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"The Adequacy of their Attention"

Gender-Bias and the Incorporation of Feminist Perspectives in the Australian Introductory Law Subject

*Helen Ward**

> Legal education is the foundation of every lawyer's function and performance in the legal system.[1]

Introduction

In 1987 the Pearce Committee,[2] established by the Commonwealth Tertiary Education Commission (CTEC) to examine legal education in Australia's then twelve law schools,[3] made the following suggestion ("Suggestion 1"):

> That all law schools examine *the adequacy of their attention* to theoretical and critical perspectives, including the study

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 (2000) 11 *Legal Educ Rev* 1.

1 LG Espinoza, Constructing a Professional Ethic: Law School Lessons and Lesions (1989) 4 *Berkeley Women's L J* 215 at 215, quoted in Australian Law Reform Commission, *Equality Before the Law: Women's Equality* Report No 69, Part II (Canberra: AGPS, 1994) 135 [referred to as ALRC Report Part II].

2 The Committee was convened by Professor Dennis Pearce of the Australian National University. The other members were Professor Enid Campbell and Professor Don Harding.

3 These were the law schools at the New South Wales Institute of Technology (now University of Technology, Sydney) and Queensland Institute of Technology (now Queensland University of Technology), the Australian National University and at the Universities of Adelaide, Macquarie, Melbourne, Monash, New South Wales, Queensland, Sydney, Tasmania, and Western Australia. The Pearce Committee also included in its investigations the Department of Legal Studies at La Trobe University, which was at that time not offering a Bachelor of Laws degree.

> of law in operation and the study of the relations between law and other social forces.[4]

This article considers to what extent *feminist* theoretical and critical perspectives have been incorporated into law school curricula, given the substantial period which has passed since the Committee's suggestion was made. This is partly in response to the consistent expressions of disquiet from feminists who argue that, stemming from an androcentric perspective of life and law, legal education delivers inaccurate messages about women and is gender-biased.

I have limited this study to a consideration of the curriculum of the first year introductory subject taught in Australian law schools. An examination of this subject is important as it is the commencement of an individual's socialisation as a law student and a future practitioner of the law. In this article, I have identified and considered, from a feminist perspective, the treatment of the legal rules and doctrines normally taught in introductory courses and also considered what may be *absent* from the course contents.

From my analysis, it is apparent that there has been a strong movement toward the incorporation of feminist (and other) theoretical and critical perspectives in the introductory courses. However, there is still a significant number of courses that approach the subject-matter uncritically with very little or no feminist content. I argue, in this article, that a law course that uncritically presents legal doctrines risks adopting and perpetuating the unstated point-of-view of a particular cultural group in our society. I discuss the constitution of this cultural group and conclude, as have others, that it is largely comprised of affluent, educated Anglo-Celtic males. I argue that legal education should be openly self-conscious of the culturally-specific point-of-view of the law, and should recognise and address its own partiality.

The Pearce Committee and "Suggestion 1"

The Pearce Committee's terms of reference included "to consider and make recommendations on … appropriate aims and objectives for the provision of legal education; … the nature and quality of courses [and] the standards of

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4 Commonwealth Tertiary Education Commission, *Australian Law Schools: A Discipline Assessment* (Canberra: AGPS, 1987) (Pearce Report) [referred to as Pearce Report] vol 1, lxxv (emphasis added).

teaching and research".[5] The Committee commenced its investigations in 1985 and provided its report to CTEC in 1987. In its report it is evident that the Committee had been mindful of the broad role that law schools needed to take:

> Their aims should include aims concerned with providing an education which develops qualities of the intellect, including the ability to engage in legal reasoning, the ability to evaluate the law and legal institutions in their social context and to assess their interactions with social, economic and other forces and the capacity to cope with change as well as acquiring knowledge of the existing law and its operation.[6]

The Committee made 48 recommendations to CTEC and 64 suggestions to Australian law schools, including Suggestion 1 regarding the adequacy of attention to theoretical and critical perspectives.

Since the Pearce Committee completed its investigations, the number of universities in Australia has increased dramatically. Institutions such as Australia's colleges of advanced education and institutes of technology, in the main, merged with each other and converted to universities, or merged with existing universities. At the same time, the number of law schools based in Australian universities more than doubled, with consequent increase in the number of Australian law students.[7]

Most of Australia's law schools have therefore been established, and their curricula and pedagogical ethos developed, after the delivery of the findings of the Pearce Committee and its more than 100 recommendations and suggestions for

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5 *Id* at lii.

6 *Id* at 18. The Committee was here speaking of the aims of certain law schools outside the university sector as distinct from the university law schools, but it noted that the former "have and should have similar aims to those of the university law schools, at least in relation to their undergraduate LLB courses or any equivalent of the LLB". Non-university based legal education, for example, the Admissions Board courses conducted in New South Wales, is still available to some intending practitioners. However, as the overwhelming majority of law students are located in university-based law schools, this paper considers only courses taught at those law schools.

7 New law schools have since been established at the Universities of Canberra, Deakin, Flinders, Griffith, James Cook, La Trobe, Murdoch, New England, Newcastle, Northern Territory, Western Sydney and Wollongong and will shortly be established at the Victoria University of Technology and Central Queensland University. Also, since the handing down of the Pearce Report, Australia has seen the foundation of three private Universities, two of which, Bond University and the University of Notre Dame Australia, have established law schools.

the provision of legal education in Australia. One might reasonably assume that some of these law schools were created with the Pearce Committee's findings in mind, particularly Suggestion 1. Certainly, the almost simultaneous creation, at that time, of such a large number of new Australian law schools presented an unprecedented opportunity for the new schools to approach the teaching of law with the benefit of a recent, extensive survey of Australian legal education.[8]

Feminist Echoes

The criticism implied in the Pearce Report's Suggestion 1 has been made often by legal scholars, including feminist legal scholars, in Australia and internationally. Feminist scholars have argued that, to fail to consider and teach the law critically, and instead to consider and teach it in isolation from its relationship with the rest of the world, would be to fail to consider and acknowledge the underlying masculinity of law and legal systems.[9] They argue that legal education delivers inaccurate messages about women because these messages derive from an androcentric perspective. From this perspective, men represent a paradigm and women are portrayed as different: a difference that is thought to make women inferior to men. Yet, paradoxically, at other times, women are also portrayed as having needs and experiences that are no different from that of men because the male is the measure of the legal person — the subject of the law. Catharine MacKinnon, for one, argues that "in societies characterized by … male dominance and female subordination, the definition of what it is to be human, the standards and expectations of treatment, and the standpoint from which knowledge is validated is defined in terms of the male side of these experiences."[10] And, according to Mary Jane Mossman —

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8 Marlene Le Brun wrote, in relation to the then new law school at Griffith University, that "one very persuasive argument can be advanced for the creation of a new law school. In short, a new law school can provide legal educators with an ideal opportunity to change the direction of legal education significantly": M Le Brun, Law at Griffith University: the First Year of Study (1992) 1 *GLR* 15 at 15.

9 There are numerous writings on this issue. See, generally, the many feminist authors referred to in this article and in R Graycar and J Morgan, *The Hidden Gender of Law* (Sydney: The Federation Press, 1990) ch 2. Further evidence in support of this assertion is anecdotal and derives from the comments made to me, or in my hearing, by law teachers since the commencement of the research underlying this article.

10 C MacKinnon, Feminism in Legal Education (1989) 1 *Legal Educ Rev* 85 at 87. She continues, on the same page, that "if one applies a

> in most university law courses, the rights and responsibilities that are analyzed are either explicitly those of men (for example, the reasonable man) or implicitly those of men (for example, the taxpayer or the shareholder, more often than the battered wife). In law school courses as in life, man is the central figure and woman is the Other.[11]

A development of this argument is, of course, that legal education and the law present a very particularised male as the legal subject: the physically-able, affluent, educated Anglo-Celt.[12]

In 1994, Craig McInnis and Simon Marginson found that, since the Pearce Report, most law schools had attached "considerable importance to students developing a critical perspective of the law in a social context",[13] finding also however that "the emphasis and expression varies."[14] Their survey was not a task specifically undertaken from a feminist perspective, which remains an important enquiry.

Outline of Article

I begin my analysis, under the heading "Assumptions and Methodology", by giving an account of the approach taken in this study and the reasons for so doing. I provide a working definition of "gender-bias" to be used in the remainder of the paper before describing the feminist analysis to be undertaken and some important qualifications to the methodology I employ. Also discussed is why a feminist analysis of the introductory law subject, in particular, is useful and

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critique of male power to Anglo-Canadian-American legal doctrine and practice, one sees that law is not written from the standpoint of the realities of women's experiences, but from the standpoint of the realities of men's experience".

11 MJ Mossman, "Otherness" and the Law School: A Comment on Teaching Gender Equality (1985) 1 *Canadian J Women and the Law* 213 at 213-14. See also N Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990); E McDonald, The Law of Contract and the Taking of Risks: Feminist Legal Theory and the Way It Is (1993) 23 *U Vict Well L Rev* 113; C Rogers, How Legal Education Will Assault You As A Woman (1993) 23 *U Vict Well L Rev* 167; and MM Shultz, The Gendered Curriculum: Of Contracts and Careers (1991) 77 *Iowa L Rev* 55.

12 See, for example, M Davies, Taking the Inside Out: Sex and Gender in the Legal Subject, in N Naffine and R Owens eds, *Sexing the Subject of Law* (Sydney: LBC Information Services, 1997) 28 and n7.

13 C McInnis, S Marginson & A Morris, *Australian Law Schools After The 1987 Pearce Report* (Canberra: AGPS, 1994) 157.

14 *Id.*

how the data used in the analysis of this subject were collected.

