

CRITICAL THINKING IN LEGAL EDUCATION: OUR JOURNEY

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In early 2012, a group of colleagues in the University of Adelaide Law School formed a working group on critical thinking. The initial intention of the group was to discuss Margaret Thornton's recent book, *Privatising the Public University: The Case of Law* and to consider its applicability to our school. To facilitate this discussion, we held several 'reading groups'² and the Law School hosted Thornton for a presentation and interactive workshop.

Thornton's book brought to Australia a critique of the corporatisation of legal education that is well established in other jurisdictions.³ In one part of her analysis Thornton argues that the neoliberal competition reforms of the 1990s have led to an overly vocationally focused curriculum.⁴ She also argues that effective teaching of critical theory and thinking have been 'jettisoned' in favour of a positivist-dominated curriculum: '[A] focus on doctrinarism, known knowledge and "right answers" has replaced the questioning voice.'⁵ This has led to a focus on black-letter law,

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

² The group read extracts from Thornton, above n 1, and Law School Reform, *Breaking the Frozen Sea* (2010) <http://lawschoolreform.com/files/lsr_breakingthefrozensea.pdf>.

³ See for example Jennifer Washburn, *University, Inc.: The Corporate Corruption of Higher Education* (Basic Books, 2006); Sheila Slaughter & Gary Rhoades, *Academic Capitalism and the New Economy: Markets, State, and Higher Education* (The Johns Hopkins University Press, 2009); Derek Bok, *Universities in the Marketplace: The Commercialization of Higher Education* (Princeton University Press, 2004); and Michael Bailey & Des Freedman (eds), *The Assault on Universities: A Manifesto for Resistance* (Pluto Press, 2011).

⁴ Ibid 12. A different thesis has been proffered by Professor Glyn Davis, who has argued that the tradition in Australian universities has, since their inception, been dominated by professional and vocationally orientated values: Glyn Davis, *The Australian Idea of a University*, 2013 Newman Lecture, 21 August 2013, Mannix College, Monash University.

⁵ Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2008) 17 *Legal Education Review* 1, 17.

to the detriment of understanding and questioning the principles on which legal principles rest.

Thornton attributes this phenomenon, predominately, to three pedagogical practices associated with the dramatic expansion in student numbers in law schools and in the perception of tertiary education as a commodity.⁶ The first practice is the use of large-group teaching, moving away from flexible, small-group learning; the second is the increase in flexible delivery, including online courses and intensive teaching; and the third is a move away from research assignments and participation-based assessment towards the almost exclusive use of examination-style assessment, which is naturally suited to assessment of doctrinal knowledge and application. As such, students are achieving surface level learning outcomes,⁷ associated with knowledge, comprehension and application, without moving into analysis, evaluation and critical thinking.⁸ This method is analogous to what Paulo Freire termed ‘banking education’ where a teacher ‘issues communiqués and makes deposits which the students patiently receive, memorize, and repeat.’⁹

While we did not feel that every aspect of Thornton’s critique was applicable to our school (Thornton herself recognises the great divergences that exist across institutions), we were motivated to strengthen critical thinking across our curriculum. Colleagues were also interested in creating a supportive learning community to strengthen our own pedagogical expertise. To facilitate this we supplemented our existing reading with texts from leading educators on critical thinking such as Stephen Brookfield.¹⁰ We also received Faculty funding to visit the law schools at the University of New South Wales and the Australian National University, both of which had recently undertaken significant curriculum reform. We spent time speaking to staff and students about how critical thinking had been incorporating into the curriculum design. Our motivation was to get beyond critique and explore what positive initiatives we could create as a community of educators committed to student development.

In this article, we share some of the insights and findings we have made as part of the critical thinking group. We do so in the hope that our story inspires other legal academics to work collaboratively with colleagues on similar projects. Fundamental to this hope is our belief (and our experience) that legal academics are not passive tools of

⁶ Thornton, above n 1, 12–18.

⁷ Ference Marton and Roger Säljö, ‘On Qualitative Differences in Learning: Outcomes and Processes’ (1976) 46 *British Journal of Educational Psychology* 4.

⁸ See for example Lorin W Anderson and David R Krathwohl (eds), *A Taxonomy for Learning, Teaching, and Assessing: A Revision of Bloom’s Taxonomy of Educational Objectives* (Pearson, 2000).

⁹ Paulo Freire, *Pedagogy of the Oppressed* (Penguin, 1996), 58.

¹⁰ Stephen Brookfield, *Teaching for Critical Thinking: Tools and Techniques to Help Students Question Their Assumptions* (Jossey-Bass, 2011).

recent university reforms. Rather, if we work collaboratively with colleagues, we can play a role in shaping our curriculum and the kinds of interactions we have with students.

With this in mind, Part I outlines our definition of critical thinking in the legal context, developing a definition that incorporates both internal and external critique. Part II provides a brief account of the history of legal education in Australia, tracing the extent to which regulatory and institutional pressures have supported or discouraged the teaching of critical thought in legal education. While these pressures have predominantly required legal educators to focus upon the teaching of doctrine and professional skills, we find that there remains a consistent concern that law students develop a capacity for independent thought and that law school goes beyond the mere transmission of knowledge. In Part III we reflect on the core elements of legal education, noting a common focus in the literature on independent thinking, intellectual breadth and social responsibility as core to a legal education. To develop these attributes, we argue that law students need to be exposed to theory as well as doctrine, and to internal and external critiques of the law. Finally, in Part IV we outline the journey we have begun at the Adelaide Law School to implement critical pedagogy in our courses. Our analysis will focus on elective and compulsory courses. We hope that the methods we describe will inspire other educators to experiment using the flexibility we have as legal educators in Australia.

I CRITICAL THINKING

In the course of exploring the teaching of ‘critical thinking’ in legal education, we have found that there is no consistent definition of the concept. At its most basic, critical thinking is ‘the art of analysing and evaluating thinking with the view to improving it.’¹¹ This process requires the ‘thinker’ to first recognise that they hold assumptions that influence the way they think and engage with the world. According to Brookfield, these assumptions are of two kinds: the assumptions held by scholars regarding the way legitimate knowledge is created and the assumptions and perhaps biases that the thinker individually holds. Once identified and brought to the surface these assumptions are evaluated against a range of different criteria such as practicality, ethics, bias and logic. If the assumption cannot withstand scrutiny it should be rejected and ‘thinkers’ encouraged to re-evaluate their positions. In this sense, critical thinking can also be described as ‘the habit of making sure our assumptions are accurate and that our actions have the results we want them to have.’¹²

¹¹ The Critical Thinking Community, *Critical Thinking: Where to Begin*, <<http://www.criticalthinking.org/pages/critical-thinking-where-to-begin/796>>

¹² Brookfield, above n 10, 14.

In the legal context, critical thinking has both immanent and extrinsic qualities. That is, it can be pursued both within the teaching of legal doctrine and from a position of external evaluation. An immanent analysis recognises that the accuracy and validity of the assumptions in law is inherent in critical analysis of legal reasoning itself. A common inquiry here is whether we accept that there is an underlying *corpus juris* of legal principle waiting to be uncovered through the legal techniques, or whether morality, politics and personal choice plays a larger part in legal reasoning.¹³ An immanent approach to evaluating assumptions in law requires understanding the orthodoxy of legal reasoning and analysis, and also being able to assess the validity of the assumptions on which it is based and understanding different methods of legal interpretation — including legal determinacy. It may also involve instruction in legal critique, the practical workings of the law and advocacy for law reform.¹⁴

A second strategy for unpacking assumptions is achieved through introducing a range of extrinsic perspectives on the law and legal processes. There is the fundamental critique of law in jurisprudence and political theory: *What is the nature of law and the source of its authority? What is law's function? Who is the law for?* The function of law dictates the function of lawyers, and feeds into a critical legal ethics perspective. There is thinking about law as a social, cultural, economic, historical, and political phenomenon. These perspectives on the law require an introduction to core critiques of law as a social and political phenomenon, such as feminist critiques, legal realism and critical legal studies, critical race theory, and postmodern theories of law. There is thinking about law in society — as a mechanism for justice through democracy and human rights, or as a means of oppression, through protecting vested interests and entrenching class privilege. All these perspectives assist in developing the ability to analyse and critique substantive rules and legal processes, and engaging in processes of law reform and policy formation.

Many legal educators have adopted the ideals of critical thinking and the methods described in this section. Further, critical thinking is formally recognised in the description of skill competences in most law degrees¹⁵ and is employed explicitly as a skill requirement in the

¹³ This debate is represented most visibly in the exchange between Ronald Dworkin and advocates of Critical Legal Studies. Compare for example, Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 225–75 and Duncan Kennedy, *A Critique of Adjudication [fin de siècle]* (Harvard University Press, 1997) 157–79

¹⁴ Note that advocacy for law reform is not itself critical thinking, but can be an example of critical thinking if it employs the capacities described in this section.

¹⁵ See, for example, the Adelaide Law School Graduate Attributes <http://www.adelaide.edu.au/professions/downloads/gradattributes/law_llb.pdf>. This document states that graduates will have 'critical thinking and problem solving skills' as well as 'an understanding of social justice through the operation of law.'

