moots in a Constitutional Law subject, that skills exercises can be used to good effect as part of course delivery to all students — not just those performing the skill at any particular time.

Usually the only audience which mooters have, aside from the

pecially-constituted Bench, are those few friends or family who come along to lend their support. In some cases these people may not be welcome and the moot occurs in camera, as it were. But even when there is an audience, there is little suggestion that they are intended to benefit in any way by observing the moot. Their role is normally confined to the curious one of silent cheersquad. Certainly, the idea that those present should be able to (or would even be remotely interested in attempting to) follow the arguments made by counsel seems to have been given little credence. The fact that the spectators are rarely, if ever, provided with any information concerning the moot problem indicates the neglect of the benefits of mooting to the audience.

This seems to reflect a rather limited appreciation of mooting and its power as an educational device. While it is widely acknowledged that moots provide skills training for those students involved, this paper argues that moot programs which are run in the context of a particular area of study may be structured so as to enhance the acquisition of knowledge of the substantive law by both the participants *and* the audience.

This idea has been tested by the author in delivering the Constitutional Law course at the University of Western Sydney, Macarthur⁹ over the last two years. The findings from that experience support the view that a mooting program provides, not only an educational experience for the mooters, but also serves as a means of engaging the interest of the spectating students in a substantive topic by situating that topic in a discipline specific context, and one which is very different from lectures or tutorials.

THE COMMONLY PERCEIVED ADVANTAGES OF MOOTING

Before examining the educational possibilities that mooting presents when one considers spectators, it is helpful to quickly revisit the advantages of the exercise for its active participants. It is widely acknowledged that students gain a number of generic skills from mooting.¹⁰ These can be grouped under the umbrella name of “communication skills” and include the ability to present an oral argument (whilst being interrupted),¹¹ to be capable of conveying meaning through written expression and also to work as a team with the various forms of communication that entails — notably

negotiation and explanation.¹² Of course, the very legal nature of the exercise ensures that mooters must be competent legal researchers and confident in their knowledge and use of legal language.

None of this is surprising and all these benefits of mooting have been appreciated (at least implicitly) since the practice of mooting evolved at the Inns of Court several centuries ago.¹³ However, in recent times, attention has been given to the substantive content of moots and how the exercise encourages interest in, and retention of, that material.¹⁴ This would seem to be the case whether the content of the moot has previously been taught to students or is in fact being exposed to them for the first time as part of an exercise in problem-based learning and knowledge construction.

An example of the former situation (which may be called “confirmatory”) is the undergraduate tax mooting program described by Bentley when he says:

The advantage of an integrated skills program is that the substantive and skills components can feed off each other while achieving their own objectives and learning outcomes. For example, a moot topic could focus on the difference between capital and income. Students acquire the substantive tax knowledge through lectures and through preparation for the moot. They acquire the mooting skills using the substantive subject matter. They then demonstrate the learning outcomes for both the substantive subject matter and the mooting component through their performance in each element of the moot.¹⁵

The alternative approach to setting moot problems is to have them deal with material which is initially foreign to the students but which they must learn in order to complete the task successfully. The content may be dealt with in lectures or tutorials subsequently or it may be covered solely through the moot. Definitely more challenging for the mooters, the educational theory behind such an approach is best identified as a form of constructivism — the active attainment of knowledge through the student’s exercise of their own initiative and work (hence the label “constructivist” seems appropriate). In particular, such moot programs are problem-based learning in its purest form.¹⁶

The acknowledgment that mooting assists student understanding of substantive law as well as developing a multitude of practical skills, may seem obvious, however, as noted above, these have been identified as outcomes for those students actually involved — the mooters. This paper seeks to look at moots from the neglected

angle of the spectator. In essence it does this by asking two questions:

- 1 How may mooting be incorporated into a subject, not just as an assessable task for the participants, but also as part of the overall course delivery to all students enrolled in the subject.
- 2 Does watching a moot significantly assist a student's understanding of the substantive law concerned?

CONSTITUTIONAL LAW MOOTS AT UWS MACARTHUR — 1997

All core subjects of the Bachelor of Laws curriculum at UWS Macarthur must feature a 25% skills component. This means that in each of these subjects, a quarter of the teaching time and the assessment must relate to a specified legal skill. For example, in Introduction to Law, students receive instruction in legal research techniques for (on average) one hour a week and must complete a substantial legal research exercise known as a “pathfinder” which is weighted at 25% of the total marks available for the subject. The skill which is concentrated upon in Constitutional Law is mooting which is worth 30% in total. The slightly higher weighting was a recognition of the very high demands which mooting makes upon students in contrast to some other legal skills.¹⁷ Additionally, there comes a point where immutable delineation between substantive content and skills is both unrealistic and negative.¹⁸ The students were marked just as much on their understanding of the legal issues involved in answering the moot problem as on their advocacy and court etiquette.

In 1997 a number of changes were made to the delivery of the subject with the aim of pacing mooting throughout the semester¹⁹ rather than the previous system of the moots being clumped at the end of the course where they occurred not only in the designated skills hour but also the two hour blocks set aside for tutorials. Once that decision had been made, it was only logical that some sort of relationship should be established between the lectures, tutorials and skills sessions. As most of the skills sessions would be given over to the hearing of moots, it made sense for the moots to concern material already covered in lectures and tutorials so that there would be some definite connection between all three arms of the course. Thus a model was adopted under which a topic would

be lectured upon in, say, week five of semester. The students then prepared for a tutorial on this topic in week six and, finally, witnessed four of their classmates perform a moot concerned with this area of the law in week seven.