The main body of the article analyses the data under several broad themes. First to be discussed is the way in which the courses have treated issues of special relevance to women. There follows an attempt to identify the courses that have been taught with a largely conventional, non-critical approach; those that are taught within a critical or contextual framework; and those that have innovative content or teaching methodologies worthy of being highlighted.[15] This last grouping includes courses taught at Griffith University, Northern Territory University, the University of New South Wales and Melbourne University.

Assumptions and Methodology

Feminist Examination of Legal Education

Different people may have different understandings of the term "gender-bias" so it becomes important to explain how this term is being used in this work.

Gender-bias: a working definition

Studies on gender-bias and the law have provided us with several definitions of the term "gender-bias." In 1994, the Australian Law Reform Commission, in its report on *Equality Before the Law*, adopted the view that gender-bias was "stereotyped views about the proper social role, capacity, ability and behaviour of women and men which ignore the realities of their lives and result in laws and practices that disadvantage women."[16] In a report on gender-bias and the Massachusetts judiciary, a more elaborate working definition of gender-bias was propounded. This definition makes explicit the Aristotelian notion of treating like cases alike and different cases differently.

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15 For the purposes of this paper, the content of a course includes, as far as was apparent to me, the content of the textbooks, journal articles and other reading materials to which students were referred during the course. However, in view of the large amount of data to be dealt with in this paper, these materials will often not be separately identified in this paper and their content will be attributed to the course in which they were used.

16 ALRC Report Part II, *supra* note 1, at para 2.3. See also Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (Canberra: AGPS, 1994) para 1.55 [referred to as *Gender Bias and the Judiciary*].

> [G]ender bias exists when decisions made or actions taken are based on preconceived or stereotypical notions about the nature, role, or capacity of men and women. Myths and misconceptions about the economic and social realities of men's and women's lives and about the relative value of their work also underlie gender bias … [G]ender bias can arise from gender insensitivity that overlooks sex as a significant variable in cases where it is indeed significant. Because the social and economic realities of women's and men's lives *are* often different, there are circumstances in which it may be appropriate to include gender as a factor in judicial decision making.[17]

For the purposes of this study, legal education will disclose gender-bias if it portrays the stereotypical male and his values as the paradigm and ignores the diversity of the lives of individual men and women. Gender-bias will occur if there is an exclusion or de-emphasis of the experiences and priorities of women from legal education. Gender-bias is at particularly serious risk of occurring when the subject topics present the law as objective and impartial and universally-applicable to all humans, whether female or male; when teaching materials do not subject the doctrines or rules to a feminist analysis, particularly those that are inherently gender-biased or informed by stereotypes; and when these materials do not use relevant cases, articles or examples with women-centred issues, and women authors or protagonists. The extreme manifestation of gender-bias is an absence of women and women's needs from legal education, virtually giving the appearance that women do not exist.

Feminist analysis

This study first distils a core curriculum, that is, identifies from research materials the topics typically taught in an introductory course. The feminist analysis is then applied to the core curriculum. The analysis involves identifying in the introductory subject (where they exist) the specific rules and doctrines particularly relevant to women, including those

17 Supreme Judicial Court, Commonwealth of Massachusetts, *Report of the Gender Bias Study of The Supreme Judicial Court* (Boston: Supreme Judicial Court, 1989) 14 (emphasis in original). See also Maryland Special Joint Committee on Gender Bias in the Courts, *Report of the Special Joint Committee on Gender Bias in the Courts* (Annapolis: Special Joint Committee on Gender Bias in the Courts, 1989) iii.

that operate in a discriminatory way.[18] The analysis then involves an examination of the extent of the inclusion in the curriculum of these rules and doctrines and their treatment during teaching, including course materials and textbooks.[19] A decision to include or exclude certain doctrines can be problematic in relation to the content of a course. For example, a decision to omit from the curriculum topics identified as women's issues, or to treat them cursorily, will perpetuate the exclusion or marginalisation of women and their discrete experiences and legal needs from the curriculum.[20]

Several qualifications are required, as attempting to isolate legal issues of particular relevance to women can be a "crude and somewhat misleading division of subject areas into women-centred and male-centred issues"[21] and may have little more than superficial validity.

First, arguably all legal issues, rules and doctrines are relevant to, and concern, women. Also, very few of these will be of concern only to women, for all issues that affect women can also indirectly benefit or disadvantage the men in their lives, including their employees, employers, fathers, husbands, partners and sons.

Secondly, attempting to identify doctrines and concepts of particular relevance to women suggests some reliance upon stereotypical notions of which social and legal issues would most concern women. This itself may help perpetuate inaccurate stereotypical ideas of women. However, there

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18 This is based on the methodology described in N Erickson, Sex Bias in Law School Courses: Some Common Issues (1988) 38 *J Leg Ed* 101.

19 For example, where a discriminatory law is discussed in a textbook, Nancy Erickson suggests that relevant issues for the teacher and student are "whether the casebook author identified the rule as sex discriminatory, whether the author commented on the discrimination, whether the author included materials on how to eliminate or correct for legal rules based on sexual stereotypes, and whether the author quoted from or cited materials that present a feminist viewpoint": *id* at 106.

20 MJ Frug, Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook (1985) 34 *Am U L Rev* 1065 at 1087-93 and S Berns, P Baron and M Neave, *Gender and Citizenship: Materials for Australian Law Schools* (Canberra: Department of Education, Employment and Training, 1996) 283-87. Nancy Erickson wrote that "women students may take superficial coverage as evidence that their experiences and concerns are devalued in legal education": Erickson, *supra* note 18, at 105.

21 C Boyle, Book Review of Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book Co, 1983) and of Waddams, *The Law of Damages* (Toronto: Canada Law Book Co, 1983) published in (1985) 63 *Canadian Bar Rev* 427 at 430.

will inevitably be some laws that impact upon men and women in different ways. One reason may be the different social and occupational roles in which men and women find themselves. As I mentioned earlier, some feminists argue that women have been constructed by an androcentric society as different from and inferior to men. Nevertheless, it is a fact that women *are* generally physically and economically weaker than men, and more closely associated than men with child rearing and the family. Often, therefore, men and women have different experiences of life, and different needs and priorities under the law. As a result of these differences, the same laws may not have the same or similar outcomes for men and women. Another closely related reason for laws to affect men and women in different ways may lie in the beliefs of the people that make and apply these laws. Legislators, judges and lawyers may hold certain generalised and inaccurate attitudes about men and women, their proper roles in society and their needs and priorities under the law, and may reflect these attitudes in their work. Men and women may be seen as having needs under the law that they may truly not have.

Thirdly, there is the risk that, where the focus is on a comparison between men and women, it may be easy to overlook the differences and diversity among women. The danger is that women might be homogenised and essentialised: that despite the diversity deriving from different racial, religious, economic and other characteristics, women will be seen as having the same needs and experiences.[22] It would be misleading to assume that the same laws will be particularly relevant to all women in the same way or to the same extent. Women are affected by laws depending on how they might already be placed in the community. For example, we might expect certain laws to be of greater, or of lesser, or simply of different relevance to an Aboriginal woman than, say, to a relatively affluent Anglo-Celtic woman.[23]

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22 See A Harris, Race and Essentialism in Feminist Legal Theory (1990) 42 *Stan L Rev* 581 and K Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics (1989) *U Chi Legal F* 139.

23 The same observation applies also to men, of course. As the comparison in this discussion is fundamentally between women and affluent, educated Anglo-Celtic men, it would be easy to overlook the differences and diversity among men, and their needs and experiences may, as a result, also be homogenised and essentialised.

Finally, I acknowledge that, at the level at which this survey operates, the discussion relies upon the culturally-constructed bifurcation of all of humanity as either "man" or "woman", based on cultural understandings of sex and gender, and which Margaret Davies, for one, has so persuasively made problematic.[24] However, while acknowledging the foregoing risks of relying on cultural constructs and stereotypical notions of what may most concern women, I believe there is, nevertheless, some legitimacy and value in attempting to identify, for the purposes of this survey, laws that have a particular relevance to women. The primary reason for this view is the different lives men and women live, or are believed to live, in society under the law.

The Need for a Feminist Analysis

There are at least three closely-related reasons for conducting a feminist analysis of legal education. The first is that legal education is a socialising process.[25] All law students enter law school with the particular set of experiences, philosophies and prejudices that have formed the individual to that point. They remain in law school for several years and receive instruction on many theoretical, practical and sometimes critical issues relating to law. Any experiences, philosophies and prejudices that a student may encounter at law school concerning men and women and their respective social roles will contribute significantly to the formation of the law graduate, as well as reinforcing or challenging any pre-existing biases.[26] Many law students complete second undergraduate degrees concurrently with their law studies. These non-law studies may reinforce (or may moderate) the ideas obtained from a legal education.[27] Important also is

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24 Davies, *supra* note 12.

25 Pearce Report, *supra* note 4, at 30-31.

26 How individuals will be affected is, of course, dependent on where those individuals are first ideologically situated. See MJ Frug, *supra* note 20, who, in her analysis of a contracts case book, characterised its potential readers as one of eight types, eg The Feminist, The Individualist and The Civil Libertarian, and discussed how each of these types might be affected by reading the case book.

27 Law students usually have a broad choice of second undergraduate degrees, including Arts, Economics and Science. However, aside from acknowledging its potential significance, it is beyond the scope of this study to consider the effect of these studies on the legal education received by students in law schools. The Pearce Committee found it important that some law students would have this interdisciplinary exposure. They wrote that "an important aspect of … evaluative and critical work in law involves seeing law, legal institutions and legal

that the majority of students in Australian law schools are less than 21 years of age.[28] These younger students would have relatively little worldly life experience with which to moderate the messages they receive at law school.