Australian Qualifications Framework (AQF),¹⁶ the function of which is described in more detail in Part II. However, despite this level of acceptance, critical thinking has also received both historical and current resistance. Further, as noted in the introduction, important elements of critical thinking, such as critique, have also received relatively low priority or been jettisoned from curricula.¹⁷ To understand this tension, it is necessary for us to say something about the changing role of legal education in Australia and those pressures that have limited the practical adoption of critical thinking.

II A BRIEF HISTORY OF CRITICAL THINKING IN LEGAL EDUCATION

The University of Adelaide's law school was the second in Australia,¹⁸ opening its doors in April 1883 to law students seeking entry into the profession through a university degree.¹⁹ Up to this time in Adelaide, and throughout the country, entry into the profession was obtained through a long period of what was essentially an apprenticeship.²⁰ The creation of a professional university-level degree for law was an innovative move for Australia. It was strongly supported by the profession, from which the vast majority of the fledging law school's tutors were drawn. But an Australian law degree in the 19th and early 20th centuries remained a 'non-academic discipline',²¹ controlled and taught by the legal profession.²² Apprenticeship remained a parallel avenue into the profession.²³ By the 1950s, full-time academic staff started to assert responsibility for legal education in Australian universities. In 1964 the Australian Universities Commission's Committee on the Future of Tertiary

¹⁶ See for examples the skills required at Levels 7 & 9 <<http://www.aqf.edu.au/Portals/0/Documents/2013%20docs/AQF%202nd%20Edition%20January%202013.pdf>>.

¹⁷ Thornton, above n 1, 59–109; Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965

¹⁸ After the establishment of the University of Melbourne Law School in 1857. Although the University of Sydney Law School opened in 1855, it only examined and did not teach law students until 1890.

¹⁹ A full history of the Adelaide Law School is available at Alex Castles, Andrew Ligertwood and Peter Kelly, *Law on North Terrace: The Adelaide University Law School 1883–1981* (1983).

²⁰ See further Linda Martin, 'From Apprenticeship to Law School: A Social History of Education in Nineteenth Century New South Wales' (1986) 9 *University of New South Wales Law Journal* 111

²¹ Vivienne Brand, 'Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education' (1999) 10 *Legal Education Review* 109, 111.

²² David Weisbrot, *Australian Lawyers* (Addison-Wesley Educational Publishers Inc, 1990) 122–3; James, above n 17, 967.

²³ Weisbrot, above n 22, 120.

Education in Australia released a report, the Martin Report, which recommended:

It is very desirable that lawyers seeking admission to independent practice ... have an education founded upon full-time studies at university level ... not so much to train them as legal practitioners as to provide them with the background intellectual training necessary for leaders in the highly complex society of the future.²⁴

Law thus eventually became accepted as an important academic discipline in the modern university, and this created the possibility of legal education extending beyond strict doctrinal training and into broader theoretical disputes. In short, it created the opportunity for the teaching of critical thinking within the legal context. Thus the move from vocational training to a university-based and then academically focused legal education represents a fundamental shift in the nature of the legal profession itself — from apprentice-trained professionals to university graduates. In the next part we will consider the place of universities, and university graduates more generally, within our communities and the importance of teaching graduates to engage in independent judgment from both within and outside of the law; that is, to engage in critical thinking.

However, law schools continue to operate within a very specific regulatory and institutional context and this has meant that despite the opportunity created by the shift to a university education model, Australian legal education has, by and large, remained predominantly focused upon the transmission of doctrinal rules²⁵ and, more recently, practical skills.²⁶

There has only been one significant challenge to this template for law schools in Australia. In the 1970s, law schools started to be influenced by more politically radical movements, and Marxist, feminist and critical legal studies critiques started to be taught in the curricula.²⁷ The incorporation of these more radical critiques into law curricula divided the legal profession and the universities. In the 1980s, academics at Macquarie University engaged in a vigorous debate about whether law schools should define themselves as a purely academic discipline engaged in the theoretical critique of the concept of law, with no necessary role in training lawyers.²⁸

²⁴ Committee on the Future of Tertiary Education in Australia, *Report of the Committee on the Future of Tertiary Education in Australia* (Australian Government Publishing Service, 1964) 70.

²⁵ See description of legal education in, for example, Sally Kift, 'My Law School — Then and Now' (2006) 9 *Newcastle Law Review* 1, 3–5.

²⁶ See James, above n 17, 968–9.

²⁷ *Ibid* 969.

²⁸ For a summary of these debates, see volume 5 of the *Australian Journal of Law and Society* (1988–89) which is devoted to the question of critical legal education, and includes key documents from debates among law school staff at Macquarie. See also James, above n 17.

Allegations were made that students educated in this environment would be unemployable as lawyers because of the lack of focus on substantive doctrine and professional skills.²⁹

It is fair to say that even today the existence of these more radical political perspectives within the law degree is divisive. The disputes on the 1970s and 1980s have left scars on many legal educators, making terms such as ‘Critical Legal Studies’ (CLS) heavy with baggage. In our discussions with colleagues in law schools across Australia, our group has found that the legacy of these disputes has even coloured the term ‘critical thinking’. For this reason, our definition of critical thinking (set out in Part I) focuses on methods that enable students to identify and question their assumptions. While this process *might* occur with reference to ideas developed in CLS and subsequent critical legal theories, it might occur in a legal education that is very differently focused. We have discovered that clarifying the distinction between critical thinking and critical legal theories has been important for bringing people into the conversation.

In the early 1990s the possibility of challenge to the dominant template again emerged, and Thornton’s experience of its demise shaped much of her current critique of law schools. In 1992, La Trobe University moved from offering legal studies to its BA students through its Department of Legal Studies, to offering an accredited professional LLB degree. During its time offering legal studies in the BA, the university developed a reputation for focusing on ‘law as a social phenomenon’ rather than ‘law for practice’.³⁰ As a newly appointed chair at La Trobe, Thornton describes the anticipation of developing an ‘innovative LLB’ in this environment,³¹ and its initial sale to the market as ‘an interdisciplinary study of the law in its social context, combining and integrating law with the perspectives and intellectual skills of the social sciences.’³² However, the program that was adopted for the new school was taken from existing law school curricula, at least partly to reassure the market of the quality of the new graduates.³³ The Department of Legal Studies became the School of Law and Legal Studies in a professionally dominated faculty, and eventually La Trobe Law.³⁴ In 1999, a review of the School recommended that it turn further towards the commercial and practice-focused curriculum expected by the market. Many remaining socio-legal scholars (the large majority of whom were

²⁹ Andrew Lang, ‘Will Macquarie Graduates Remain Employable?’ [1989] *Law Society of NSW Journal* 41, extracted in James, above n 17, 972.

³⁰ Margaret Thornton ‘The Dissolution of the Social in the Legal Academy’ (2006) 25 *Australian Feminist Law Journal* 3, 6.

³¹ *Ibid.*

³² Victorian Post-Secondary Education Commission, *Report of the Review of Legal Education in Victoria* (Melbourne, 1991) 9, cited in *ibid.*, 7.

³³ Thornton, above n 30, 6, 9.

³⁴ *Ibid.* 10, 13.

feminist scholars) were given ‘exit packages’ and replaced with ‘professionally orientated’ academics and practitioners.³⁵

Alongside these developments in legal education, law schools remained very closely regulated by the legal profession. Today, entry into the profession in South Australia requires an individual to satisfy the Board of Examiners and ultimately the Supreme Court that they are of good character, and that they meet the academic and practical requirements set out in the *Admission Rules* and the *LPEAC Rules*.³⁶ The academic requirement is filled by an Australian tertiary degree in law which teaches the subjects specified in the ‘Priestley 11’ (the Priestley 11 subjects will be returned to below). Admitting authorities have the power to approve a particular law school’s degrees as satisfying these requirements. The practical requirements were once met by a two-year period as an articled-clerk. They are now met by completing a practical legal training course.

In 1987, a discipline assessment for the Commonwealth Tertiary Education Commission (the ‘Pearce Report’) strongly supported a scholarly and critical approach to teaching law at the 12 schools in Australia (while at the same time recommending that the Macquarie Law School be closed down, at least partly on the basis of the rejection of the view that law schools should be predominantly concerned with training lawyers and its association with the CLS movement). The Pearce Report accepted that legal education was highly doctrinal in content. Nonetheless, it also recommended a focus on the ‘theoretical and critical dimensions of legal education’, accepting that university law schools are ‘concerned to evaluate and criticise the law’, as well as a focus on the teaching of legal skills.³⁷

In a report that assessed the impact of the Pearce Report on legal education in Australia, McInnis and Marginson credit the Pearce Report with leading to a significant review of law curricula.³⁸ However, contrary to another recommendation in the Pearce Report, between 1989 and 2013 the number of law schools has increased from 12 to 36,³⁹ and the intake of students in existing schools has also risen sharply. This reflects changes in the university environment in Australia more generally, though the change in law has been particularly dramatic.⁴⁰

³⁵ Ibid 11.

³⁶ Similar requirements apply in other states.