There were two attractive features of this approach. Firstly, it enabled the benefits that Bentley found in his undergraduate tax program²⁰ — the reinforcement of student understanding of lectured topics through preparation for the moot, and the assessment of students in the professional context provided by the moot court. This, of course, comes at the price of foregoing the benefits of asking students to actively construct their own knowledge in addressing a moot problem dealing with issues they are unfamiliar with, as described above. This is the difficult choice which faces anyone who is devising a moot program. Essentially, it is a question answered by the context surrounding the program. In this instance, where the moots are but a part of a larger subject, the limitations of the subject must also apply to the moot program. Ultimately, the factor which determined that the Constitutional Law moots would be confirmatory, rather than constructivist, was the limited time available to teach the course, with the corresponding demand which that imposes upon students to assimilate a lot of information quite quickly.

Secondly, looking beyond the issue of the mooters' learning, it presented an opportunity for what may be best described as informed spectating. Essentially, all this does is seek to extend some of the benefits of mooting to the audience. Surely their understanding of a legal topic can be improved by watching others debate the correct application of the law to a problem? We often request our students to make tutorial presentations to each other. The fact that a moot is situated in an extremely legal environment — unlike lectures or tutorials — should only strengthen the learning experience for all concerned.²¹ To that end, over the course of semester, all students watched the moots of their colleagues in the same skills/tutorial group.²² They were provided with the moot problem about 15-20 minutes before the moot actually commenced and given that time to read it.²³ The moot problem was based around the topic covered in tutorials in the preceding week and lectured upon the week prior to that.

Any significant educational benefit to the audience is absent if the moots are constructivist in nature. If the students have not

studied a topic in the subject but some of their number answer a moot problem on it, the two groups — mooters and audience — are not operating from a remotely similar knowledge base. In these instances, the audience is too far removed from the issues under discussion and will gain little from hearing a series of complex arguments on a topic with which they are unfamiliar. It was only by adopting a confirmatory role for the moots that there was any possibility of them assuming the role of a third form of delivery of the subject matter.

DO INFORMED SPECTATORS LEARN FROM OBSERVING MOOTS?

Having described how the moot program was integrated into the Constitutional Law course so as to assist student understanding of the substantive content through the participation in *and watching of* moots, the next question must obviously be: did it work? There is no justification for packing the gallery of a moot court with students if they are not going to learn anything but merely cause distraction and add to the anxiety of the mooters.

At the end of the moot program in 1997, the students were surveyed and asked three questions as well as invited to make any general comments. The statistical results and a representative sample of student responses help to indicate their attitude towards the program and explain the reasons behind the changes implemented in 1998. Of the three questions, it is the second which is of primary interest to this paper (Watching other moots assisted you in understanding the subject matter of Constitutional Law?) but the responses to question 1 complement the earlier discussion about moots generally.²⁴

Question 1: Performing in moots in Constitutional Law was a valuable experience.

[Total Responses: 56 (1997)]

These figures are hardly surprising given what we already know about the (normally retrospective) fondness which students have for mooting.²⁵ Some of the comments on the survey forms explain these figures and lend further support to the numerous advantages of mooting identified earlier:

- It showed me what it was to be a Barrister — if you know what I mean. It showed me I was not wasting my time doing law because this was definitely what I want to do with my life;
- It gave a better understanding on the general themes of Constitutional Law and an in-depth understanding of the particular topic being mooted;
- Learning from experience is far more educational than reading out of a thick textbook;
- I may feel it scared the proverbial shit out of me, but most people, including myself, loved the rush.

And from a student who wanted to cover all bases:

- It allowed me to practically apply my knowledge
- It was an enjoyable challenge
- A good practical experience
- Allowed me to gain more experience in legal research.

From establishing that most students found value in their mooting experience, the next question focussed upon their role as spectators across the semester.

Question 2: Watching other moots assisted you in understanding the subject matter of Constitutional Law.

[Total Responses: 57 (1997)]

An immediate glance at these results indicates that they are much more evenly spread out and hence require a more thorough analysis. Further complexity arises because the comments which students wrote do not bear a great relationship to the numerical ranking they gave in response to the question. It is almost as if there are two scales in operation. Student A may give a score of 1 but when asked “why” may have given a very similar response to Student B who gave a score of 3. This works the other way also — Student A may give a score of 5, but still express reservations echoing the response of someone who gave a score of 3. The 3 mark is clearly the focal point and all sorts of comments — highly critical and highly favourable congregate there. To clarify matters, each quote below will indicate what score the particular student gave in answer to the question.

Firstly, it is probably best to start with the negative reactions. In a lot of these, the students were very honest and volunteered that the reason the spectating was unsuccessful was due to their own lack of interest. This does not invalidate their feedback on this aspect of the program but is a very real factor to be considered in evaluating the educational benefits of watching the mooting of others:

- Waste of time. No-one was paying attention (1);
- I think because our class was so late at night there was less effort made to listen to the moot going on (2);
- Subject mater is a little dry, so our concentration span is NON-EXISTENT! (1);
- Didn't always pay attention (3).