The second reason for conducting this kind of analysis flows from the ultimate societal roles of most law graduates.[29] After their legal education, law graduates generally find positions in the well-remunerated, power-wielding strata of our society.[30] Law graduates, of course, predominate in private and Government legal practice, and the courts, but also figure prominently in the legal academy, commerce, industry and Parliament.[31] The law graduate's relationship with wealth and power may be recognised in the career aspirations of many parents for their children, that is, that they become lawyers.[32] However, my concern is not limited to those law graduates who occupy the more prestigious and influential of the positions to which law graduates can aspire. It extends also, at the other extreme, to those law graduates who, in private or public practice, choose to apply their skills to help the disadvantaged in society. As professional actors in the legal arena, a role largely denied the ordinary individual, all law graduates wield considerable power in that they are in a position to participate in, and influence, outcomes in the law and legal system, to shape its development, and to pursue or resist change to the legal status quo. Moreover, if we understand the law to be a major constructor and enforcer of social and cultural norms, and an agent of social and cultural control, those privileged

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processes from an interdisciplinary perspective, examining the role of law in contrast to other means of social control, evaluating the effectiveness of legal institutions and methods and considering proposals and alternatives in the light of insights from other fields": Pearce Report, *supra* note 4, at 22.

28 In a survey of Australian law students, Christopher Roper found that approximately 66.5 per cent of first year and 68.8 per cent of final year students in Australian law schools in 1994 were under 21 years of age: C Roper, *Career Intentions of Australian Law Students* (Canberra: AGPS, 1995) 28-29.

29 A 1994 survey of law students from 24 Australian law schools found that approximately 60 per cent of first year students and 75 per cent of final year students intended seeking admission to practice law upon the completion of their degree: *id* at ch 5.

30 See D Kennedy, Legal Education as Training for Hierarchy, in D Kairys ed, *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982).

31 McInnis, Marginson & Morris, *supra* note 13, at 26-28.

32 D Weisbrot, *Australian Lawyers* (Melbourne: Longman Cheshire, 1990) 20.

to be actors within the legal system clearly also have the capacity to participate in and influence social and cultural outcomes, shape social and cultural development and pursue or resist change to the social and cultural status quo.

A third reason why a feminist analysis of legal education is important is that modern legal education affects the quality of legal services that women in our community receive. Legal practitioners are likely to provide inadequate legal services to their women clients if they have received a legal education that contains inaccurate messages about women or that is virtually silent on women's different and diverse experiences in society and their consequent different and diverse needs under the law. Simply, they are unlikely to be able to recognise these issues when confronted by them in legal practice. The Australian Law Reform Commission, in its report *Equality Before the Law*, wrote that submissions it had received —

> reveal that women are dissatisfied with the service they receive from many lawyers. They refer to lawyers' lack of expertise in the kinds of problems women present and to a failure to see how a woman's perspective may not be properly represented in traditional legal thinking and practice. … Legal education has a critical role to play in training lawyers who can serve all clients, women as well as men.[33]

Similarly, after a legal education lacking in accurate or adequate information about women, women's experiences and needs are less likely to be adequately represented in the other legal planning and decision-making arenas inhabited by law graduates, such as parliaments and the bureaucracy.[34] The corollary of this is that the diversity of women's discrete social and legal experiences are unlikely to have as much of an impact in the development and creation of the law and our social and cultural norms as do the social and legal experiences of men.

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33 ALRC Report Part II, *supra* note 1, at 134. John Goldring argued that "understanding legal material, in terms of both internal consistency and structure, and of its relations to the social context, is essential to sound professional judgements and evaluations": J Goldring, Thinking About First Year Law Teaching (1995) 2 *Canb LR* 137 at 139.

34 "Legal education clearly has a critical role in helping future lawyers detect and eradicate gender bias from common law and statutes": ALRC Report Part II, *supra* note 1, at 134.

The Importance of the Introductory Subject

In a work of this length, the scope of analysis of the content of the law curriculum is necessarily limited. However, a useful examination of the potential for inaccurate messages about women, and of gender-bias in the law curriculum, can be conducted of the subject which introduces students to the discipline and study of law.[35] This subject goes under various names, and the content and the methodology by which it is taught varies widely also. This subject typically seeks to explain to the student the philosophies, sources and institutions of Australian law, the methods of legal reasoning, procedure and research, and sometimes also study skills. I refer to it as the introductory law subject. One of the purposes of the introductory subject is to establish a doctrinal and philosophical foundation for the student's study of other subjects in the law curriculum: it tells students what the law is and locates its place in society. Analysis of the introductory law subject, and of the materials prescribed to students for reading, is particularly important because this constitutes the students' first exposure to detailed descriptions of the structure, operations, purposes and effects of the Australian legal system. For most law students, this is the commencement of their socialisation as law students and future practitioners of the law. Although the messages received by law students in their introductory course are capable of being moderated by courses they undertake later in their degree, it is likely that the influence of this subject, precisely because it is a student's first exposure, will extend throughout their law studies and into their professional lives. It will help form the basis of their methodologies as practitioners and, hence, their understanding, application and interpretation of the law to legal problems and dispute resolution.

A further reason for examining the introductory subject, as opposed to compulsory subjects taken in later years, is that the teacher of the introductory subject has considerably greater latitude in the design of the curriculum. Unlike most of the other subjects in the core curriculum, admissions authorities do not prescribe the content of the introductory subject.[36] Therefore, there is scope for innovation and creativity

35 Some universities taught the introductory topics in two or more distinct subjects, for example, "Legal Method" (1996) and "Introduction to Law" (1996) at Flinders University.

36 See, for example, *Rules of Court Regulating the Admission of Practitioners* 1993 (SA) r 7.

in the materials chosen to teach the course and in the methodology employed to teach the subject. More so perhaps than in other subjects, materials provided to students of the introductory subject can consist of a diverse mix containing extracts from specialist and non-specialist texts, journal and newspaper articles, as well as cases and problems. The corollary of the capacity for greater flexibility in curriculum design is the potential this represents for the subject's content to betray a certain cultural or institutional ethos. This is not only the case where individual introductory courses adopt a critical stance. Introductory courses can betray a particular ethos even where teachers limit themselves to specialist texts in the area, and do not take advantage of the potential for greater flexibility in curriculum design. Adopting such a narrow approach and presenting to students the views of a limited number of scholars is itself taking a position and expressing a value.

To some it may appear that there is little fertile ground for a feminist analysis of the introductory law subject. I would argue, however, that the ways in which legal education reflects gender differences and hierarchy are pervasive and often barely visible. An American academic once refused feminists' participation on a contract law project because he considered that "feminist theory … was unlikely (ever) to contribute significantly to contract law because 'the male bias of our society … has not had important consequences for contract law'."[37] However, as the work of feminist scholars in many other fields of law has established, the reality is that inaccurate content relating to men and women and their social roles, is not always easily identifiable and can be quite insidious: gender-bias needs excavating. A short-sighted or blinkered attitude will only impede the advance of knowledge of the interrelationship between the social roles of men and women and the law. This indicates also a further reason for examining the first-year introductory subject: that if gender-bias can be established in a seemingly innocuous subject in the law curriculum, it may suggest a need to place other subjects under similar close scrutiny.

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37 MJ Frug, Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law (1992) 140 *U Pa L Rev* 1029, at 1030 (containing a quotation from Professor W. David Slawson). See also Boyle, *supra* note 21, at 427-29.

The Data

The objective of this study was to conduct a very detailed analysis and critique of the contents of the introductory law subject. The ultimate aim was to conduct an analysis of a sufficient number of introductory courses such that any general tendencies could be identified and generalisations made with relative confidence. After communicating with each Australian Law School teaching a law degree[38] and requesting the course outlines and reading lists of their introductory courses, I have been able to include in this analysis 36 introductory courses from every such law school bar one.[39] These include law schools at the elite, so-called sandstone Universities. Australia's prestigious law schools[40] tend to educate people who later occupy positions high in the legal hierarchy, including Australia's QCs, judges and politicians, whose legal education should come under particular scrutiny. I also considered it important to canvass the private universities as well as the State or public institutions. This was the case especially with the recently established University of

38 Namely, those of the following universities: Australian National University; Bond University; Deakin University; Flinders University of South Australia; Griffith University; James Cook University of Northern Queensland; La Trobe University; Macquarie University; Monash University; Murdoch University; Northern Territory University; Queensland University of Technology; Southern Cross University; University of Adelaide; University of Canberra; University of Melbourne; University of Newcastle; University of New England; University of New South Wales; University of Notre Dame Australia; University of Queensland; University of Sydney; University of Tasmania; University of Technology, Sydney; University of Western Australia; University of Western Sydney; and the University of Wollongong. Information about the University of Canberra law school's curriculum was derived from its Internet web site.

39 The only law school that was not included in this study was Murdoch University as I received only a reading list from that law school but no further information on the course. The first year course "Legal Reasoning" offered by La Trobe University was also not included, as no materials were able to be provided to me in relation to that course, however, its companion, complementary course, "Foundation of Legal Studies" (1995), was included. For similar reasons, I have not included the two Queensland University of Technology courses, "Introduction to Study in Law" and "Legislation" but I have included the course, "Law in Context" (1996). I have included information from Griffith University, Monash University and the University of Tasmania about their particular introductory courses although in each of these cases my comments will need some qualification as only the first semester's material in each of these full year courses was able to be provided to me.

40 Here, I am especially referring to the law schools at the Universities of Melbourne and Sydney.

Notre Dame Australia whose law school has, as its philosophy, the teaching of law within an ethical, Catholic context.