³⁷ Dennis Pearce et al, *Australian Law Schools: A Discipline assessment for the Commonwealth Tertiary Education Commission*, Vol 1 (Australian Government Publishing Service, 1987).

³⁸ Eugene Clark, *Australian Legal Education a Decade After the Peace Report* (Australian Government Publishing Service, 1994).

³⁹ Including the University of the Sunshine Coast, which is due to open its Law School in 2014.

⁴⁰ See generally, Glyn Davis, ‘The Rising Phoenix of Competition’ (2006) 11 *Griffith Review* 13, 21. Since the 1950s, the proportion of the community with a University education has increased 23-fold. In 1950, there were 30,000 students

These changes have placed competing pressures on law schools. Firstly, there is pressure to broaden law degrees and reduce the focus on legal skills. This is because a large number of graduates do not end up practising law — either because of the scarcity of legal jobs or because they never intended to do so. However, alongside this pressure to broaden the role of legal education is a countervailing pressure from the profession and students to ensure that graduates have the requisite skills to practise in an increasingly competitive job market.

Nickolas James describes the trend in the 1990s towards a ‘clinical or skills-based education’.⁴¹ The trend away from articles of clerkship and practical training within the profession has meant that on-the-job training has largely been replaced by the ‘virtual workplace’ and the ‘mock file’. Law firms hire graduates already admitted to practice, and they expect these students to be proficient in the practical skills required. The emphasis on ‘practical skills’ often pulls against attempts to introduce critical engagement with the law.

More generally, the pressure to teach skills competes with the traditional role of universities as places of free intellectual inquiry and critical thinking. This tension is not unique to Australian law schools. An influential review of US Law Schools, the 1992 MacCrate Report commissioned by the American Bar Association, observed:

Thus, a gap develops between the expectation and the reality, resulting in complaints and recriminations from legal educators and practicing lawyers. The lament of the practicing bar is a steady refrain: ‘They can’t draft a contract, they can’t write, they’ve never seen a summons, the professors have never been inside a courtroom.’ Law schools offer the traditional responses: ‘We teach them how to think, we’re not trade schools, we’re centers of scholarship and learning, practice is best taught by practitioners.’⁴²

In response to such sentiments, many legal educators and professionals have emphasised the harmony between the goals of training good lawyers and teaching critical engagement with the

in Universities in Australia. In 2006, there were more than 940,000, including 228,000 international students. In 1988, the Labor Minister for Education, John Dawkins, consolidated 63 Higher Education providers into 36 universities. In doing so, the distinction between technical training and traditional university education disappeared at a formal level.

⁴¹ James, above n 17, 976.

⁴² 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, 1992).

law. This line of thinking is articulated by English Professor Sir Otto Kahn-Freund, who argued:

There is in fact no contradiction between the needs of an academic professional education and those of a vocational training. English law does not consist of an uncoordinated mass of rules for practitioners which can only be learnt by rote. The unquestioning acceptance of judicial decisions or utterances is not part of the professional equipment of an English lawyer.⁴³

We return to the core elements of a legal education in Part III of this article, where we explore this relationship between doctrine, theory and skills.

As we have already demonstrated, the professional regulation of Australian law schools has been predominantly concerned with the doctrinal content of law degrees. In 1994, the Law Council of Australia created a 'Blueprint for the Structure of the Legal Profession'. The Blueprint included a list of 10 areas of law that needed to be studied for admission. The Council proposed that these subjects be taught 'in the context of an overall course of study which provides: a well-rounded education in the law; a level of scholarship usually associated with a course leading to an undergraduate degree; a good grounding in the analytical, communication and other skills required of a lawyer in a modern society; and which placed the theory in a practical context.'⁴⁴

The Law Admissions Consultative Committee, headed by Justice Priestley, expanded the list to 11 core subject areas — criminal law and procedure, torts, contracts, property, equity, company law, administrative law, federal and state constitutional law, civil procedure, evidence, ethics and professional responsibility. The Law Council of Australia has since compared the academic requirements in Australia with those in other jurisdictions and considered options for reform.⁴⁵

⁴³ Extracted in J H Wade, 'Legal Education in Australia — Anomie, Angst, and Excellence' (1989) 39 *Journal of Legal Education* 189, 195; see also Charles Sampford and David Wood, 'Theoretical Dimensions of Legal Education' in John Goldring, Charles Sampford and Ralph Simmonds (eds) *New Foundations in Legal Education* (Cavendish Publishing, 1998) 100, 115; Andrew Stewart, 'Educating Australian Lawyers' in Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (Federation Press 1999) 132, 148-9.

⁴⁴ Law Council of Australia, *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* (1994), 3 <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=2F019E0B-1E4F-17FA-D26D-E43663EDE0F9&siteName=lca>.

⁴⁵ Law Council of Australia, *Rethinking Academic Requirements for Admission* Discussion Paper, February 2010, <<http://www1.lawcouncil.asn.au/LACC/index.php/ct-menu-item-3/discussion-papers>>.

In contrast to the heady debates of the 1980s, in some law schools at least, there has been little resistance from the academy to this prescription of content from the profession. This may be symptomatic of the financial and time pressures felt by academics within law schools. Financially, law schools have come under increased pressure since the introduction of a relative funding model by the Commonwealth Government in 1990. The funding model compares the cost of funding different disciplines in higher education and allocates funding accordingly. Law was assigned to the lowest funding band. In 1996, a differential system of student contributions was introduced to reflect the cost of providing different courses as well as the potential earning capacities of graduates. Law was included in the highest contribution band because of the potential earning capacity of graduates.

The combination of these funding and contribution reforms now mean that law students pay the highest contribution per unit of study, while law schools receive the lowest funding from the Commonwealth.⁴⁶ In a submission to the Review of Higher Education Base Funding in 2011, the Council of Australian Law Deans described law schools as ‘chronically under-funded’.⁴⁷ This has led to increased student–staff ratios, a higher proportion of casual staff, and increased reliance by law schools on full-fee paying students — increasing their international student and post-graduate level intakes. Margaret Thornton argues that these financial and time pressures have caused legal educators to turn their focus away from deeper philosophical questions about the mission of a law degree and how it fits within the University and society, to more prosaic and pragmatic questions of how to competently teach a standard, relatively uniform law degree.

While recognising that increased student–staff ratios, high proportions of casual staff and increases in international student intake all present significant challenges, one of the purposes of our group was to identify and apply techniques to re-engage our students in critical judgment *within* existing constraints. We have found that within the Priestley 11 there is significant flexibility in the content that may be taught, as topics are described with broad generality. Further, educators have broad freedom to teach more or less how they like within these content areas, including through immanent and

⁴⁶ Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (AUTC) (Higher Education Group Department of Education, Science and Training, January 2003), 3–4.

⁴⁷ Council of Australian Law Deans, *Review of Higher Education Base Funding: Submission* (2011) 3 <<http://www.innovation.gov.au/HigherEducation/Policy/BaseFundingReview/Pages/ReviewSubmissionsAToF.aspx>>.

extrinsic methods of critical thinking.⁴⁸ Some of these techniques are necessarily innovative; some are adaptations of old methods to this new context. We return to explain a number of these techniques in Part III

A new phenomenon in legal education in Australia has been a move towards teaching law at a post-graduate level, through a Juris Doctorate (JD).⁴⁹ At many universities the introduction of JDs was a response to the funding pressures described above. However, at two law schools, UWA and Melbourne, the move to a JD was part of a comprehensive reform of all degree offerings at the university, and thus had strong pedagogical motivations for the change from undergraduate to postgraduate law degrees. At least 12 law schools currently offer JD degrees.⁵⁰ Of these, the law schools at the University of Melbourne, RMIT and UWA no longer offer undergraduate law degrees in addition to the JD. JD programs contain a mixture of full-fee paying and Commonwealth funded places.

For law schools in which the motivation for introducing a JD was financial, JDs were a way to bring law degrees to new markets, such as graduate entry students with existing careers.⁵¹ JDs are shorter than LLBs, and are more often taught through an intensive-delivery mode.⁵² The emphasis has been on teaching as short a degree as possible within the professional accreditation rules, and on teaching the JD in as similar way as possible to existing LLB teaching, so as not to require extra resources for its delivery.

JDs have caused issues for state accrediting bodies, which have insisted on a law degree being a minimum of three calendar years of full-time study,⁵³ and for the Tertiary Education Quality Standards Agency (TEQSA) in relation to the whether the teaching methods and assessment requirements in JDs fulfil the requirements for an

⁴⁸ See also Lucy Maxwell, 'How to Develop Students' Critical Awareness? Change the Language of Legal Education' (2012) 22 *Legal Education Review* 101, who argues that 'changing the presentation of legal doctrine and developing critical awareness can be achieved simply, requiring neither additional class time nor additional resources'; contrast David Weisbrot, 'What Lawyers Need to Know What Lawyers Need to be Able to Do: An Australian Experience' (2002) 1 *Journal of the Association of Legal Writing Directors* 21, 40.