Responses which highlighted a more intrinsic problem with the concept of moot spectating were of the following kind:

- They tended to be boring and besides the basic law, it was useless because of the lack of knowledge we had (2);
- Mooters have gone into [so] much detail — have carefully & comprehensively analysed each judgment. So at times, veiwers may get a little lost (1);
- Although we were given the question sheet, only the people actually involved in the particular moot had researched it enough to understand the issues on that level (2);
- We didn't have the same degree of understanding on the topics as the mooters (3).

The audience's feeling of alienation from the moot due to a less

detailed understanding of the issues involved is something that needs to be solved if spectating is to be beneficial. Whilst it is obvious that students will have a much deeper knowledge of the topic covered in their own moot, it was anticipated that the broad issues raised in the questions would not be beyond the basic understanding students should have of an area through lectures, tutorials and their own reading. Clearly, for some students, this was not the case.

A number of the survey responses were critical of the way in which the audience was provided with information regarding the moots. As stated above, the fact problem was distributed to non-mooting students at the conclusion of their tutorial and about 15 minutes prior to the hearing of the moot. As only two of the six questions were over a page in length, it was thought that there would be plenty of time for students to read them and have a fairly good idea of what was to unfold in the Moot Court. It seems this was an error of judgment:

- It would be good to get the question at a time when we can actually read them (2);
- Not as much as I would have liked. Maybe if we got the moot question the day before or had 15 minutes to discuss it in class it would have been more beneficial (3);
- Suggestion: a copy of the written arguments given to the rest of the class one week prior to the moot (3).

The last comment was echoed in several responses, however, it is just not feasible in terms of administrative time and expenditure, though it would have the potential to enhance the experience for those students who chose to prepare properly. Not all the students advocated an early distribution of the moot problems, as the following response demonstrates:

- It might have helped to look at other people's moot question in advance but in all honesty I doubt whether I would have thought about how I would have answered it in advance (4).

However, the overall impression gained was that the moot question should be made available much earlier and this was done in 1998. This can only serve to maximise the potential benefits of spectating²⁶ for those students who wish to read it and will make no difference for those others who do not read the question until the hearing of the moot itself.

The suggestion that some discussion of the question occur prior

to or after the moot was supported by several of the responses:

- If the mooter was confused or they said the wrong thing, it made me confused (3);
- Sometimes the arguments made sense and sometimes you could not understand a word. Although necessary, the questioning made it harder to understand because you did not know where the ‘judge’ wanted the speaker to go (3);
- Arguments [are] not always correct (3);
- If something was said [that] I didn’t understand, there was no way to clarify anything (3).

These comments highlight two things: the student perception that some guidance, additional to the mere distribution of the moot problems, was required for the spectators, and the necessity of providing adequate opportunity for reflection on the moot for the whole group. Whilst timetable constraints prevented a review of the moot immediately after the judgments were handed down, time should have been allocated in the tutorial in the following week to review the moot. This realisation led to significant redesign of the course which is described below.

Before looking at the more positive feedback, it should be mentioned that there was only one response which indicated a dislike of the spectating aspect on the ground of inappropriateness — “private moots would have given more confidence (considering this is our first year of law)”. This is an issue that has to be considered and the adoption of spectators in a first-time moot program should be approached with a degree of caution. In the case of this subject, almost all of its cohort have already completed a bail application exercise in Criminal Law (which does occur in private) and so it was felt that as they were at least familiar with the moot court and its formalities they would not be as uncomfortable as students completely fresh to public speaking of this sort. Certainly there was little comment or complaint from any of the mooters about the presence of the audience. Rather it was the spectators who tended to find reasons why they should not be there!

Despite all of the above feedback, it is just as apparent that some students found spectating extremely worthwhile. The statistics display a general balance in the responses and on the high side of the score of 3 the favourable comments reflect the advantages of spectating which the course was designed to achieve:

- Didn’t see the written submissions so only saw snippets of

[the] line of reasoning. *But*: What we did see were the main issues: YES this did assist. *And*: If we didn't see anything it couldn't possibly have assisted (3);

- You could listen about the mooters' view and ideas of the law on the topic (5);
- It was helpful in so much as it allowed viewers to have a quick think about arguments they would raise for a particular moot (3);
- It gave us a deeper insight and a much more comprehensive understanding of the other topics (5);
- It puts into play the principles which are often obscure in the text book and cases. It does this in an alternate forum to the tutorials (3).

Interestingly, the concerns examined earlier where some students felt that the moot had the potential to cause confusion due to the presentation of the law from two opposing sides, were seen by some of the higher scoring students to be a strength:

- I found sometimes it confused me — I thought I understood a topic and the speakers proved I didn't know it as well as I thought I did (3);
- [We] got different interpretations of the law from both sides (4);
- ... the arguments presented for both sides made it easier to understand the subject matter of that moot and the legal concepts involved in that area of constitutional law (3).

In all, the responses to this question can be construed in a number of ways. Statistically, the percentage of students who indicated that watching moots assisted their understanding of Constitutional Law in some way is encouraging — 80.7% of the responses gave a score of 3-5 on this question. However, one should be mindful that over 70% of those responses are clumped at the midway point of 3 and, as noted above, a numerical response of 3 was not always accompanied by a positive response to the benefits of observing the moot.

That a proportion of the student body viewed the exercise as without benefit is interesting — but it is hardly surprising. In the eyes of staff involved, it did not seem to justify the abandonment of moot spectating in future offerings of the course — especially in light of the favourable reception it received with many other students. Instead it stimulated us to adopt strategies which would

hopefully overcome some of the perceived weaknesses in the program. The challenges for the 1998 teaching team were twofold. Firstly, to address the organisational gripes which students expressed about distribution of moot information. Secondly, and far more intimidating, to combat student disinterest and boredom and provide encouragement for spectators.