The commentary in this study is derived from a study of the course outlines and other material provided to me by the law schools that responded to my requests for information. However, it is necessary to make some further observations on the data I obtained which may have an impact on the accuracy of descriptions and conclusions drawn. First, the information I was provided with differed in quantity and detail between law schools: some law schools provided me with very detailed information on course contents, while others provided only course outlines and reading lists. Secondly, I did not have access to subject teachers' lecture notes. Consequently, my ability to describe *exactly* what was included in the content of introductory courses was limited and the information I did obtain was derived entirely from information in course outlines and descriptions of curricula that varied in detail. Moreover, this has been neither a properly longitudinal nor latitudinal study. Instead, I have aimed to take a snapshot of the teaching of a particular law subject in any one of the four years 1995 to 1998 inclusive. Despite the limitations of these data, I believe that useful and reliable conclusions can be provided from the data. While the introductory courses can and do change from year to year,[41] in any one year alone they are being taught to several thousand law students.

Treatment of Women in the Introductory Subject

This part will identify and consider the treatment of the legal rules and doctrines normally taught in the introductory subject with particular attention to those of special relevance to women. Attention will be given to the manner in which women are treated, if at all, in the course contents.

The introductory law subject typically covers certain issues fundamental to the Australian legal system. These are commonly the history and sources of law in Australia, the structure of governments and courts in Australia, issues of jurisdiction, the judicial and legislative processes, the doctrine of *stare decisis* and the rules of statutory interpretation. Introductory law courses usually also incorporate a practical component on skills of legal research and writing. Generally, the

41 Hence, in the text I have made clear, in parentheses, the year that the courses included in this analysis were taught.

introductory subject provides law students with a basic overview of Australia's legal system. Most common core components to introductory courses can be summarised under broad headings, including Legal History and Sources of Law; Legal Systems and Hierarchies; Legal Reasoning; Dispute Resolution; and Legal Research. These are my own headings and are used, largely for convenience, to place common and related topics within broad classifications for the purposes of my discussion and analysis of the introductory law subject. The foregoing description of the content of introductory courses should not, however, be taken to imply that this is the constitution of each of the courses selected for analysis, however, it is at least broadly representative of Australian introductory law courses.

Legal History and Sources of Law

Legal and constitutional history

Australian legal and constitutional history is a very common topic in the introductory law subject. This includes the history of the Westminster system, and the history of common law courts and of equity. Introductory law courses usually also incorporate discussion of the development of nationhood and self-government in Australia, including the establishment of the Australian court system, the move towards federation and the creation of an Australian Constitution.[42] Some courses, for example, "Introduction to Law" (1996) at Flinders University, "Law in Society" (1996) at the University of Wollongong and "Introduction to Legal Systems and Methods" (1997) at the University of New England, also touched upon the issue of an Australian republic.

The very important part played by women of different social and cultural backgrounds in the development of Anglo-Australian legal history and Australian nationhood was discussed in one law school only. This was in the course "Legal System – Torts" (1994-1996) at the University of New South Wales. This course included illuminating discussions on the effect on Aboriginal women of European law and society, the fundamentally different experiences relative to men of transported convict women and first settler European

42 Statutes commonly made reference to include the *Colonial Laws Validity Act* 1865 (Imp); *Commonwealth of Australia Constitution Act* 1900 (Imp), *Statute of Westminster* 1931 (UK), *Australia Act* 1986 (Cth & UK) and the relevant State's Constitution.

women, including their access to voting rights, and the status of both convict and settler women as sexual commodities for men.

As far as instruction on Australian constitutional law is concerned, admittedly, this topic is not taught extensively in the introductory subject. The scope for introducing feminist materials in the constitutional law component of the introductory subject is, therefore, limited, and in the case of the courses surveyed, was wholly absent. However, Sandra Berns, Paula Baron and Marcia Neave offer some suggestions that demonstrate that the ostensibly "aridly formalist and procedural"[43] subject of constitutional law is, nevertheless, open to feminist analysis and critique.[44] Their suggestions include the role played by women and women's issues in the formation of the Federation and the Australian Constitution, and the exclusion of women from the notions of active citizenship and human or political rights.

Sources of law

A consideration of the sources of Australian law, including its English sources, is also common in introductory courses. Students are taught the common law rules governing the reception of English law in Australia. The question of whether Australia was a settled colony at the time of reception is sometimes made problematic as in "Legal Process" (1995) at the University of Western Australia Law School[45] and "Introduction to Law" (1996) at Flinders University. It is also not uncommon for introductory law courses to include discussion of the common law recognition of custom and the incorporation of Aboriginal customary law in the Australian legal system. For example, at Australian National University Law School, the course "Legal System and Process" (1996)

43 Berns, Baron & Neave, *supra* note 20, at 195.

44 Berns, Baron & Neave, *supra* note 20, at 195–245. It is not my intention to refer the reader of this paper to materials which might have substituted for any that teachers of these courses actually used. My several references to this work of Berns, Baron & Neave, and also to that of R Graycar and J Morgan, *Work and Violence Themes: Including Gender Issues in the Core Law Curriculum* (Canberra: Dept of Education, Employment, Training and Youth Affairs, 1996), are generally only in the context that these are the most apposite Australian writings on the topic.

45 Which included a discussion of the primary cases in this area, ie *R v Jack Congo Murrell* (1836) 1 Legge 72; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Coe v Commonwealth* (1979) 24 ALR 118; and *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

included discussion of Aboriginal customary law as a further source of Australian law.

Introductory courses invariably incorporate a discussion and comparison of the two main sources of law: legislation and case law. Common law jurisdictions are contrasted with other legal systems such as those in civil law countries. Students are taught the distinction between private law and public law, common law and equity, crimes and civil wrongs, and substantive and procedural law. A discussion of the sources of Australian law also covers the processes by which law is made by courts and Commonwealth and State Parliaments. This includes the passage of laws through the Houses of Parliament, the process of amendment, consolidation and repeal of legislation and the relationship of delegated legislation to Acts of Parliament. One course, "Law in Society" (1996) at the University of Wollongong, through the medium of the *World Heritage Properties Conservation Bill* (Cth) and the *World Heritage Properties Conservation Act* 1983 (Cth), considered the effect of politics and policy on the creation of a statute, and queried what effect political processes have on the legitimacy of the laws created by Parliaments.

The distinction between private law and public law, and the related ideas of the public domain and the private domain, have each been the subject of considerable feminist attention and criticism.[46] In their report on legal education, Berns, Baron and Neave have suggested that it is important that students be required to reflect on the nature and function of the categorisation of some law as public law and some as private law.[47] They argue that:

> the basic premises of liberal political theory emphasises public law as the domain of juridical equals. Private law is very different. Private law regulates consensual relationships among formally equal individuals. Under normal circumstances, the state will not inquire into the actual content of these relationships. The state is, however, concerned with the circumstances of their formation. So long as they are entered by juridical equals and not induced by

46 See, for example, M Thornton ed, *Public and Private: Feminist Legal Debates* (Melbourne: OUP, 1995). Essentially, the public domain is the regulated domain, associated with parliaments, commerce and the professions, while the private domain, or personal privacy, remains relatively unregulated and protected from state interference and has become associated with thoughts, individual liberties, personal relationships and the home.

47 Berns, Baron & Neave, *supra* note 20, at 169.

> improper means such as force or by fraud equality is maintained.[48]

These authors explain that it is not the concern of private law that individuals may consent to "hierarchical and inegalitarian relationships",[49] as these individuals are assumed by the law to be equals. The difficulty, however, is that, as women are generally physically and economically weaker than men, women more than men suffer from violence and exploitation in private and public relationships that, in fact, are both hierarchical and inegalitarian.[50] Teaching the distinction between private law and public law without a feminist analysis can disguise the androcentricity of this division. As a result of women's position of disadvantage in society, the "equals" this division assumes cannot include women.[51]

There was some exploration of these feminist issues in several of the courses. One, "Legal Institutions" (1996) at the University of Sydney, incorporated a discussion of the public and private distinction, including issues such as domestic violence and rape in marriage.[52] "Foundations of Legal Studies" (1995) at La Trobe University also explored the public/private legal dichotomy. The course notes explained that —

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48 *Id.* Later in this publication, the authors refer to the public/private dichotomy as that of "market/family": *id* at 283 ff.

49 *Id* at 170.

50 *Id* at 169-78. Catharine MacKinnon has argued that "the negative state, which draws a public/private line on a jurisprudential level, assume[s] that the sexes are equal in the home and in society so long as government does not interfere": MacKinnon, *supra* note 10, at 91.

51 Teaching the distinction between private law and public law without a careful, general critical analysis can also disguise the cultural specificity of the public law/private law division. It is not only women who cannot participate in the law as "equals". He who is not "a middle class man of the market" may also be excluded. See Naffine, *supra* note 11, at ch 5.

52 "History and Philosophy of Law" (1996) at Macquarie University explored the "boundaries of the 'private' domain" and whether this question can "be settled by the mechanical application of rules to the facts of a case": Macquarie University, *Law 112 History and Philosophy of Law: Study Guide* (Sydney: Macquarie University Law School, 1996) 9. Unusually, this course also appeared to leave it to the students themselves to study the usual issues of an introductory topic. The subject guides advised that "for an introduction to the study of law generally, using legal materials, introduction to legal reasoning, court structure, being a lawyer, etc" the students could refer to R Chisholm and G Nettheim, *Understanding Law* 4th ed (Sydney: Butterworths, 1992), C Enright, *Studying Law* 4th ed (Sydney: Federation Press, 1991) or S Frazer, *How to Study Law* (Sydney: Law Book Co, 1993).