⁴⁹ See further examination of the emergence of the JD and the issues it raises in Donna Cooper, Sheryl Jackson, Rosalind Mason and Mary Toohey, 'The Emergence of the JD in the Australian Legal Education Marketplace and its Impact on Academic Standards' (2011) 21 *Legal Education Review* 23

⁵⁰ These are ANU, University of Canberra, UNSW, UTS, Sydney, Bond, University of Southern Queensland, Monash, RMIT, Melbourne, Murdoch and UWA.

⁵¹ Cooper et al, above n 49, 26–9.

⁵² Ibid. See also, Maree Sainsbury, 'Intensive Teaching of Graduate Law Subjects: McEducation or Good Preparation for the Demands of Legal Practice?' (2008) 1 *Journal of the Australasian Law Teachers Association* 247

⁵³ Uniform Admission Rules 2008, Rule 2, <http://www.lawcouncil.asn.au/lacc/documents/admission_policies.cfm>; Law Admissions Consultative Committee, 'Statement on Duration of Legal Studies', <http://www.lawcouncil.asn.au/lacc/documents/admission_policies.cfm>, February 2013.

Australian Quality Framework (AQF) Level 9 (Masters level) degree. These requirements are discussed below.

The move towards JD degrees as a common, and possibly in the future the standard, way to attain a law degree has the potential to profoundly affect legal education and the potential to teach critical thinking. On the one hand, the shorter length of a JD means that it will focus on a core group of subjects with fewer elective choices. Since a much higher proportion of students (and in some institutions, all students) will be fee-paying, there may be a demand for the degree to be more narrowly focused on preparing students for legal practice. On the other hand, the JD format may lead to new opportunities to reinvigorate legal education. JD students, having completed a tertiary degree already, and being on average older and therefore with more adult experience of the world, will bring to their law studies an experience of critical thinking that students straight out of school may not have. The fact that the degree is post-graduate means that there is a formal requirement for a higher level of learning than for an undergraduate degree.⁵⁴ If this requirement is embraced, it opens up space for a higher level of critical engagement with the law.

The introduction of JDs in Australian law schools coincided with a new emphasis on the quality of teaching and learning in universities. Again, this presents new opportunities for law schools to impart critical legal thinking skills to their students. In 2001 the Commonwealth government established a new body, the Australian Universities Quality Agency (AUQA), to conduct audits of all Australian universities. In 2011 AUQA was replaced by the Tertiary Education Quality and Standards Agency (TEQSA). Like AUQA, TEQSA's role is to monitor and assess the delivery of higher education against certain standards as part of the Government's Higher Education Quality and Regulatory Framework, which includes the Australian Qualifications Framework (AQF), the requirements of which have already been mentioned in Part I, above. Part of the AQF is a statement of minimum learning outcomes for each AQF level and qualification type (for example, bachelor degree (level 7), honours degree (level 8), masters degree (level 9)).

In the lead-up to the implementation of these new reforms, in 2010 the Australian Learning and Teaching Council (ALTC) issued a report containing the Learning and Teaching Academic Standards Statement for the Bachelor of Laws.⁵⁵ The report contained the agreed minimum learning outcomes, known as the Threshold Learning Outcomes (TLOs), to meet the AQF qualification standards for the LLB. The ALTC consulted with professional bodies, accreditation bodies, employers, graduates, academic institutions and teachers.

⁵⁴ This is discussed further in Part II.

⁵⁵ Sally Kift, Mark Israel and Rachel Field, *Bachelor of Laws, Learning and Teaching Academic Standards Statement* (ALTC, 2010).

The report sets out six TLOs for the LLB. The TLOs are: TLO 1 Knowledge; TLO 2 Ethics and Professional Responsibility; TLO 3 Thinking Skills; TLO 4 Research Skills; TLO 5 Communication and collaboration; and TLO 6 Self-management.

A number of the TLOs emphasise the importance of critical legal thinking within a Bachelor of Laws program, and developing in graduates a sense of their role and responsibilities to the community as university graduates. TLO 2 includes an ability to ‘recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community’. TLO 3 includes the ability to identify and articulate legal issues and apply legal reasoning and research to generate appropriate responses to legal issues as well as:

- (c) engage in critical analysis and make a reasoned choice amongst alternatives, and
- (d) think creatively in approaching legal issues and generating appropriate responses.

Law schools must reflect upon their curricula against this new framework. At the University of Adelaide, for example, in 2012, the Law School conducted a mapping exercise for each of the TLOs across the core courses in the LLB.⁵⁶ In addition to assessing their current curricula against this framework, the new AQF standards and TLOs provide an opportunity and justification for legal educators to re-engage with critical thinking as one of the fundamental purposes of the law degree.

Another factor that will affect choices of how to teach law is how individual universities respond to the changing tertiary education environment. Online and distance education is challenging conventional approaches to teaching and learning, and requiring universities to consider their missions within a global context. At our institution, the University of Adelaide, the most recent University Strategic Plan, the *Beacon of Enlightenment*, has committed the university to recapture an ideal of ‘Small Group Discovery Learning’ where students are not only taught in small groups, but are exposed to research and discovery in that forum.⁵⁷ An important caveat to this new policy is that the university is not offering additional resources to prepare and engage in this more intimate learning environment. On one level, this exacerbates the financial and time pressures on legal educators. However, the new emphasis on teaching at university level also offers an opportunity and justification for educators to explore new learning opportunities for students that emphasise deeper theoretical engagement with legal doctrine in small classes.

⁵⁶ See the full TLO Report at <<http://www.law.adelaide.edu.au/documents/threshold-learning-outcomes-report-2012.pdf>>.

⁵⁷ University of Adelaide, *Beacon of Enlightenment: The University of Adelaide Strategic Plan 2013-2023* (2013) 8 <<http://www.adelaide.edu.au/VCO/beacon-of-enlightenment.pdf>>.

As legal education in Australia has moved away from its historical origins of a vocational training course, its focus and objectives have fundamentally changed. It is now properly viewed as an important academic discipline in a modern university, although its connection and regulation by the profession still remains. But what is clear from this brief survey of legal education in Australian universities is that the environment remains dynamic. There is a new focus on teaching and learning in higher education institutions, and more attention to teaching pedagogy, learning outcomes and student satisfaction.⁵⁸

In law, the dominance of the LLB degree as the pathway to legal practice is being challenged, and there are on-going discussions at the national level of what are the minimum requirements for accreditation of law degrees, and the minimum requirements for offering law at the postgraduate level. The most recent AQF standards demonstrate that there is now almost universal recognition that a law degree must produce graduates with not *just* the knowledge of legal principles and processes, but a broader liberal education that provides them with a foundation for informed and independent judgment in whatever role they ascend to within the community, whether as a practising lawyer or not. In this environment, we are convinced that individual legal educators, and legal educators in the collective, have a fundamental role in developing their own techniques to encourage students to engage critically with their legal education. The recent moves have encouraged this emphasis and provide a number of opportunities for renewed work and creativity in this area.

Sally Kift has noted that one of the challenges for 21st century education is the articulation of the purpose of the modern law degree.⁵⁹ In Part III of this article, we will explain more specifically what we believe are the core elements of legal education, against the background of the role of universities more generally, and why critical thinking is the key element of legal education. We then turn to techniques we have recently employed in our own courses as we strive to be better educators against these standards.

III REFLECTIONS ON THE CORE ELEMENTS OF LEGAL EDUCATION

In 2000, as part of its review of the federal civil justice system, the Australian Law Reform Commission emphasised the ‘critical role’ education and training played in shaping the ‘legal culture’.⁶⁰ In their role as educators, academics do not participate directly in the

⁵⁸ See description of some of these changes in Kift, above n 25; Sally Kift, ‘21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law’ (2008) 18 *Legal Education Review* 1

⁵⁹ Kift, ‘21st Century Climate for Change’, above n 58, 12.

⁶⁰ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000), [2.3] <<http://www.alrc.gov.au/report-89>>.

legal profession. Yet they play a pivotal role in shaping the culture of the profession — both in the university and through continued legal education.

This, of course, begs the question what legal culture law schools want to participate in shaping, and whether, within the constraints imposed by external and internal forces, that is achievable. The 2000 Law Reform Commission Report recommended a culture that ‘values lifelong learning and takes ethical concerns seriously’.⁶¹ Without derogating from the law school’s responsibility to teach substantive law, it recommended a greater emphasis of ‘legal ethics and high order professional skills’.⁶² It explained that:

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 Australian Law Reform Commission agreed with the 1996 report of the Lord Chancellor’s Advisory Committee on Legal Education and Conduct (ACLEC), in England, that a law degree ‘should stand as an independent liberal education in the discipline of law, not tied to any specific vocation’.⁶³ The ACLEC stated that the first goal of legal education in England should be:

Intellectual integrity and independence of mind This requires a high degree of self-motivation, an ability to think critically for oneself beyond conventional attitudes and understanding and to undertake self-directed learning; to be ‘reflective’, in the sense of being self-aware and self-critical; to be committed to truthfulness, to be open to other viewpoints, to be able to formulate and evaluate alternative possibilities, and to give comprehensible reasons for what one is doing or saying. These abilities and other transferable intellectual skills are usually developed by *degree-level education*⁶⁴

As can be seen from the historical exploration of the regulatory framework in which law schools operate, chronicled in Part II, there is growing evidence that the legal profession, the students, the community, the regulators and the law schools themselves also expect legal education to provide more than just the transfer of knowledge of legal rules. In 2000 a special edition of the *International Journal of the Legal Profession* was devoted to ‘theory in legal education’. The central theme of the collection was that ‘theory ... should not be seen as separate from substantive law and legal education; and that theory

⁶¹ Ibid.