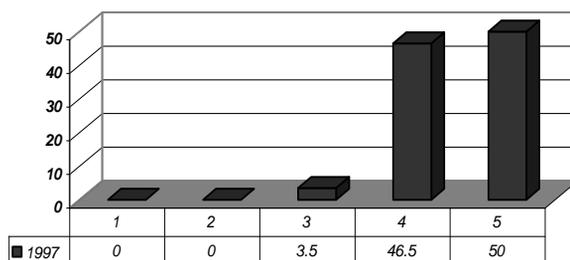
A CONSIDERED REVISION — 1998

The heavy emphasis on skills at UWS Macarthur can often mean that when one attempts to revise that component of a subject the rest of the course must inevitably be redesigned also. This was very much the case with Constitutional Law. The key to increasing student interest in the moots they watched was obviously to make them more relevant to the remainder of the course. To this end the coverage of a topic changed from the weekly progression of lecture/tutorial/moot which was described above. A re-ordering occurred so that a topic would be covered, again across the span of three weeks, but using a lecture/moot/tutorial sequence. The placement of the moot between the two traditional means of delivery was designed to enable a full debriefing of the moot problem in the subsequent tutorial. The aim of this was twofold — firstly, students were made aware that they would be expected to discuss the problem in the tutorial and would be asked about what the mooters had said in relation to it. They were given the problem a full week in advance of the actual moot and told to prepare an answer to it for discussion in the tutorial, two weeks later. Obviously, there was now a reasonable incentive for closely following the proceedings in the moot court. Secondly, by discussing the problem after the moot, staff were able to clarify particular issues that may have become confusing in the course of the legal submissions.²⁷

In order to best evaluate the success of these changes, the moot program survey was slightly expanded in order to be more precise. To overcome any possible confusion over the results of the question which asked whether spectating assisted an understanding of the subject matter of Constitutional Law, a new question addressing just the skills aspect of spectating was included. A question on the tutorial debriefing of the moot problem was also added. Before examining the responses to these, it is worthwhile to “set the scene”

as it were by seeing how students answered the initial question:

Question 1: Performing in moots in Constitutional Law was a valuable experience.



[Total Responses: 56 (1997) 89 (1998)]

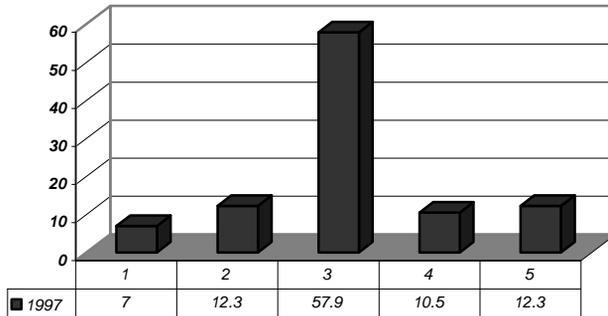
The 1998 results are not dramatically at variance with those of 1997 — there are still no students who will rate the value of the experience as a 1 or 2. The drop of 5 responses and the corresponding increases in 3 responses is hardly pleasing, however. The comments which students made do not provide any clear explanation for this and it may well be just a consequence of the larger student numbers. There may also be an element of lack of novelty value — by the time students moot in Constitutional Law at UWS Macarthur they have already performed in the moot court twice — a viva exam and a bail application having already been assessed. It will be interesting to see whether the 1998 spread of statistics remains roughly fixed or whether it is just an anomaly of that particular cohort.

Do the 1998 Survey Results Provide (greater) Support for Moot Spectating?

Turning to the central issue of this paper, the teaching team were obviously very curious to see whether students reacted favourably to the spectating component of the moot program — especially in light of the changes we had made in order to improve it. There were three questions asked of students in order to determine this — the first addressing the benefits of watching others *do* the moot rather than following what they said:

Question 2: Watching other moots assisted you in

familiarising yourself with techniques.



[Total Responses = 89]

The results for this question are hardly surprising as it was anticipated that the number of favourable responses would be high. As one student succinctly put it, “Always helpful to see how others stuff up and what they do well”. Other comments showed a more thoughtful response but really were variations on this theme:

- Not being actually involved allows you to pick up on things that you should and shouldn’t do that you don’t often notice whilst in your own moot;
- It is helpful when you can see and hear the different approaches taken, so as to fine tune your own style;
- The way the judge interacted with the advocates also helped me to prepare my own work;
- It was reassuring to see other people being nervous!;
- It reminded you NOT to say “yeah” & “OK” when someone else did;
- Some mooters were positive examples of calm control under pressure.

Clearly, there is an enormous benefit if students can learn from each other in this way. These statistics support this but it must be acknowledged that they are an incidental result of this study and it was not our original intention to demonstrate anything so extremely obvious in the first place. Even so, it is worth considering whether we enable our students to learn from each other enough in the skills area. Even ignoring the possible academic benefits of following a moot, the absorption of advocacy skills would seem enough of a reason in its own right for leaving the doors to the moot court open and encouraging the existence of an audience.