> liberal legalism is predicated on the assumption that there is a clear line of demarcation between public and private life. This will be shown to be a myth. Not only are the boundaries permeable, but the meaning of what is public and what is private is constantly being contested.[53]

Students of this course were exposed to considerable feminist literature generally, including in this area.[54]

A related feminist concern is the division of private law and public law into various discrete, independent branches. Legal analysis and dispute resolution involves the reinterpretation of individual human problems to fit within pre-constructed legal categories. For example, insulting words spoken in public may be defamatory; falling into an open, unguarded council ditch may be negligence on the part of the council; parental conflict over children may be a custody dispute. Law students are taught to approach the resolution of human problems by this method. An important question, therefore, is from whose standpoint these legal categories have been constructed. Feminists argue that it is an androcentric standpoint and that women have not participated in the construction of these categories.[55] This becomes most evident when we see how ill-fitting some women's experiences are within these categories. For example, there existed a vacuum in the law of self-defence which ill-suited it to the experiences of some women victims of violence. This led to the development of the battered woman syndrome. Occasionally, women's discrete experiences of life, such as sexual harassment in the workplace, do not fit neatly within any category. Without a legal category into

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53 La Trobe University, School of Law and Legal Studies, *1 LLB FOLS: Foundation of Legal Studies: Subject Guide* (Melbourne: La Trobe University School of Law and Legal Studies,1995) 6.

54 Another course, "Public Law" (1996), at the University of New South Wales, examined the public law elements of Australia's legal system, namely, administrative law, constitutional law and public international law. According to a lecturer in this course, Robert Shelly, the content and contact hours of this course were halved for 1996. Consequently, many topics were removed, including a feminist critique of the public/private distinction. The course for 1996 contained no material of a feminist nature: from correspondence with Mr Shelly held by the author.

55 Graycar and Morgan, *supra* note 9, at 3-5; Berns, Baron & Neave, *supra* note 20, at 283–87 and Shultz, *supra* note 11. Graycar and Morgan also argue that a law text that reflected "the concrete realities of women's lives will need a very different framework from a traditional subject-bounded law text. It follows that a law book which is able to respond to women's lives must cross doctrinal boundaries and in doing so, restructure and redefine legal categories": Graycar and Morgan, *supra* note 9, at 5.

which their experiences may fit, these women often cannot be recognised as having legal problems and therefore are denied access to legal or quasi-legal dispute resolution. None of the courses in this study engaged with this important feminist discussion.

Legal Systems and Hierarchies

Introductory courses usually also include an exploration of the Australian legal system in the State and Federal context and its various components such as parliaments, courts, the Crown and the executive. Introductory courses typically examine the hierarchical structure of courts and legislatures in Australia, and their relationship with the British Parliament and courts. Students are taught the jurisdictions of the various courts: original and appellate; and criminal and civil, and, sometimes, those of tribunals and commissions in the Federal and State hierarchies. The powers of the Commonwealth, State and Territory Parliaments are contrasted and fundamental constitutional issues are raised. These include parliamentary sovereignty, the extent of and limits to Federal and State legislative powers, the effect of inconsistency of laws, and representative and responsible government. The doctrine of the separation of powers is discussed, including the difference between executive, judicial and legislative power, and the necessary interrelationships of the Crown, judiciary and legislature. The principles of the rule of law and responsible government led to discussion of administrative discretion and review of administrative decisions in the course "Law in Society" (1996) at the University of Wollongong.

Usually in tandem with instruction in the doctrine of precedent, students are taught which decisions of courts in the hierarchy of Australian courts will bind other courts, and more technical issues including the resolution of equally-divided appellate courts and whether courts are bound by their own decisions. This includes a consideration of the historical connection of British courts with Australian courts, particularly the Privy Council, and the effect of the Australia Acts.

No course introduced any feminist content in teaching of this broad area. Some commentary on the androcentric nature, history and constitution of these law-making institutions was nevertheless possible.[56]

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56 See the discussion to follow on law making and the judiciary, and the legal profession.

Legal Reasoning

In the broad area described by this heading, introductory courses teach methods and tools of legal reasoning and judicial decision-making. Primary among these are the doctrine of precedent and the methods and rules of statutory interpretation.

Case law and *stare decisis*

Students are given instruction in the reading and analysis of cases, including identification of the various parts of a reported case, such as the catchwords, headnote and the judge's Order. A common topic in introductory courses is the distinction between, and identification of, the *ratio decidendi* and the *obiter dicta* of a case, therefore establishing which part of the case is binding under the doctrine of precedent. Students are also taught the methods by which courts may avoid a precedent, namely, by distinguishing or overruling it, and about decisions that are *per incuriam*.

The process of common law reasoning and *stare decisis* has been subjected to feminist criticism in that, without statutory intervention, the common law is often slow to respond to women's needs and experiences of life, and helps perpetuate the existing androcentricity of the law. The common law has, for example, been slow to recognise what is known as the battered woman syndrome to assist women who have been victims of domestic violence. These important feminist issues were raised in two law schools. The course "Legal Process" (1997) at Monash University involved the teacher using the development of the common law defence of provocation to illustrate issues of common law reasoning. This allowed discussion of whether the common law should recognise differences between men and women, or cultural differences, in the defence of provocation. Cases used in this discussion mainly involved killings by men of women with whom they were in intimate or sexual relationships, for example, their wives and, in one case, a prostitute.[57] However, the cases of *R v Kina*[58] and *R v Muy Ky Chhay*[59] were discussed in the context of the legal recognition of the battered woman syndrome and its implications for

57 For example, *Holmes v DPP* [1946] AC 588; *Bender v DPP* [1954] 2 All ER 801 and *R v Voukelatos* [1990] VR 1.

58 Unreported decision of the Court of Appeal, Supreme Court of Queensland, 29 November 1993.

59 (1994) 62 A Crim R 1.

self-defence.[60] Newcastle's law school also included a similar discussion during its teaching of the topic of the common law and *stare decisis* in "Legal System and Method" (1996). Including feminist perspectives on the topic can help students to understand that the doctrine of *stare decisis*, an apparently neutral legal doctrine, is capable of having a gender-biased effect on the law and one which is not readily adapted to dealing with the diversity of women's experiences of life.

Statutory interpretation

The teaching of the rules of statutory interpretation encompasses instruction in the structure of a statute, including features such as citations, dates of assent and the marginal notes; the reading of a statute; the general[61] and statutory[62] rules of construction; the legal presumptions of construction;[63] and the syntactical presumptions commonly expressed as Latin maxims.[64] The rules on the use of material intrinsic[65] and extrinsic[66] to the statute as aids to its interpretation are also taught.

The concept of the legal person can be used to demonstrate to the student some of the instances of overt gender-bias in the law through the medium of the apparently neutral legal doctrines of statutory interpretation. In the way most course contents are presented, the concept of the legal person is one often simply overlooked or taken for granted, but it is one issue on which feminist jurisprudence, in particular, has

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60 The discussion on these issues was then extended when the teacher asked why women appear only as victims in cases of this nature: Monash University, Faculty of Law, *Legal Process, Stream A 1997, Part 1, First Semester, Reading Guide, Supplementary Materials and Problems*, (Melbourne: Monash University Faculty of Law, 1997) 81-82. The lecturer of this course, Ms Sue Campbell, said that the second semester materials, not available to be included in this study, would also contain some issues concerning "gender": from correspondence with Ms Campbell held by the author.

61 Including the literal rule, the golden rule and the mischief rule of statutory interpretation.

62 *Acts Interpretation Act* 1901 (Cth) and its State equivalents.

63 Such as the presumption against extra-territorial operation of legislation, the presumption against legislation binding the Crown, and the presumption against retrospective operation.

64 The main rules include *ejusdem generis*, *expressio unius est exclusio alterius*, *generalia specialibus non derogant*, *leges posteriores priores contrarias abrogant* and *noscitur a sociis.*

65 Such as its title, marginal notes, headings and preamble.

66 Including parliamentary debates and other parliamentary publications on the subject of the statute, and the various Acts Interpretations Acts.

shed light. The legal person is one who can enter into legal relations, own and deal with property, enter into contracts and other transactions, and sue or be sued, or otherwise enjoy the benefit and suffer the disadvantages of our laws. A legal person can be either a human being or a corporation. However, some feminists have argued that for most of our history the legal person has been more closely identified with men than women.[67] Berns, Baron and Neave have attempted to show how the historically gender-biased nature of the legal person can be demonstrated to law students studying the introductory subject.[68] These authors use the body of cases from the late 19th century and early 20th century in which women litigated so that they might enjoy the public rights available to "persons".[69] Women were very often refused these rights as courts held they were not "persons" for the purposes of the relevant legislation. These rights included the ability to practise law, vote and stand for elected office, and graduate from universities. Berns, Baron and Neave argue that —

> the real problem did not lie in simply allowing women to study law or medicine or to enter professional practice. The real problem lay in allowing women to enter public life.[70]

No law school introduced these important themes in their teaching of this topic.

Law-making by the judiciary

The sometimes controversial role of the judiciary as law-maker is also taught during the introductory subject. In "Legal Process" (1997) at Monash University, the law-making role of the judiciary is discussed in the context of several landmark cases, including *Mabo v Queensland*,[71] *Australian Capital Television Pty Ltd v Commonwealth*[72] and *Dietrich v the Queen*.[73] "Introduction to Law" (1996) at Flinders University

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67 Indeed, married women were once categorised, with children and the mentally incapable, as persons who were "civilly dead" and unable to transact in their own right. See Berns, Baron & Neave, *supra* note 20, at 148-51.
68 *Id* at 144-60.
69 Cases such as *Jex-Blake v Senatus of the University of Edinburgh* (1873) 11 McPherson 784; *Re Bradwell* (1873) 83 US 130; *Ex parte Ogden* (1893) 16 NSWLR 86 and *Re Kitson* [1920] SASR 230.
70 Berns, Baron & Neave, *supra* note 20, at 152.
71 (1992) 175 CLR 1.
72 (1992) 177 CLR 106.
73 (1992) 177 CLR 292.

also discussed these issues in relation to the *Dietrich* decision.