⁶² Ibid [2.77].

⁶³ Lord Chancellor’s Advisory Committee on Legal Education and Conduct, *First report on legal education and training 1996*, 57, referred to in ALRC, above n 60, [2.85].

⁶⁴ Ibid, 21. This goal was then supplemented with the goals of core knowledge, contextual knowledge, legal values and professional skills.

is intrinsic to, and constitutive of, legal education and scholarship.⁶⁵ Most legal educationalists in Australia have also called for a broad set of objects for law degrees including the teaching of skills, doctrine and theory in an integrated program.⁶⁶ David Weisbrot has argued:

[i]n a changing environment, the best preparation that a law school can give its graduates is one which promotes intellectual breadth, agility and curiosity; strong analytical and communication skills; and a (moral/ethical) sense of the role and purpose of lawyers in society.⁶⁷

This understanding of legal education has been advocated by student groups as well. An investigation conducted by a student group at the ANU Law School, the ANU Law School Reform Committee, revealed that students want a legal education that leads to ‘transformative personal growth’, and not just the transmission of legal rules. Students are seeking a law degree where doctrine is taught *with* critical perspectives, self-reflection and broad skill development.⁶⁸

Critical thinking is mentioned explicitly as a skill requirement in AQF level 7 (bachelor) and AQF level 9 (masters) degrees. Law degrees at the undergraduate and postgraduate level must reach the requisite AQF standards. It is instructive to compare the standard required for a JD (AQF Level 9) with that required for an LLB (AQF level 7). At Level 7, graduates of a bachelor degree will have:

- cognitive skills to review critically, analyse, consolidate and synthesise knowledge
- cognitive and creative skills to exercise critical thinking and judgement in identifying and solving problems with intellectual independence.

At Level 9, graduates will have:

- cognitive skills to demonstrate mastery of theoretical knowledge and to reflect critically on theory and professional practice or scholarship
- cognitive, technical and creative skills to investigate, analyse and synthesise complex information, problems, concepts and theories and to apply established theories to different bodies of knowledge or practice
- cognitive, technical and creative skills to generate and evaluate complex ideas and concepts at an abstract level.

⁶⁵ Avrom Sherr and David Sugarman, ‘Theory in Legal Education’ (2000) 7 *International Journal of the Legal Profession* 165, 167.

⁶⁶ See, for example, Mary Keyes and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality and Prospects for the Future’ (2004) *Sydney Law Review* 38; Rob Guthrie and Joseph Fernandez ‘Law Schools in the 21st Century’ (2004) 29 *Alternative Law Journal* 276

⁶⁷ David Weisbrot ‘From the Dean’s Desk’ (1994) 3(1) *Sydney Law School Reports* 1. This statement was recommended to be adopted by Law Schools as an underlying philosophy by the ALRC, above n 60, in 2000 ([2.89]).

⁶⁸ Law School Reform, above n 2.

The TLOs that have been adopted to meet the AQF requirements, set out in Part II, demonstrate that the thinking skills described at both Level 7 and Level 9 are high-order thinking skills. They are not skills that students can simply ‘pick up’ through learning and analysing legal doctrine and applying it to legal questions. This is the challenge that critiques of modern legal education in Australia, such as Margaret Thornton’s, present to legal educators, and that TEQSA and the AQF descriptors require us to meet.

With this background in mind, we set out to articulate the purpose of legal education. It is our contention that many of these goals and approaches to legal education are realised through a focus on critical thinking (as defined in Part I) in pedagogical practice.

We believe a legal education should equip students with a foundation of legal knowledge that distinguishes them from students educated in other academic disciplines. This means law degrees will require a detailed knowledge of the legal institutions of the state, the origins of the common law and Australian legal systems, the political processes that generate laws, the systems of dispute resolution, and a knowledge of key areas of legal doctrine and their application. This initial goal focuses then on teaching students the ‘content grammar’ of law as a new discourse.⁶⁹ In law, John Zerilli has referred to the necessity of teaching ‘faculty’:

Practising lawyers must comprehend legal principles and processes. The curriculum rightly would include a survey of the substantive corpus of law, for example, the law of obligations, public law and crime as well as the adjectival law, such as the law of evidence and procedure. It would also cover legal method, rules of precedent and formal legal reasoning. A lawyer is not a lawyer until he or she has these arrows in his or her quiver. The lawyer may possess nothing besides and still be a lawyer. But without these, even possessing other admirable qualities, he or she is no lawyer.⁷⁰

While its focus is on substantive legal doctrine, we do not accept that this necessarily requires the adoption of a passive, teaching-as-transmission style. Within the teaching of the legal rules, we envisage an important role for immanent critique of doctrine, including through logical critique and critical engagement with orthodox legal method.

However, we also believe that the prescriptive content of a law degree, currently articulated in the Priestley list of subjects, need not constrain the scholarly mission of a legal education. As we explained in Part II, by setting the broad parameters of the required knowledge base in a law degree, the Priestley requirements somewhat relieve

⁶⁹ P S Peters, referred to in Brookfield, above n 10, 28.

⁷⁰ John Zerilli, ‘Reflections on Legal Education and Philosophy: The Critical Role of Theory in Practice’ (2007) 17 *Legal Education Review* 103, 108.

law academics of the need to determine *what* to teach, and free them to focus on the more important issue of *how* to teach it.

A legal education should also produce graduates with an understanding of the place of law in society and with an ethical framework which ‘prepares the graduate for intelligent participation in the politico-legal life of the community’.⁷¹ For this, graduates should have the capacity to engage in debates arising in and around the practice of law. They need a global perspective and a deep understanding of the key ethical questions facing society to engage in rigorous extrinsic critique of the existing legal structures and rules. With these considerations in mind, Roberto Unger has suggested that law school education should be ‘a sustained conversation about our [socio-economic and political] arrangements’.⁷² It might be added that even lawyers *not* wanting to engage in this larger conversation need to have the resources and skills to draw upon when faced with difficult legal questions.

In a legal education, students should learn not only how to think like a lawyer, but also how to think in different frames outside of the law so that they have ‘the capacity to form their own independent judgements on ... matters’.⁷³ In this way, students learn to engage in an external critique of law. There have been numerous calls for, and formulations of, the place of ‘theory’ in law degrees to satisfy this capacity for independent thought.⁷⁴ A legal education should, therefore, consider law as a discipline, a way of thinking, and a theoretical and social construct. There is great value, Ian Duncanson has noted, in ‘re-examining the discipline’s truths from different sites of knowing’.⁷⁵

Finally, legal education offered by universities should teach students how to engage in self-directed learning. This requires a solid grounding in skills such as reasoning and communication, research and intellectual discipline. There is a direct link between independent learning and critical thinking. An important way to unpack assumptions, and to formulate independent views, is to have the capacity to access and interrogate fresh material. Furthermore, from the educator’s point of view, a focus on developing skills of self-directed learning relieves the pressure to cover a particular canon of doctrine in the course of the degree, leaving more time for immanent and external critique of that doctrine.

⁷¹ Roger Brownsword, ‘Law Schools for Lawyers, Citizens and People’ in F Cownie (ed), *The Law School: Global Issues, Local Questions* (Dartmouth, 1999) 29.

⁷² Robert Unger, ‘Legal Analysis as Institutional Imagination’ (1996) 59 *Modern Law Review* 1, 8 in *ibid*.

⁷³ Fiona Cownie, ‘The Importance of Theory’ (2000) 7 *International Journal of the Legal Profession* 225, 227.

⁷⁴ See, for example, Charles Sampford and David Wood, ‘The Place of Legal Theory in the Law’ (1987) 11(41) *Bulletin of the Australian Society of Legal Philosophy* 98; Sherr and Sugarman, above n 65; Cownie, above n 71.

⁷⁵ Ian Duncanson, ‘Interdisciplinarity in Law’ (1996) 5 *Griffith Law Review* 77, 81.

IV TEACHING CRITICAL THINKING IN LAW

We now turn to explain our journey of discovering new teaching strategies that enhance critical thinking in our efforts to meet the standards of legal education articulated above. From our experience as legal educators and the review we conducted of existing curricula and pedagogy as part of this project, the trends in legal education towards doctrinal and vocationally focused mass-education identified by Thornton were apparent. However, in our subsequent development and implementation of new strategies to foster critical thinking, we found that even under the pressures every legal educator faces (we particularly felt the strain of high student–staff ratios, high reliance on casual staff and the pressure to provide online teaching resources at the expense of face-to-face teaching), sufficient flexibility existed to improve student engagement with legal discourse.