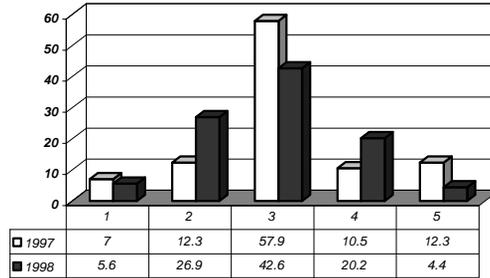
A small percentage of people tended to disagree with the proposition, seemingly for reasons of alienation from the process and a lack of constructive guidance:

- It was sometimes counter-effective as you may copy the way someone did it and think it was good when it really wasn't. [It] strongly influenced your own presentation for better or for worse. We didn't hear the criticisms that [the mooters] did afterwards;
- It both did and didn't. Whilst we saw others attempting to abide by the rules of advocacy, no comment about their attempts were made so that we were really informed of what was correct or incorrect!

These are fair comments but it seems rather undesirable to give feedback to a (first time) mooting student in full view of their peers. It also seems a little unnecessary given the preparation provided to students at the start of the program which should enable them to be pretty good judges of a mooter's performance. Do they really need to have it pointed out to them that John seemed poorly prepared and could not answer simple questions and that Sarah made irritating clicking noises with her pen? Surely their exposure to various videos and instruction books should enable them to spot this behaviour as undesirable without having to publicly embarrass the student at such an early stage of their career. The responses of a majority of students made it clear that they were able to discern the good performances from the bad through watching enough of the moots and also by identifying the attitude of the bench. However, giving students more detailed instruction on how to critically peer evaluate moot performances might ensure less confusion for some.

Having ensured that survey respondents would not confuse the observation of advocacy with their understanding of the academic content of the moot, the students were then asked the same question as their 1997 counterparts:

Question 3: Watching other moots assisted you in understanding the subject matter of Constitutional Law.



[Total Responses: 57 (1997) 89 (1998)]

A number of observations may be drawn from these results. Firstly, they are more evenly spread across the five possible responses than those of 1997, with over 30% of students expressing disagreement with the proposition. Not only is this a fairly high percentage in its own right, but it is a substantial increase on last year’s figure of 20%. This may be explained due to the difference between the 1997 and 1998 surveys. The suspicion that some 1997 students answered this question thinking of the advocacy aspects and not the subject matter seems to have been well founded. Hence, the appearance of the new question 2 above leads to a more accurate portrayal of student feeling on this question in 1998.

That said, there are still 70% of students who either agree strongly with the proposition or are neutral about it. And so while it must be acknowledged that there are a greater number of negative responses, there are also slightly more students prepared to circle 4 or 5 indicating agreement with the proposition. The 1998 results are more polarised than those of 1997 yet overall they do not signify a particularly strong case for abandonment of moot spectating in Constitutional Law — especially when they are taken in conjunction with the figures from question 2 which indicate that most students benefited from exposure to the practice of mooting. The fact that a fair proportion also learnt something about the law as well, seems to support continuation of this feature of the course.

Many of the written responses confirmed what had been said by the 1997 cohort. This was especially the case with respect to the interest factor of students and the difficulties in following what was

going on — for a number of reasons:

- It was difficult to hear what each person was saying. The level of argument [was] too detailed for comprehension;
- It became “boring” (for lack of a better term) because the gallery could not act. Perhaps it should not have been compulsory to attend the moot;
- It was helpful to watch the other moots but sometimes I really couldn’t follow what was being said so I didn’t walk out knowing very much;
- They were boring and hard to follow.

There was a slight trend amongst the 1998 students to throw blame for the failure of the spectating on to the inadequacy of the participants!

- If the argument wasn’t convincing or clear it didn’t help at all. Admittedly the participants were nervous and if you hadn’t read the material it was really hard to concentrate;
- It depends on the efforts of moot participants to research the moot topic effectively;
- Some people were all over the place, softly spoken and obviously nervous which at times made it difficult to follow what was being argued. Sometimes you would learn more just reading the textbook.

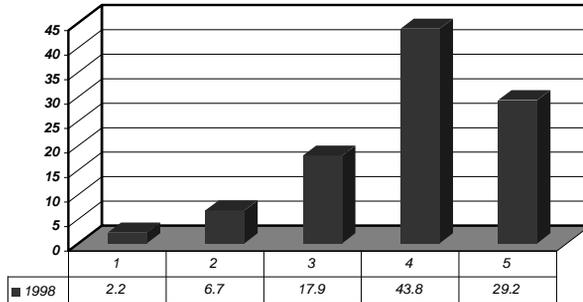
All these criticisms are valid — it *is* difficult to learn from any presentation if you have trouble hearing the speaker and the material is poorly presented. However, even in making this point, these respondents acknowledge that there were other mooters who were clear, well-read and illuminating speakers. Other students added praise whilst also recognising the limitations of what was being attempted:

- It was helpful although as a supplementary method of learning only. The substantive issues were essentially covered in lectures allowing for a brief idea of the issues of the mooters;
- It did assist in understanding subject matter, but it was by no means an extension of the area covered. A great deal of the arguments were detailed and directly related to the question, not necessarily to the subject. In spite of this, it was still valuable in seeing subject matter applied in a mooting format;
- It allowed for a clear understanding of both views of the problem and how to apply the constitution and authorities;
- The moot problems help illustrate the operation of the

substantive law in a more practical sense.