For many feminists, however, the law-making role of the judiciary is not as important an issue as an understanding of the values inherent in those decisions. With the preponderance of judges being males of an affluent, educated Anglo-Celtic background,[74] feminists have argued that it is the values of this social stratum that prevail in judicial decisions. There is the further suggestion that greater numbers of women on the bench would not only better represent women in our community, but would result in a differently-natured decision-making process.[75] One course only, "Foundation of Legal Studies" (1995) at La Trobe University, dealt with this issue. It placed important issues, such as the social composition of the legal profession and the "desire of the legal profession for homogeneity",[76] under close critical scrutiny. The course notes identified the composition of the legal profession as "overwhelmingly ... Anglo-Australian, middle class men" and asked "what are the societal implications of this phenomenon? To what extent is a judge ... able to act as an independent agent?"[77] For example, as alluded to earlier, feminists have made the rules of statutory interpretation problematic. These critics emphasise that the meaning judges give to statutes will be seriously influenced by their social and political positions.[78]

Problem solving

Many introductory courses teach a methodology by which law problems, exercises and exam questions might be answered. For example, problem-solving by the MIRAT methodology is taught at Bond University Law School. MIRAT is an acronym which describes the steps and elements in legal problem-solving, namely,

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74 ALRC Report Part II, *supra* note 1, at ch 9 and *Gender Bias and the Judiciary*, *supra* note 16, at paras 5.48-5.52.

75 This is a reference to the idea that, jurisprudentially, women speak in a "different voice". See Berns, Baron & Neave, *supra* note 20, at 308-15 and C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge MA: Harvard University Press, 1982).

76 La Trobe University, School of Law and Legal Studies, *supra* note 53, at 9.

77 *Id* at 8.

78 Regina Graycar and Jenny Morgan have suggested how these issues might be introduced to students when teachers are discussing the rules of statutory interpretation in Graycar and Morgan, *supra* note 44, "Legal Process II", at 39-41.

Material/missing facts

Issue(s)

Rule (principle) of law/research

Application/argument

Tentative conclusion.[79]

MIRAT is advocated by Bond Law School as the method for students to use when answering tutorial and examination problems, in written assignments and case analysis. The Queensland University of Technology, in "Research and Legal Reasoning" (1996) teaches problem-solving by the ISAACS method:

Identify a legal issue arising from the facts

State the relevant law and the

Authority for it.

Apply the law to the facts

Come to a conclusion on that issue, then repeat the above steps for another issue

Synthesise the partial conclusion into an overall conclusion.[80]

Who really thinks this way?

A very important feminist theme, and one which is relevant to the whole area discussed under the heading "Legal Reasoning", asks: "who really thinks this way?" For example, there are some feminists who argue that, generally, women do not inherently approach legal problems in the manner traditionally favoured by law schools.[81] These feminists posit that the rights-based and justice-based model of legal reasoning taught in contemporary law schools is more associated with the values and priorities of men in our society. On the other hand, women, they argue, are more concerned

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79 Bond University School of Law, *Introduction to Law (LAWS 100) Course Materials, September Semester 1995* (Bond University School of Law, 1995) 69-73. The same or similar methodology can sometimes be found under other acronyms including IFRAC or IRMAT.

80 Queensland University of Technology, *Research and Legal Reasoning LWB 134, Study Guide* (Queensland University of Technology, 1996) 26.

81 Central to these arguments is the work of Carol Gilligan, in Gilligan, *supra* note 75.

with the maintenance of relationships and would seek to solve legal problems in a way that promoted this goal. It is important to point out that these very ideas are themselves much in dispute among feminists.[82] The essentialist nature of these ideas is evident. Further, radical feminists would say that any differences between men and women in approaches to legal problems are merely the product of social and cultural construction.[83] Nevertheless, these interesting and significant ideas were overlooked and not dealt with in any of the courses the subject of this survey.

Dispute Resolution

Adversarial dispute resolution

Issues connected with the adversarial dispute resolution process also commonly find a place in introductory courses. These include an examination of the adversarial trial and discussions of the development of the jury system and the role of lawyers, the jury and the judiciary in trial outcomes. For example, "Legal Process" (1995) and "Legal Process and History" (1995), the introductory courses at the University of Western Australia Law School and the University of Technology, Sydney, Law School, respectively, covered issues of adversarial dispute resolution in lectures on civil and criminal procedure, including a discussion of the basic rules of evidence.[84] The University of Western Australia Law School's course also contrasted for students the adversary system in Australia with the civil law model of civil and criminal procedure.

Two courses in particular appeared to be largely structured around the theme of the law as a mechanism for resolving disputes. Adelaide Law School's introductory course, "Law and Legal Process" (1995), presented conventional introductory subject topics within the practical setting of law as a means for dispute resolution, yet incorporated a critical analysis of the law and dispute resolution mechanisms. The

82 For example, D Rhode, The "Woman's Point of View" (1988) 38 *J Legal Ed* 39.

83 For example, see C MacKinnon, Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence in KT Bartlett and R Kennedy eds, *Feminist Legal Theory: Readings in Law and Gender (New Perspectives on Law, Culture, and Society)* (Boulder: Westview Press, 1991), at 181-200.

84 The adversarial and jury systems were also taught in "Introduction to Law and Legal Writing" (1996) at the University of Queensland, "Introduction to Law" (1996) at Flinders University, "Legal Process" (1997) at Monash University, and "Introduction to Law" (1998) at the University of Canberra.

course demonstrated a particular conceptualisation of law: "that law is a purposive exercise, that rules are commonly regarded as central to achieving those purposes, and that rules reflect values and represent distributions of power."[85] The course covered the efficacy of the adjudicatory and adversarial approaches to dispute resolution, especially in the context of the Hindmarsh Island Bridge dispute. The course ventured beyond the traditional content of the introductory subject, in keeping with its aim to encourage students to be reflective and critical about rules and dispute resolution processes, their objectives and outcomes. "Law in Society" (1996), at the University of Wollongong, began with a consideration of the *Tasmanian Dams Case*[86] and the *Mabo*[87] case. This operated to found a relationship between a legal system and prevailing social concerns, and to establish the law as a system of dispute resolution for conflicts of some social importance. In approaching dispute resolution from this perspective, "Law in Society" (1996) also explored the links between society and the legal system; the way in which prevailing social concerns or values find legal expression; and the functions and effects of legal institutions. Later in the course, teaching further challenged conventional forms of dispute resolution. Students were asked to consider the following questions: "To what extent is the ideal model of adversary adjudication realised in real life? … Does the use of the jury system lead to just or unjust outcomes? … What do you consider to be the primary obstacle to courts achieving justice that is accessible?"[88] In a similar vein, "Foundation of Legal Studies" (1995) at La Trobe University discussed the "ramifications of the assumption that the courtroom is the locus of justice."[89]

There have been many feminist critiques of the adversarial, confrontational trial as an inadequate and, at times, inappropriate method of dispute resolution.[90] Any discussion of the trial as a means of dispute resolution is, arguably, seriously lacking without a consideration also of

85 University of Adelaide Law School, *Law and Legal Process Seminar 2 Materials* (Ref. No. 46/95) (Adelaide: University of Adelaide Law School, 1995) 2.
86 *Commonwealth v Tasmania* (1983) 158 CLR 1.
87 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
88 From University of Wollongong, Faculty of Law, *Law in Society LAW 100 Autumn 1996 Subject Outline* (Wollongong: University of Wollongong Faculty of Law, 1996) 23.
89 La Trobe University, School of Law and Legal Studies, *supra* note 53, at 4.
90 For example, Berns, Baron & Neave, *supra* note 20, at 261-68.

these feminist analyses. For example, considerable feminist attention has been directed to the experiences of female sexual assault victims at the hands of the defendant's cross-examining counsel. These issues were raised in one course only, "Law in Context" (1996) at the Australian National University. Here the course required students to consider whether, in respect of women, who are "already at a disadvantage … , the structure of the criminal legal process serves only to exacerbate feelings of alienation from society at large."[91] The adversarial dispute resolution process is largely taken for granted, uncritically, by the majority of the introductory courses. Consequently, the adversarial process is made to appear capable of achieving objective and fair outcomes for all. Yet, many would contest this claim on the grounds that adversarial dispute resolution does not give due regard to the differences among and between men and women, including the differences in their experiences of life and the law.

Alternative dispute resolution (ADR)

Courses in some law schools also include a discussion of alternative dispute resolution. For example, the courses, "Legal Process and History" (1995) taught at the University of Technology, Sydney, "Introduction to Law" (1996) at Flinders University and "Introduction to Law and Legal Writing" (1996) at the University of Queensland discussed the various means of dispute resolution and arbitration, mediation, conciliation and negotiation as alternatives to litigation.

However, ADR has not been without its own critics. There are some feminists who argue that ADR does not provide an unproblematic answer to the difficulties women face in the adversarial process.[92] ADR mechanisms presuppose an equality of bargaining power between the parties to a dispute. Potentially, women, who are generally in poorer financial circumstances than men, may have inferior access to information about their legal rights, leading them to compromise their rights too readily in ADR processes. More importantly, where women are affected by domestic violence,

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91 Australian National University Law School, *Law in Context: Course Information and Lecture Guide* (Canberra: ANU Law School,1996) x. The question also referred in the same fashion to other disadvantaged groups, namely the poor, the uneducated, and Aborigines.

92 For example, KM Mack, Alternative Dispute Resolution and Access to Justice for Women (1995) 17 *Adel L Rev* 123.

sexual abuse or sexual harassment, and the other party is their partner or employer, the considerable power imbalance can seriously affect outcomes.[93] Other social or cultural differences may also exacerbate women's position in ADR processes. These issues appear to be highlighted in the course "Foundation of Legal Studies" (1995) at La Trobe University, which notes that women have been excluded from the formal justice system and discusses "the pros and cons of mediation as an alternative mode of dispute resolution."[94] Also, "Legal Institutions" (1996) at the University of Sydney incorporated a discussion of ADR, primarily mediation, and its impact on women participants. This was the limit of the discussion of this issue among the courses as a whole.