We will explain why we have adopted certain strategies and provide practical insight into how we have incorporated them into our current courses. This section is organised by subject and where possible we have endeavoured to reference the sources that have inspired our techniques. Although we have received feedback on these courses through standard student evaluations of teaching, we have not included this information, as it is not possible to disaggregate feedback specifically relating to the techniques used. We offer these examples in the hope that they encourage other educators to explore strategies for teaching critical thinking in their own courses.

A Peter Burdon: The Politics of Law

This year I used my elective subject ‘The Politics of Law’ to trial techniques directed at critical thinking. I taught this course to a class of between 70 and 90 students in one three-hour session, once a week. The first hour was generally a lecture, followed by two hours of discussion. The setting was an amphitheatre-style lecture theatre. In this course I focused on three main pedagogical tools — discussion as a way of teaching; classroom democracy; and the Critical Incident Questionnaire (CIQ).

For this elective subject my focus on critical thinking was made explicit from the outset. My course description contains an explicit statement that:

This course is designed specifically to foster an inclusive learning environment and encourage critical thinking skills. It also intends to provide students with ownership over their learning and their assessment

This statement was followed up in the course guide with an explanation of why I think discussion and critical thinking are

important skills and guidance on how to read texts critically.⁷⁶ The course guide also contained a detailed description of my teaching philosophy, and the following ‘product warning’, which I used to establish expectations and limit my elective to those seriously interested in developing critical thinking skills:

If you don’t feel comfortable talking with others about your ideas in small and large groups, you should probably drop this course.

If you don’t feel comfortable with group discussion and think it is a touchy-feely waste of valuable time, you should probably drop this

If you are not prepared to analyse the political and moral beliefs of yourself and the class, you should probably drop this course.

However, if you are comfortable with this process or you are at least willing to give it a genuine try, then welcome. I hope we can look forward to a creative exchange of ideas this semester.

Our first group session was dedicated exclusively to the learning environment and critical thinking. Students were required to complete preliminary readings for discussion⁷⁷ and I took the time to ensure that every student introduced themselves and had their voice heard.

We also used the first session to establish a group agreement and ground rules for discussion. To facilitate this process I asked students to prepare answers to two questions prior to class:

1. Think of the best group discussion you’ve ever been involved in. What things happened that made these conversations so satisfying?
2. Think of the worst group discussion you’ve ever been involved in. What things happened that made these conversations so unsatisfactory?

Students then put themselves into groups and took turns sharing their feedback and listening to their peers. I then facilitated a whole-group discussion which resulted in a group agreement. The agreements were usually 10 points long and contained rules such as ‘Sit at the front of the class so that we can hear and see each other’ or ‘Respect the talker and don’t speak over the top of each other’. This group agreement was put online for students to review and onto the lecture screen prior to every class. It was a living document that could be amended as the semester progressed.

The final tool that I used to encourage discussion is a weekly ‘sentence completion exercise’. There were no topic-specific

⁷⁶ Stephen Brookfield, *Discussion as a Way of Teaching* (Jossey-Bass, 2005) 42–62

⁷⁷ Brookfield, above n 76, 21–41; Mary Heath, ‘On Critical Thinking’ (2012) 4 *International Journal of Narrative Therapy and Community Work* 11; bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* (Routledge, 1994) 1–22; and bell hooks, *Teaching Critical Thinking: Practical Wisdom* (Routledge, 2009) 7–22.

questions for our weekly seminar and instead I asked students to answer the following questions prior to class:

1. What struck me about the text/s we read to prepare for the discussion is ...
2. The question that I'd most like to ask the author of the text is
3. The idea I most take issue with in the text is ...
4. The part of the text/s that made the most sense to me was ...
5. The part of the text/s that was the most confusing was ...⁷⁸

These questions helped ensure that discussion was connected and directed by the students' own concerns. As above, students were first put into groups of 5–6 where they listened to each other's answers and recorded the points they would most like to discuss with the rest of the class. The students then led the discussion with myself as teacher playing a facilitative role. I also used this as an opportunity to encourage students to delve deeper into the assumptions that underpinned their comments, and if needed, brought students back to the topic at hand or to the group agreement.

Further to focusing on discussion as my dominant method of teaching I also used lectures to model the forms of democratic dispositions I wished to encourage in my students. Some of the techniques I used include:

- Beginning every lecture with one or more questions that I am trying to answer. I do this to encourage the view that education is a never-ending series of questions and striving toward points of greater understanding. I also acknowledge that whatever truths I claim are provisional and temporary.
- Encouraging questions, interruptions and discussion as I proceed.
- Ending every lecture with a series of questions that I have raised and left unanswered. I hope that this prepares students for the practice of volunteering questions that will form the basis for our subsequent discussion.
- Deliberately introducing alternative perspectives to the position I have advanced during the lecture and involving the class in interactive exercises aimed at uncovering the assumptions that underlie both positions.
- Introducing buzz groups and interactive exercises into the lecture.

The final key method that I used to encourage critical thinking is the CIQ, developed by Stephen Brookfield.⁷⁹ The assumption underlying this tool is that students learn critical thinking skills best by watching people in positions of power and authority model these

⁷⁸ Brookfield, above n 76, 69–70.

⁷⁹ See Stephen Brookfield, *Critical Incident Questionnaire*, 23 February 2013, <http://stephenbrookfield.com/Dr._Stephen_D._Brookfield/Critical_Incident_Questionnaire.html>.

processes. The CIQ is a simple classroom evaluation tool that is used to find out what and how students are learning. It consists of a single sheet of paper containing five questions, all of which focus on critical moments in the classroom that have taken place in class. The CIQ is administered three times over the semester at the end of class.

The five questions are always the same:

1. At what moment were you most engaged as a learner?
2. At what moment were you most distanced as a learner?
3. What action that anyone in the room took did you find most affirming or helpful?
4. What action that anyone in the room took did you find most puzzling or confusing?
5. What surprised you most about the classes?

Importantly, the CIQ sheets are never signed and I encouraged students (both verbally and in the course guide) to be honest and frank in their responses. After the exercise was completed, I analysed the responses to get a sense of main themes and forms. The following week, I began our class by going over the results and invited reactions, comments and elaborations. For this exercise to work effectively, we teachers must be prepared to be open and self-reflective with the class. That is, we must model the skills we are hoping to inculcate in our class. This means we must be prepared to hear criticism and respond as non-defensively as we can. At times it will be appropriate for us to defend our pedagogical position. However, we must also be open to change and learning from students who seek to invigorate our practice.

While this process can be difficult, in my experience the overall effect is very powerful. This is particularly true if students see us putting ourselves in the uncomfortable position of highlighting comments that show us in a bad light. Over the course of a semester, the CIQ earns us the right to ask students to take the same risk and extend themselves as part of their learning.

B *Gabrielle Appleby: Constitutional Law*

In first semester 2013, I coordinated two subjects: Australian Constitutional Law, a compulsory course usually undertaken in second or third year with an average cohort of approximately 400 students; and Advanced Constitutional Law in Theory and Practice, an elective undertaken by an average cohort of 40 students who have completed Australian Constitutional Law.

Inspired by my involvement with the critical thinking reading and discussion group that started in 2012, in 2013 I introduced a number of strategies designed to foster an environment that encourages critical thinking across both subjects. Some of these strategies are relatively innovative, while others are more traditional, but have

refocused my courses away from doctrinal learning and problem-based assessment.

Using Twitter to open up new perspectives and networks

In both of my subjects I have used the social media microblogging forum Twitter.⁸⁰ I used Twitter to *supplement* the course material and teaching in a number of ways. For example I used it to disseminate to students information that provides greater context and new perspectives on doctrinal rules learnt in class. This might be through tweets that provided links to articles or blogs that introduced contemporary examples of significant legal developments and legal commentary. Using social media in this way provided the students with new perspectives from which to consider legal principle and challenge their assumptions about the operation and impact of legal rules. Twitter thus provided students with a digital tool to unpack some of the assumptions made in doctrinal teaching. For example, after spending two weeks on theories of constitutional interpretation, I tweeted a link to a feminist blog post written by Helen Irving, ‘Constitutional Interpretation: A Woman’s Voice’.⁸¹ This was not just an act of transmission on my part. Students favoured and retweeted the post, and also engaged with Irving’s work in subsequent essays to critique current High Court jurisprudence.

I also hoped that my students would use Twitter to develop their own networks, sharing and collaborating with other legal students, professionals and academics on the forum. By linking into the diverse legal network available on Twitter, students were provided with a forum in which to engage in self-directed learning and critical thought during my course but also, more importantly, as an ongoing concern. I therefore saw my role in introducing them to the opportunities of Twitter as facilitating self-engagement. Galloway, Greaves and Castan have explained that diverse relationships forged over twitter can ‘provide ongoing inspiration and support and “constructive confrontation” that challenge our assumptions and complacencies’.⁸² Almost immediately, students engaged in these conversations and forged these relationships. For instance, after posting a piece on the value and status of undergraduate degrees in modern society,⁸³ I engaged with two of my students in a critical

⁸⁰ For a good explanation of Twitter as a microblogging tool, see Kate Galloway, Kristoffer Greaves and Melissa Castan, ‘Interconnectedness, Multiplexity and the Global Student: The Role of Blogging and Microblogging in Opening Students’ Horizons’ (2012) *Journal of the Australian Law Teachers Association* 177

⁸¹ Helen Irving <http://blogs.usyd.edu.au/womansconstitution/2013/03/constitutional_interpretation_1.html>.