While the statistics and written responses indicate little real difference between the views of the 1997 and 1998 cohorts about the value of spectating, the 1998 students had an altogether different course structure — namely the holding of the relevant tutorial in the week following the moot to enable discussion of the problem. They may not all have been wildly enthusiastic about the spectating, but this new aspect seemed to be more warmly received:

Question 4: The analysis of the question in tutorials in the following week was a valuable part of the moot program.



[Total responses = 89]

Students tended to agree with the proposition for fairly obvious reasons, indicating that the change in the order of modes of delivery was successful:

- Cleared any misunderstandings between conflicting views that were not clearly discussed with relevant authority during the moot;
- This alleviated many of the problems of not understanding completely the specifics, as well as the cases, of the moots;
- Great discussion and debate led by the mooters;
- It showed the strengths and flaws of the arguments put forward in the moots. It also gave instructive feedback on the content of the arguments presented surrounding that question.

This feedback aspect of the subsequent examination of moot problems in tutorials was highlighted by a number of students. This was an agreeable outcome and one not really appreciated at the

time of the course's design. The teaching team was primarily motivated by the need to clarify the legal issues, but, of course, in doing so we necessarily gave plenty of informal feedback to the students upon their understanding of the moot topic:

- One of the most important parts of learning, especially in this type of thing, is feedback, and being able to discuss the question the week after was a most invaluable part of the program;
- It was important to get feedback on our own moot and what should have been included in the question. And for the others [the spectating students], it was an aid to understanding the subject matter;
- I do agree & I do think that this should be the way to go.
Reason:
 - We have a broad picture of what the issues are;
 - It can serve as feedback;
 - Can enhance and encourage students to learn and remember the issues.

However, while all of this was very positive, we had become aware of a significant flaw in the course design during semester and the students also commented on this quite heavily in completing the surveys. The teaching of a particular topic over three weeks through the various mediums of lecture, moot and, finally, tutorial was needlessly drawn out. Given that moot and tutorial were taught in a three hour block, there seemed no good reason not to have a topic covered in both those formats in the one week. So rather than having the moot on topic *y* and then following that immediately with a tutorial on topic *x* (the subject of the moot from the week before), it would have made far more sense to have had the moot on topic *y* occurring just before the tutorial on that same area. This would have had two results. Firstly, students would come to the moots better prepared as they had to discuss the question in the tutorial immediately after. That students tended to read up on a topic before the tutorial and not the moot was confirmed by one survey response which said, "The Follow Up tutorial is the more valuable part since by this time you have read the relevant materials". Presumably this greater understanding of the area would improve the students' chances of following what was going on in the moot and also their interest level. Secondly, it would make the discussion of the moot problem far easier as it would not be relying

on memories of an event occurring a week earlier:

- Analysis should be directly after the moot. There was little retention of the previous moot considering the one week break;
- It would have been better if we could have talked about it straight afterward instead of having to wait until the following week;
- It would have been better though to go through the question straight away.

Student criticism of this aspect of the program is justified. It may now seem incredibly obvious that the moot and tutorial should have been on the same topic in the one week, but at the time that we were redesigning the course, the legacy of 1997's week-by-week approach did not seem so undesirable. It had not been the source of negative feedback and the realisation that the other changes would not be happily accommodated by that earlier style did not come until too late. There was also a lingering fondness for development of a topic across three weeks as it was perceived that it would allow time for deep understanding to develop — but, of course, when it necessarily means there is more than one topic “on the go” at any particular time, it was in fact more likely to overwhelm students. The fact that we didn't get it right in 1998 is unfortunate but is a natural consequence of trial and error. Certainly the reordering and availability of an examination of the question was a vast improvement on what had been done in 1997 and raised the moots from the position of an occasionally baffling postscript to an integral part of a student's experience of a particular topic. Putting the moots before the tutorials was clearly the right approach — in future there needs to be less time between these two so as to compress the coverage of the topic to a two week span.

CONCLUSION

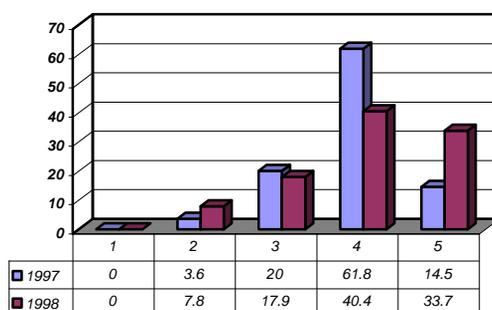
The introduction to this article made it clear that its purpose was really to describe just one attempt to achieve a closer integration between the teaching of substantive law and skills. There are undoubtedly many other stories that could be told. Also as certain, is the room for continual improvement and development. The changes that have occurred in the delivery of this one subject at UWS Macarthur have been fairly significant, yet it is clear that there is so much more that can be done. In particular, stronger efforts

should be made to ensure that theory is not lost in a sea of doctrine and skills. At present there is a substantial portion of the course devoted to an examination of the tenets of Western legal theory which underpin the Westminster system of government, but perhaps this material could be enhanced by a greater connection to the material covered in the moots, or at least the reflection upon them.

Overall, I would suggest that the experience of spectating moots at UWSM has been a valuable one. It is educationally sound and, despite student protestations at the time and the occasional sleeper in the audience, the survey results indicate that there are benefits to be gained by those students who are prepared to devote a little preparation and energy to making the most of their spectating role. A tighter course structure can assist students to do this. The role of feedback can also receive more emphasis. The potential then exists for students to approach their studies in Constitutional Law in a manner which prepares for, and facilitates, learning through a variety of contexts thus enabling a deeper understanding of all facets of the course.