Legal Research

A common and important component of introductory courses is legal research skills. Instruction is given in areas such as legal writing and law library research. This includes the location, manually and on electronic databases, of primary authorities such as case law and legislation and the updating of these authorities, and the location of secondary sources such as materials in journals, texts, digests and reference books. Instruction in the use of electronic or computer-based systems is a prominent part of legal research in introductory courses.

This topic in the introductory subject can be somewhat dry and uncontroversial. However, it also presents an opportunity to introduce to the student some feminist or woman-centred concerns and this is particularly important where a course is otherwise silent or relatively silent on women's different and diverse experiences of life and the law. For example, in "Introduction to Law" (1996), University of Western Sydney, Macarthur, feminist as well as other current social issues were explored by students during their compulsory library research exercise. Topics included the battered woman syndrome, anti-stalking laws, euthanasia, liability of the Crown for transmission of the Human Immuno-deficiency Virus (HIV) in prisons, adoption, and the decriminalisation of homosexual activity.

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93 Berns, Baron & Neave, *supra* note 20, at 269-282.

94 La Trobe University, School of Law and Legal Studies, *supra* note 53, at 10.

Professional Legal Issues

The legal profession

Some law schools give students information on the role of the legal profession in the legal system and the professional duties, responsibilities and ethics of lawyers. For example, "Legal Process" (1995) at the University of Western Australia Law School, covered topics such as the admission rules for legal practitioners, monopolies enjoyed by lawyers, and the division and fusion of the profession. Similar issues were discussed in "Introduction to Law" (1996) at Flinders University and "Legal Process" (1997) at Monash University. "Foundations of Legal Studies" (1995) at La Trobe University, "Introduction to Law and Legal Writing" (1996) at the University of Queensland and "Legal System and Method" (1996) at the University of Newcastle all gave classes on professional ethics among legal practitioners. The course "Law in Society" (1996) at the University of Wollongong engaged in a discussion of issues relating to the legal profession, including regulation, lawyers' duties and conflict of interest.[95]

It is still a significant issue for feminists that, although women have for some time now represented half of all law students,[96] they are not represented in similar proportions in the higher echelons of the legal profession, the Bar or the Bench, law schools, Government, or Parliaments generally.[97] These are the power-wielding strata in our society. Even where women are represented in these institutions, they often face direct and indirect discrimination, particularly in relation to their combined work and family lives, that makes it difficult for women to participate in the workplace to the same extent and with the same success as some males.[98] Moreover, the further removed a woman is from the paradigm of the affluent, educated Anglo-Celtic male, the greater the discrimination she might expect to encounter in

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95 University of Wollongong, Faculty of Law, *supra* note 88, at 27.

96 ALRC Report Part II, *supra* note 1, at 136.

97 Australian Law Reform Commission, *Equality Before the Law* (Canberra: AGPS, 1994) Report No 69, Parts I and II, *passim* [referred to as ALRC Report Parts I and II].

98 For an interesting modern and historical account of women in the legal profession, see J Hagan and F Kay, *Gender in Practice: A Study of Lawyers' Lives* (New York: OUP, 1995); M Harrington, *Women Lawyers: Rewriting the Rules* (New York : Alfred A. Knopf, 1994) and KB Morello, *The Invisible Bar: The Woman Lawyer in America 1683 to the Present* (Boston: Beacon Press, 1986). See also Berns, Baron & Neave, *supra* note 20, at 295-07.

the workplace.[99] These are important issues to raise with students. In a tutorial in "Introduction to Law" (1996), University of Western Sydney, Macarthur, there was some treatment of the problems faced by women in the legal system, both as practitioners and as consumers of legal services.[100] It is of some concern that this important issue was dealt with in only one of all the courses included in this survey, and then only as a part of one tutorial.

Legal aid and access to justice

Legal aid, and the dearth of government funding made available for legal aid, is an important, related issue in this area because women, being relatively poorer, are less likely than men to be able to afford private legal services. Students of "Law in Context" (1996) at the Australian National University considered the operation of the legal system in practice, including the roles and ethics of lawyers, and access to justice and legal services within the criminal and civil adversarial dispute resolution systems. "Legal Institutions" (1996) at the University of Sydney also conducted a discussion of access to justice issues, including those raised by *Dietrich v the Queen*.[101]

Finite legal aid resources raises significant issues of concern to women in relation to access to justice.[102] Without some exposure to these issues, the provision of legal aid can appear to students to be neutral, in its availability and effect, in relation to men and women, and also among women. For example, criminal law trials, where the preponderance of defendants are male, continue to receive priority funding at the expense of family law and civil matters, thus denying poor or financially-dependent women legal representation.[103] "Introduction to Law" (1996) at Flinders University, "Introduction to Law" (1996) at the University of Western Sydney, Macarthur, "Introduction to Law and Legal Writing" (1996) at the University of Queensland and "Legal Process" (1997) at Southern Cross University all discussed funding and access to justice and the experiences of the legal system had

99 See generally the references in the preceding footnote.

100 Students of this course were also asked to consider the attitude of the legal system towards Aboriginal Australians. Critical Aboriginal perspectives of the Australian legal system are another example of what could, and arguably should, be included in introductory law courses.

101 (1992) 177 CLR 292.

102 See, for example, R Graycar and J Morgan, Disabling Citizenship: Civil Death for Women in the 1990s (1995) 17 *Adel LR* 49.

103 Berns, Baron & Neave, *supra* note 20, at 241-45.

by women, including victims of domestic violence. Readings in this area at the University of Western Sydney included the Australian Law Reform Commission's Interim Report No 67, *Equality before the Law: Women's Access to the Legal System*.[104] The University of Queensland also offered readings and other materials on women's specific experiences with access to justice.[105] In this course there were lectures on "The Challenge of Inclusion" which discussed the need for Australian laws to take account of the diversity in the population, including not only women generally but also Aborigines, migrants, children, the aged and the disabled.

Professional skills

A few law schools included a certain amount of instruction in professional skills, such as legal writing and negotiations, in their introductory course. For example, "Legal System and Method" (1996) at the University of Newcastle included training in the skills of interviewing, drafting, file maintenance and negotiation. Also, an introduction to legal negotiation was a component of the course "Introduction to Law" (1995) at Bond University Law School. "Legal Process" (1995) at the University of Western Australia also provided students with a copy of the article "Plain English for Lawyers",[106] which included a small section on non-sexist legal language.[107]

Topical Legal Issues

At some law schools, teaching in the introductory subject was enlivened by a discussion of contemporary and topical legal issues. "Legal System and Method" (1996) at the University of Newcastle Law School discussed legal approaches to the terminally ill and topical issues such as euthanasia. In a section of "Legal Process & History" (1995) at the University of Technology, Sydney (1995) entitled "Future Challenges", issues raised included law and technology, improving access to justice and the possibility of a national

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104 Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System* Interim Report 67 (Canberra: AGPS, 1994) [referred to as ALRC Interim Report].

105 The teacher of this course, Mrs Ann Black, provided students in tutorials with "Learning Baskets" which contained diverse media, such as videos, cassettes and cartoons, as well as conventional written material, on the issue of women and access to justice.

106 R Wydick, Plain English for Lawyers (1978) 66 *Cal L Rev* 727.

107 *Id* at 752-54.

legal system. Some topical legal issues of concern to women which may equally find a place in discussions of this nature, but generally did not, include abortion, pornography, and discrimination in the workplace.

Problems, Exercises and Hypotheticals[108]

The use in tutorials or other classes of hypothetical problems allows scope for a course to introduce materials concerning women. For example, in "Legal Process" (1995) at the University of Western Australia, issues concerning women were raised in the context of claims for damages brought for the loss of a wife and/or mother. Other tutorials taught in that subject, as well as tutorials taught in "Introduction to Legal Systems and Methods" (1997) at the University of New England, used many of the exercises found in *Laying Down the Law*.[109] Although none of these exercises identified doctrinal material of concern to women or subject to feminist comment, many involved women as parties in cases or as hypothetical characters in problems.[110] Where a course contains little or no doctrinal material with feminist themes, it is helpful to introduce women and women's issues in class exercises so that the student is exposed to at least some content concerning women. For example, "Legal System and Method" (1996) at the University of Newcastle taught class problems and exercises involving females, including one concerning abortion.[111] By contrast, there are several problem questions and a trial examination question provided in the first semester materials for "Legal Process" (1997) at Monash University. In none of these questions do any female characters or protagonists appear, nor any doctrinal or other issues of particular relevance to women.

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108 This information was not available in respect of all courses included in this study.

109 C Cook et al, *Laying Down the Law The Foundations of Legal Reasoning, Research and Writing in Australia* 4th ed (Sydney: Butterworths, 1996).

110 These exercises were numbers 1, 3, 7, 9 and 10.

111 Female characters also figured in problems used in "Introduction to Law and Legal Writing" (1996) at Queensland University; "Introduction to Law" (1996) and "Legal Method" (1996) at Flinders University; "Research and Legal Reasoning" (1996) at the Queensland University of Technology; "Law and Legal Obligations" (1997) at Griffith University; and "Introduction to Law" (1998) at the University of Canberra.