⁸² Galloway et al, above n 80.

⁸³ See Lucinda Schmidt, ‘A Matter of Degrees’, *The Age*, 30 May 2013, <<http://www.theage.com.au/national/education/a-matter-of-degrees-20130530-2neo9.html>>.

conversation about the reasons for undertaking a law degree when degree saturation is high. I also witnessed students favouring and retweeting interesting legal posts, asking critical questions of others, and tweeting interesting legal posts themselves.

2 *Rethinking reliance on problem-based assessment*

I read Margaret Thornton's critique after teaching Australian Constitutional Law at the Adelaide Law School on and off since 2008. While I did not necessarily agree with Thornton's description of the inevitability of the decline of teaching critical thinking in the current legal education environment, her warnings immediately made me reconsider the course's assessment scheme. Australian Constitutional Law has been, at least during my time teaching in the course, entirely assessed through problem-based questions (an interim assignment and final exam) requiring knowledge and application of doctrinal rules. While we may have *taught* the students more critical engagement with the material (for example, in lectures and in small group discussions), we were not assessing this.

Assessment is emphasised in the literature as a very important part of the teaching function. Assessment incentivises work, and therefore the different forms of assessment will incentivise different forms of work/learning.⁸⁴ Students focus on knowledge and rote-learning where assessment is problem based (and the focus is therefore on rule handling, fact analysis, questioning, reading and interpretation), and particularly in exam situations.⁸⁵ Problem-based questions emphasise individualism, knowledge of the status quo, stressing the importance of 'quickness, surprise, comprehensiveness in lieu of depth'.⁸⁶ Barnes argues that using problem-based assessment and exams is an obstacle to greater experimentation with teaching and learning styles. Because of the emphasis on knowledge and application, it emphasises lectures and knowledge transmission, with tutorials focused on practice problem questions.

Having identified the Australian Constitutional Law assessment scheme as a barrier to encouraging critical engagement in this course, I made a number of changes. These changes did not necessarily implement novel or innovative strategies. However, they demonstrated that in large, compulsory, Priestley 11 courses, assessment does not *have* to be solely problem-based.

First, I introduced class participation (not attendance) marks. When we visited the Faculty of Law at the University of New South Wales, we were struck by the use of class participation marks in *all* of their compulsory courses. We were told that students responded

⁸⁴ Jeffrey W Barnes, 'The Functions of Assessment: A Re-examination' (1991) 2 *Legal Education Review* 177, 181.

⁸⁵ *Ibid.*, 188, 190.

⁸⁶ *Ibid.*, 195.

very positively to the class participation marks provided that the rules and expectations were set out clearly for them. I developed a set of ‘class participation’ guidelines that I released to the students. These explained to the students my reasons for introducing class participation marks:

I included a class participation mark in the course to:

- encourage students to explore a diverse range of viewpoints and question their own views and assumptions;
- strengthen students’ communication and listening skills;
- increase students’ confidence and voice;
- increase student engagement with the material;
- invite students to be co-creators of knowledge; and
- encourage students to engage in a continuing discourse in the area.

I then explained what type of participation I (and other seminar leaders) would be looking for. I emphasised that I was not looking for quantity, but rather:

thoughtful contributions that demonstrate good preparation and engagement with the conceptual issues raised by the readings. This does not mean that each contribution that is made has to be correct — students will not be marked down for questions that assist them in coming to a better understanding of the more complex concepts in the course. I will also be looking for students who engage with their peers in an appropriate fashion — responding and listening to their contributions as well as myself, or a guest who may be leading the class.⁸⁷

By explaining the class participation marks in this way I was able to emphasise that while it was an individual mark, students would be rewarded for working well with their peers and class leaders and therefore an individualistic, competitive atmosphere was, hopefully, avoided.

Secondly, I supplemented the problem-based questions in both the interim assignment and final exam with short-answer questions. The aim of the short-answer questions is to ask the students to engage with the historical and theoretical perspectives that are contained in the course to critique the doctrinal teaching. Students may engage in an external critique of the law, or critique the doctrinal reasoning employed in particular cases by reference to logic or methodology, that is, engage in an intrinsic critique.

I supported the short-answer questions in the course through a number of discussion questions in each seminar and a weekly ‘activity’. The activity asked students to engage critically with legal principles in a practical scenario that required them to consider the impact and relevance of the principle on different interests in government and/or society. For example, the activity for the week

⁸⁷ Ibid.

relating to taxation powers of the federal and State governments, was as follows

Imagine you have been asked to attend as a delegate to a constitutional convention to draft the constitution for a new federation. What arguments will you make about dividing the power to raise revenue between the States and the Commonwealth? What limits would you like to see placed on the revenue-raising powers of the different levels of government? What impact do you think this will have on how the federation will operate?⁸⁸

Students engaging with the exercise adopted the perspective of the legislator and the politician. Informed by their understanding of how Australia's current revenue-raising powers operate, they had to think about the possible future consequences of a different system for different groups within society. Students were asked to consider the various entities that may be affected by the system (the governments, the community, the individuals) and how different models would impact on them. Students needed to consider the law as a social, political and economic phenomenon within society, and advocate and defend a proposal against possible critiques.

In formatting the short-answer questions in the mid-semester assignment, I realised that one difficulty would be ensuring that students engaged deeply with the question. My experience with short-answer questions in previous courses has been that students tend to regurgitate doctrine rather than engage critically, or write out pre-prepared answers. Instead of asking a number of short-answer questions related to each issue raised by the problem question, I gave students an option of answering short-answer question from a bank of three or four — each relating to an issue raised by the doctrinal rules they had to apply in the problem question. That way, I was able ensure that students were provided with sufficient time to encourage deep thinking, rethinking, and precision of communication.⁸⁹

Finally, I introduced a small piece of peer review assessment early in the course. While this was a problem-based question, I introduced it as part of my critical thinking reforms to the course. This is because the purpose of the peer-review exercise was twofold: to allow the students to revise the initial topic and receive feedback on it, but also to develop an understanding of the marking process for problem-based questions. The last point was intended to be the most important part of the exercise. It will assist the students to reflect on their own work in future, and particularly the coverage of issues and logic of their arguments. Students were asked to mark

⁸⁸ This particular activity was drawn from the 'critical morality' model that is expounded in Charles Sampford and David Wood, 'Legal Theory and Legal Education — The Next Step' (1989) 1 *Legal Education Review* 107, 113–20. Each week, the activity will ask students to engage in different types of critical thinking about the relevant principles and concepts.

⁸⁹ Barnes, above n 84, 189.

another student's assignment and to discuss with their peers and the teachers why a particular mark ought to be given to the work. This critical reflection on the assessment process will be valuable to students when they come to write and edit their own work in this course, but also across their law degree and into their post-university careers. Students have been given a new perspective through which to critique their own work, and question the assumptions that they brought to that exercise.

3 *Structuring and modelling critical engagement with cases*

My elective course, Advanced Constitutional Law, focused on critical engagement with recent High Court decisions. Students in Advanced Constitutional Law were in the final years of their law degree and brought a level of prior knowledge and maturity to the material. The course itself is less concentrated on knowledge transmission and understanding legal principles than on critical engagement with different perspectives — primarily of the judges, but also lawyers, litigants, governments, and other interest groups in the community.

The course commenced with two foundational classes on constitutional interpretation and history, which set up many of the tools which were to be used to analyse the High Court's jurisprudence in the second part of the course. In the following weeks, each class was designed around the discussion of a single recent High Court decision. Students were asked to prepare for the class discussion in these weeks by reading the decision carefully and considering a number of questions about the case. The questions were designed to encourage students to engage critically — with the effect of the case, the reasoning employed by the judge (from both internal and external perspectives), and also with the parties and the positions they adopt.⁹⁰ These questions were provided to the students at the start of the semester and were the same every week, although some were more relevant to particular cases. The questions included:

- Who was the plaintiff/applicant/appellant and why were they bringing the challenge?
- What is the political background behind the legislation under challenge?
- Can you follow the logic of the reasoning of the judgments? To check the logic of the judgments, check (1) is the argument based on sound premises? (2) do the premises support the conclusion?

⁹⁰ Many of these questions have been drawn from the 'melee' model of critical thinking: Sampford and Wood, above n 88, 120ff; and the work of Jonathan Crowe on supplying methodical knowledge: Jonathan Crowe, 'Reasoning from the Ground Up: Some Strategies for Teaching Theory to Law Students' (2011) 21 *Legal Education Review* 49, 57–8.