APPENDIX 1

Question 5: The Mooting Program was well organised and the instructions and expectations were made clear.



[Total Responses: 55 (1997) 89 (1998)]

* Faculty of Law, University of Western Sydney, Macarthur. The author wishes to gratefully acknowledge the contributions made to the mooting program in Constitutional Law by Susan Fitzpatrick (the course co-ordinator at UWS Hawkesbury), Rita Shackel and Cameron Stewart. This article reports on the ongoing development of the mooting program at UWS Macarthur and builds upon a conference paper presented by Susan Fitzpatrick and myself at ALTA'98. Susan's input on that paper, and thus her influence on this one, is acknowledged with thanks. The author alone is responsible for the contents of this paper.

© 2000. (1999) 10 *Legal Educ Rev* 83.

- 1 D Pearce et al, *Australian Law Schools — A Discipline Assessment for the Commonwealth Tertiary Education Committee*, AGPS, Canberra, 1987. I am somewhat wary about referring to the Pearce Report within the very first words of this paper as its age is starting to show. But as my reference demonstrates, its significance as a landmark remains despite the growing irrelevance of much of its content. To peruse its pages now is truly to read an historical document. The landscape of legal academia has altered dramatically since 1987. The conversion of the CAEs to universities, the survival of the law school at Macquarie and the creation of several new Faculties elsewhere (in contradiction of the Report) have combined to create a great temporal distance in the last twelve years. The most touching evidence of the Report assuming the status of archival resource is found in paragraph 16.53 with the statement that “for all law schools a minimum target staff:student ratio of 18:1 is essential” (at 641).
- 2 As McInnis and Marginson remind us, “the only explicit formal suggestion given by the Pearce Committee to law schools on aims and objectives was a clear message that they should ‘examine the adequacy of their attention to theoretical and critical perspectives’”. C McInnis & S Marginson, *Australian Law Schools After the 1987 Pearce Report*, AGPS, Canberra, 1994 at 157.
- 3 “Fourth wave” is a reference to the post-1987 law schools, though admittedly the terminology, which is derived from C McInnis & S Marginson, *id.* at 99 has the potential to create confusion. The pre-Martin Report 1964 law schools are “first wave” while those that came after are “second wave”. But as McInnis & Marginson point out, Macquarie and La Trobe are so ideologically distinct from

the remainder of the second wave that they can be said to form “a distinctive third wave in legal education”. The confusion arises because it seems that the second and third waves were occurring roughly simultaneously. Curiously, McGinnis & Marginson themselves, ignore the distinction of a third wave in the presentation of tabled information at the end of their work.

- 4 See the review of skills development in the law schools after 1987 found at C McGinnis & S Marginson, *id.* at 168-170. The authors do not make any direct conclusions about their comparisons between the pre and post-Pearce law schools’ attitudes towards skills training. However, phrases such as “the new schools responded strongly to this item” (skills of oral expression and legal advocacy); “overall, the skill of drafting was integral to the new school courses”; and “all but one of the new schools responding to the survey identified subjects specifically designated to develop negotiation and interpersonal skills” indicate that the fourth wave schools were at least keeping up with their pre-1987 counterparts if not seriously surpassing them in commitment to skills teaching.

Wade acknowledges the role of new law schools in the development of the “third wave of skills” (these are waves distinct from those used to categorise the schools themselves) but places this as occurring in the 1980s. JH Wade, “Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges” (1994) 5 *Legal Educ Rev* 173 at 180. I would suggest that the findings of both the Pearce Committee and McInnis & Marginson, aside from the fact that the “new law schools” only started to emerge at the beginning of this decade, indicate that the increased presence of skills in law undergraduate programs has certainly occurred well into the 1990s and in a much more enthusiastic way than prior to 1987.

- 5 S Kift, “Lawyering Skills: Finding their Place in Legal Education” (1997) 8 *Legal Educ Rev* 43 at 43-45; K Mack, “Bringing Clinical Learning into a Conventional Classroom” (1993) 4 *Legal Educ Rev* 89 at 89-90; and M Le Brun & R Johnstone, *The Quiet Revolution: Improving Student Learning in Law*, Law Book Company, Sydney, 1994 at 169.

- 6 As Spiegelman says, “much of the call for reform in legal education can be seen as a conflict between theorists, who want to move toward more sophisticated abstraction, and practice-oriented teachers, who want to move toward more concrete learning”. P Spiegelman, “Integrating Doctrine, Theory and Practice in Law School Curriculum: The Logic of Jake’s Ladder in the Context of Amy’s Web” (1988) 38 *J Legal Educ* 243 at 245. Some key literature in this area includes W Twining, “Pericles and the Plumber” (1967) 83 *LQ Rev* 396; N Jackling, “Academic and Practical Legal Education: Where Next?” 4 *Journal of Professional Legal Education* 1; J Goldring, “Academic and Practical Legal Education: Where Next? — An Academic Lawyer’s Response to Noel Jackling” 5 *Journal of Professional Legal Education* 105.

- 7 S Kift, above n 5 at 44.

- 8 P Spiegelman, above n 6 at 245 where he also says, “If it were necessary to choose among teaching doctrine, teaching practice, and teaching theory, then a continuing debate might make sense”. See also K Mack, above n 5; K Mack, “Integrating Procedure, ADR and Skills: New Teaching and Learning for New Dispute Resolution Processes” (1998) 9 *Legal Educ Rev* 83.