- How would you describe the interpretative methodology used by the different judgments? Why do you think particular judgments have adopted a particular methodology? Do they justify it? Was there an alternative approach? Why wasn't this adopted?
- Are the judgments informed by constitutional principles (such as federalism, responsible government, democracy)? What do the judgments reveal about the judges' conceptions about these principles? Where do these come from? Are there competing, alternative conceptions of these principles?
- Did the practical consequences of the outcome inform the judgment? If so, how?
- Does the judgment reveal anything about the judge/s conception of the role of the Court? What about their values and politics?
- Does the case reflect tensions that exist in the broader community? How will the decision affect government and the community? Will there be groups who benefit from the decision, and groups who will be disadvantaged?

During the class, I used large-group discussion, small-group exercises and discussion and group presentations as we progressed through the different questions. In the class itself, I was joined by one of our Adjunct Professors, the Hon. John Doyle AC QC, who has extensive experience and expertise in constitutional law. His perspective, as a former Chief Justice of the Supreme Court of South Australia and Solicitor-General of South Australia, provided a contrast to my own academic perspective. Brookfield emphasises the importance of teachers modelling the process of identifying and questioning assumptions, and the technique of 'modelling point-counterpoint'.⁹¹ In Advanced Constitutional Law I have been able to model this technique throughout the course. With my co-teacher,⁹² we have been able to demonstrate to the students how to question the assumptions of each other's (often different) views on the questions in a professional and non-threatening manner.

In my compulsory course, Australian Constitutional Law, I would also like to start introducing some aspects of this more critical engagement with the cases that we teach — particularly some of the seminal constitutional cases that have had an enduring impact on the structure and practice of governance in Australia. However, because of the significant difference in the size and experience of the cohort, the smaller amount of flexibility in terms of content (as it is a core course), and the restraints in funding, I had to consider alternative ways of bringing the technique into the course. I have to accept that a large part of this course will be on doctrine. But this does not mean that it must be taught as the transmission of unquestionable judicial decisions or constitutional or statutory provisions.

⁹¹ Ibid, 65.

⁹² And also with other invited guests.

Next year, I will develop a series of podcasts on important constitutional law cases covered in the course. The podcasts will show a critical discussion engaged in between the lecturer and another person (who may be another lecturer in the course, an adjunct professor, or a legal practitioner who may have been involved in the particular case discussed, although the key here will be that they bring a different perspective to the case). These podcasts will be a resource that can be drawn on in later years and will allow large groups of students to see critical discussion modelled in an intimate setting. As part of a larger trend towards the ‘flipped classroom’,⁹³ these changes will also allow me to use creatively the time and spaces that I do have with my students.

C Alex Reilly: Foundations of Law and Refugee Law and Policy

A particular concern of critical thinking is to appeal to and develop students’ extrinsic and intrinsic motivations for learning.⁹⁴ A technique I use in all my courses to motivate students to learn is teaching legal principles through an engagement with contemporary issues which students discover for themselves in the context of a course. I do this very differently in a first year course and a final year elective.

In 2013 in Foundations of Law, the teaching team began each seminar with 15 minutes of ‘Legal Gossip’. Students were required to find local, national or international legal issues in print, broadcast or online media. The task was to identify the legal issue underpinning the news item and to ask questions about the item that reflected our learning of the law in the course at that time. As we learned about the institutions of government and the separation of powers, court hierarchies, and the concept of jurisdiction, students were required to apply their understanding of these concepts to the item that was currently the subject of legal gossip.

In the first week of Legal Gossip, we discussed the sources of legal information in the media and which information outlets students themselves used to source information. Students were encouraged to try out new sources of legal information, such as the ‘Legal Affairs’ sections of *The Australian* and the *Australian Financial Review* newspapers on Fridays, and the Law Report on ABC Radio National. Introducing students to these alternative sources of legal information is an important way to foster independent, self-directed learning.

⁹³ See, for example, Jonathan Bergmann and Aaron Sams, *Flip your Classroom: Reach Every Student in Every Class Every Day* (International Society for Technology in Education, 2012).

⁹⁴ John Biggs, *Teaching for Quality Learning at University* (Open University Press, 2003) 61–3

We discussed the limitations of the media as a source of legal information, noting in particular that the journalists producing the stories were unlikely to have a legal background, and may not have had a deep understanding of the operation of legal institutions and their production of law. We also asked what assumptions underpin the journalists' reporting of the law.

When a Legal Gossip item was reported to the class, the student presenting it was asked to present a brief summary of the story, and then to identify the legal context in which it arises and the particular legal issues at stake. Throughout the semester, students accessed an increasingly broad range of legal issues. Whereas in the early weeks they tended to report back on court cases, predominantly cases involving criminal offences, as the semester progressed they were able to identify a broader range of legal issues that were not evident on the face of the article, and through this, were often able to assess and critique the balance of reporting in the article.

Legal Gossip begins the process of inquiry that we hope to model throughout the law degree at Adelaide. Firstly, it demonstrates to students that they in fact have a considerable knowledge of the law without any formal training, and that they are able to extend this knowledge through their own inquiries. Secondly, it makes evident to students that law is a social and political construct which underpins and shapes the resolution of all issues in society. Thirdly, it offers an opportunity to unpack assumptions that are made in the reporting of legal issues, and the students' assumptions in reading them, thus offering a direct engagement with the process of critical thinking as we have defined it above.⁹⁵ By the time students study Refugee Law and Policy in the final years of their degree, they have a strong foundation of doctrinal knowledge. Instead of contributing to this store of knowledge directly, Refugee Law and Policy poses fundamental questions that underpin this area of law, such as the nature of state responsibility, the concept of state membership, the legal and political scope of the concept of a 'refugee', and the operation of the Refugee Convention in the Asia Pacific region, given the nature of refugee flows and political relationships in the region.

The course explicitly aims to raise difficult policy issues in their global, national and local contexts. The assessment requires students to engage in their own inquiries in response to the set questions discussed in class. The class discussion is designed to provide a foundation for deeper individual inquiry. Students are required to engage in two assessment tasks. The first is a short research paper on one of a set of topics arising from the classes. The second is a group presentation at the end of the semester on a set topic to which a group

⁹⁵ Brookfield, above n 10, 159.

of students has been allocated. Each assessment is structured so that there is an interim assessment task on which students will receive feedback leading to the final research essay or presentation.

The difficult policy questions that underpin a nation's response to the global refugee issue obviously lend themselves to this sort of wide-ranging inquiry. As a result of the investigation we have been conducting into critical thinking, I am considering other ways to challenge students' assumptions about the regulation of people seeking asylum in Australia. One idea is to require students to have a more personal engagement with the issues by:

1. Requiring students to engage in community service with public or private organisations offering assistance to refugee arrivals in the local community, and writing a reflective journal on this experience. Possible activities include volunteering to assist high school students with homework, or acting as a mentor for first year university students with a refugee background. There are a number of established programs run by refugee organisations in which students can participate.
2. Organising students to visit refugees in the Inverbrackie Alternative Place of Detention. I have organised a tour of this facility in a previous course. The Department of Immigration and Citizenship openly facilitated this tour and spoke to the students at length about the facility. A different and more challenging experience for the students would be to visit the facility in a volunteer capacity, offering a service to residents in the Centre.

These examples of experiential learning could be linked to assessment tasks which require students to reflect on their experiences, and to consider those experiences in light of the legal regime governing refugee resettlement in Australia.

The Legal Gossip segments are a way to shift the focus from doctrinal analysis to a critical appraisal of law in society. It is a segment that works well in large or small classes. For me, this simple segment is a useful strategy to meet Thornton's concern about the loss of a critical appraisal of law as a result of class sizes and passive teaching methods.⁹⁶

V CONCLUDING REMARKS

This article began by describing how the Adelaide Law School critical thinking group was formed in response to Margaret Thornton's economic analysis of contemporary legal education. While we do not claim to have transcended this critique, we have done important work toward strengthening the critical thinking skills of our students in both elective and compulsory courses. Our experience has been

⁹⁶ See above, text accompanying footnote 5 to 7.

that, in many instances, the doctrinally focused pedagogy at the heart of Thornton's critique does not necessarily exist because it is the inevitable result of neoliberal pressures on universities, but because it has become accepted and replicated as the status quo. But for educators interested in moving beyond doctrinal transmission, encouragement lies in a number of recent reforms that have again emphasised the importance of teaching critical thinking in the LLB.

Through this project we have built relationships with other educators committed to critical pedagogy, shared knowledge and experiences and involved ourselves in a project that enriches our working lives. It is our hope that by sharing our journey we inspire other academics to work collaboratively on a project that matches their own unique interests and institutional concerns. At the Adelaide Law School, our critical thinking group will continue to encourage new membership and will run a daylong workshop to elicit feedback from students who have participated in the courses described above. We also plan to run seminars for our colleagues where we can share our experience and learn further about how to strengthen critical thinking in our curriculum.

Our project, like other investigations into areas such as staff and student wellbeing, represents one part of a growing tapestry of initiatives that are seeking to enrich our schools and 'humanize legal education'.⁹⁷ We should not lose sight of the level of collective energy that is going into alternatives, even as we continue to be self-reflective and critical of neoliberalism and its impacts on law schools.

⁹⁷ See The Florida State University, College of Law, *Humanizing Law School* 22 December 2010, <http://www.law.fsu.edu/academic_programs/humanizing_lawschool/humanizing_lawschool.html>.