- 9 The same course structure was employed for the delivery of Constitutional Law at UWS Hawkesbury. Students undertaking Bachelor of Commerce/Law degrees at UWS Hawkesbury complete a number of subjects from the law program at UWS Macarthur as part of their undergraduate course, before transferring to UWSM to complete their combined law degree. Constitutional Law is one of the UWSM subjects taught by the staff at UWSH.

- 10 Only in very recent times has mooted been subject to serious criticism about its ability to teach useful legal skills which adequately prepare students for legal practice. This is found in A Kozinski, “In Praise of Moot Court — NOT!” (1997) 97 *Colum L Rev* 178. Although Kozinski is addressing the use of mooted in most American law schools, there seems no reason why his views should not

extend to most moot programs in Australia. Kozinski's article is a timely attack on our complacent assumptions that moots provide students with "real world" experience. However, the article fails to appreciate the significance of contextual variables upon skills training in the undergraduate curriculum. Speaking as one who is obliged to conduct moots with first year students, I can foresee disastrous consequences of an application of Kozinski's school of hard knocks style of mooting in such an environment. So, whilst Kozinski has provided a fresh perspective in the sparse literature on moots, I submit that many of the suggestions he makes may only have value in moot programs at an advanced level — perhaps even beyond the undergraduate curriculum altogether and at the stage of professional training only. That said, I do not deny that most undergraduate skills training is noticeably artificial when contrasted with the reality of practice. See J Costinis, "The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education" (1993) 43 *J Legal Educ* 157 at 171-5.

- 11 See T Gygar & A Cassimatis, *Mooting Manual*, Butterworths, Sydney, 1997 at 3-4; J Snape & G Watt, *The Cavendish Guide to Mooting*, Cavendish Publishing Limited, London, 1997 at 11-12. The latter publication tends to present the art of moot presentation as a uniquely legal skill and the authors talk of "the presence of a certain nebulosity — an indefinable quality" which enables lawyers to "explain simply and clearly what may be very complex legal material" (at 11-12). However, the view of Bentley seems preferable when he states that "the skills identified as essential to good lawyering are not exclusive to the legal profession. The skills are often defined in different terms in other disciplines, but the content is essentially similar". D Bentley, "Mooting in an Undergraduate Tax Program" (1996) 7(1) *Legal Education Review* 97 at 99.
- 12 T Gygar & A Cassimatis, above n 11 at 4; J Snape & G Watt, above n 11 at 12-13; A Lynch, "Why do we Moot? Exploring the Role of Mooting in Legal Education" (1996) 7(1) *Legal Education Review* 67 at 86-88.
- 13 See generally W R Prest, *The Inns of Court under Elizabeth I and the Early Stuarts 1590-1640*, Longman, London, 1972; and WJV Windeyer, *Lectures on Legal History*, 2nd ed., Law Book Co., Sydney, 1957 at 137-139.
- 14 A Lynch, above n 12; D Bentley, above n 11 at 117; JT Gaubatz, "Moot Court in the Modern Law School" (1981) 21 *J Legal Educ* 87 at 89.
- 15 D Bentley, above n 11 at 104. This approach is similar to that adopted in the Constitutional Law course at UWS Macarthur which will be described in detail below, however, the focus of this paper is upon the learning experience for spectators of the moot.
- 16 For an overview of the educational theory relevant to moots, see A Lynch, above n 12 at 74-81. See also S Kift, above n 5 at 59-71; M Le Brun & R Johnstone, above n 5 at 71-80 for discussion of constructivism. It goes almost without saying that either kind of moot — confirmatory or constructivist — is an example of experiential learning for the mooters. See DA Kolb, *Experiential Learning: Experience as The Source of Learning and Development*, Prentice-Hall Inc, New Jersey, 1984. This concept is also explained in all three of the above sources.
- 17 In 1997 the 30% was split evenly — 15% for oral argument and 15% for written submission. In 1998 the teaching team decided it was desirable to tip the balance in favour of the oral work required of students. Hence this component was weighted at 20% and the written submission was worth 10%.
- 18 Above n 8.
- 19 All subjects at UWS Macarthur are one semester in length.
- 20 See quote accompanying n 15.
- 21 The importance of presenting knowledge in some context related to its use is discussed by JS Brown, A Collins & P Dugid, "Situated Cognition and the Culture of Learning" (1989) (Jan-Feb) *Educ Researcher* 32.
- 22 Fortunately in 1997 the numbers in the groups facilitated this in almost all cases. Most groups were of 24 students each and with four students appearing weekly in one of six moots, the moot program was completed with only a few extra

- moots needed to accommodate extra students. In 1998 however, student numbers rose to about 32 in each skills group with the result that many more extra moots had to be held outside of contact hours. These moots had no audiences.
- 23 Student feedback on this aspect of the program was fairly critical and shall be examined below.
- 24 The third question asked of students was their views about the general organisation of the program and the results for this are contained in Appendix 1. This information is included solely to give some indication about the program which has been the source of the data analysed below.
- 25 See the section above titled “The Commonly Perceived Advantages of Mooting”.
- 26 Survey responses considered below, indicate that there may actually be some, despite the comments considered so far!
- 27 Obviously, this process calls for tact on the part of the tutor. In providing a legal answer, great care should be taken not to be too harsh on some of the more outlandish submissions which counsel have made.