Conventional and Unconventional Courses

Conventional Courses

A conventional course is one that does not appear to stray outside the typical core components of the introductory subject. The course outline allow little or no scope for a socio-political analysis of the law, and no significant room for the Pearce Committee's Suggestion 1 to be implemented. Instruction in the various components of this course could be very detailed and legalistic and taught instrumentally, rather than critically. Such a methodology would tend to place law within a practical, rather than socio-political, context. Individual courses that appeared clearly to fall into this category include "Elements of Law" (1995) at James Cook University of North Queensland;[112] "Introduction to Law" (1995) at Bond University School of Law; "Legal Process" (1995) at the University of Western Australia; "Legal System and Process" (1995) at The Australian National University; "Legal Method" (1996) at Flinders University; the "Law Induction School" (1996) at Deakin University; and "Introduction to Legal Systems and Methods" (1997) at the University of New England. However, at many law schools, as mentioned above, some introductory courses were taught with others in the first year curriculum. The other subject in the pair was, in some cases, complementary and added a critical component lacking in the first. For example, at the Australian National University, "Legal System and Process" (1995) and its companion course, the more critical and analytical "Law in Context", are taken by all law students in their first year of study. Also, at the University of Notre Dame Australia, the apparently conventional treatment of the usual introductory topics is complemented by the discussion of ethics, philosophy and theology in three other discrete first year subjects.[113]

Some of the conventional courses did include a small critical component in their curriculum. For example, "Legal

112 This course was typically conventional. However, as preparatory reading for the course, two texts of quite diverse approach to the study of law were recommended in the alternative to students: M Davies' *Asking the Law Question* (Sydney: Law Book Co, 1994) and C Enright's *Studying Law* 5th ed (Sydney: The Federation Press, 1995). Arguably, the student who chose to read Margaret Davies' challenging book would find quite incongruous the uncritical nature of the course itself.

113 However, the extent of any critical or feminist material in these three courses is not clear to me from the available resources.

Process" (1995) at the University of Western Australia appears to have provided its students with a largely uncritical approach to the subject, while covering the fundamentals in some detail. However, it did include critical discussion of some issues. The course included a lecture on law reform, but this teaching appears to have been limited to the operations and characteristics of law reform commissions. Also, as mentioned above, at the Australian National University, "Legal System and Process" (1995) provided the student with a conventional education in this area. However, the Law School does include in the course's objectives "the impact of imported law on the indigenous Australian community; and the philosophical underpinning of the legal system"[114] and, to that end, some discussion of the common law recognition of customary law is included in lectures. Similarly, "Introduction to Legal Systems and Methods" (1997) at the University of New England included Feminist Legal Theory as a "main concept to be understood" in its broad ranging discussion on the nature of law.[115] No further feminist issues were apparently taught during the remainder of the course.

The above-mentioned courses do not fare well in comparison to what might be a feminist application of the Pearce Committee's Suggestion 1 for legal education. There is little or, in some courses, no attention given to the androcentric origins and perspectivity of the law and legal education, and the feminist commentary on these issues. Consequently, there appears to be little discussion of the different effects of the law on those social groups outside the paradigm of the privileged, Anglo-Celtic male.[116] The law could appear to the students of these courses to be a genuinely universally-applicable system, capable of producing just and fair outcomes to all members of the community in a jurisdiction at all times, when in fact this conflicts with the experience of the law in Australia had by women.[117] Arguably, in the absence of any compensating critical studies to moderate the influence of this non-critical teaching,

114 Australian National University, Faculty of Law, *The LLB Handbook 1996* (Canberra: ANU, Faculty of Law, 1995) 49.

115 This discussion included some legal theory and some teaching on the sources of law: University of New England, Department of Law, *Legal Studies 100, Introduction to Legal Systems and Methods, 1st Semester 1997, Study Guide* (Armidale: University of New England Department of Law, 1997) 12.

116 Even discussions of native title and Aboriginal customary law treat Anglo-Australian law as the paradigm.

117 See generally ALRC Report Parts I and II, *supra* note 97.

students of these courses are unlikely to acquire the skills or knowledge that would equip them to approach, critically and consciously, the remainder of their law studies and ensuing employment in the legal arena.

Critical Courses

Several of the introductory courses taught the typical core topics of the subject within a critical or contextual framework. These courses demonstrate to a greater extent the implementation of the Pearce Committee's Suggestion 1. A student of these courses would arguably have a better grounding in the skills necessary to think critically in the remainder of their law studies than students who have been taught the introductory law subject in a largely conventional, uncritical manner, and this is indeed the stated objective of several of the introductory law courses.

Many of the law schools engaged in a discussion of various legal theories, including natural law and positivism, and contrasted them with liberal legalism, the prevailing notion of law in the Anglo-Australian legal system. This allowed the teachers to draw from the rich store of feminist and other critical jurisprudence and legal writing. Many of these courses, in fact, contained few of the usual topics of the introductory subject, such as the course, "History and Philosophy of Law" (1996) at the University of Melbourne Law School.[118] This course offered students a theoretical grounding to law in a conventional Western legal system. It then placed these ideas under challenge by juxtaposing them with ideas of law derived from non-conventional and non-Western legal systems. The aims of "History and Philosophy of Law" (1996) included imparting to students skills that would enable them to think reflectively and critically about the law throughout the rest of their law degree, and have an awareness of issues such as gender and sexuality in the study and practice of law.[119] In order to achieve this,

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118 The usual topics are the province of "Torts and the Process of Law" (1996), the companion course to "History and Philosophy of Law" (1996) at the University of Melbourne Law School. "History and Philosophy of Law" (1996) followed very closely the book R Hunter, R Ingleby and R Johnstone, *Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law* (Sydney: Allen & Unwin, 1995) which one of the lecturers described as the "core of the subject": from correspondence held with the author.

119 University of Melbourne Faculty of Law, *History and Philosophy of Law, Teaching Materials Volume 1* (Melbourne: University of Melbourne Faculty of Law, 1996) 1-2.

class, race and gender themes, and a general critique of liberal legalism, were used in the course to challenge certain existing, Western notions of law and its role in society. A considerable part of the course dealt with various aspects of liberal legalism, for example, the ideas of liberty, rights, equality and the rule of law. Students were introduced to Marxist, feminist and postmodernist critiques and those from the Critical Legal Studies scholars.[120] Unique aspects of this course were the inclusion of a comparative analysis of the Malaysian legal system as a non-Western legal system; a discussion of Confucianism and legalism; and a discussion of "law in action in Japan".[121] The course moved closer to the traditional topics of introductory law courses later in the second semester when there was a discussion of law in society and law in the courts. This section of the course covered issues such as law reform, the legal profession and judicial decision making.[122]

Similarly, the course "Foundation of Legal Studies" (1995) at La Trobe University taught very little of the traditional topics of the introductory subject and what it did include was subjected to apparently strong analysis and critique. This course refers students to many challenging critical works on the various topics taught. Feminist materials featured conspicuously among these references.[123] The aim of this subject was to "show that law is not an autonomous and scientific system, but is a politically and ideologically contingent body of knowledge which reflects the dominant values of society."[124] For example, in a module entitled "The Nature of Law and Legal Method", topics discussed included "a consideration of the ways in which liberal values … are incorporated into law" and "the rule of law and the role played by judicial hierarchies in upholding the rule of law."[125] A further topic entitled "The Myth of the Neutrality of Law" discussed "the fundamental tenet of legal positivism that law is neutral, objective and fair … that law is the embodiment of justice."[126]

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120 *Id* at 4-5.
121 *Id.*
122 *Id.*
123 See La Trobe University, School of Law and Legal Studies, *supra* note 53.
124 *Id* at 4.
125 *Id* at 6.
126 *Id* at 7.

Another course which did not contain any of the typical contents of introductory courses was "Law in Context" (1996) at the Australian National University.[127] Rather, it presented the student with a rigorous intellectual analysis of the law and its interaction with the various strata in society. This subject had, as its objective, to introduce "students to ideas and perspectives from the areas of legal philosophy, sociology, economics, and politics so that they are better prepared for later law subjects."[128] The teaching incorporated discussions of major philosophies critical of law, such as feminism and Critical Legal Studies, and also analysed law from the perspective of race and class. An objective of the course was to encourage "students to ask some basic questions about law and its processes. For example, why is the law like this? Who benefits? Who loses? How could it be different?"[129] The course closely examined the various shades of liberal philosophy in order to help students discover the nature of the liberalism said to be informing Australian law and society. It took students through the theories of individualism, equality, formalism, justice, utilitarianism and the rule of law. Feminist legal theory and feminist critiques of liberalism occupied a discrete two-hour lecture, but, to some extent, feminist analyses were also threaded through other sections of the course. For example, students were asked to consider the effect of the criminal legal process on women in society and were also asked to consider a feminist critique of the *Political Advertising Case*.[130]

The usual topics of the introductory subject also did not figure prominently in "Legal Institutions" (1996) at the University of Sydney, but there was some instruction on common law and legislation, statutory interpretation, legal reasoning and judicial method. One of the aims of the course was to enable students "to see the law in its wider social context and have the skills to respond to and direct change in law and society where necessary."[131] This aim

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127 This was the task of the companion first year course at ANU Law School, "Legal System and Process" (1996).

128 Australian National University Law School, *supra* note 91, at 1.

129 *Id* at i. The teaching followed very closely the chapter outline of the book, *Law in Context*, which itself originated from course materials for the first Law in Context course in 1990: S Bottomley, N Gunningham and S Parker, *Law in Context* rev ed (Sydney: The Federation Press, 1994) iii.

130 *Australia Capital Television v Commonwealth* (1992) 177 CLR 106.

131 University of Sydney, Law School, *Legal Institutions, Course Guide* (Sydney: University of Sydney Law School, 1996) 1.

was dealt with more in the second part of the course which discussed law in a social context, primarily by examining liberal theory and its tenets of rights, justice and equality. Feminist themes appeared significantly at this point, especially in the area of equality, alternative dispute resolution and in the law's treatment of the private and the public domains. To a lesser extent, feminist scholarship in books and journal articles was also employed in the first part of the course. There was also some use throughout this subject of cases with themes concerning women.[132]

"Legal Process & History" (1995) at the University of Technology, Sydney,[133] also required students to engage in a critical evaluation of the law. The course prefaced its teaching of the sources of law with a discussion of theories of law, particularly natural law and legal positivism, and law, justice and morality. "Introduction to Law" (1996) at Flinders University conducted similar classes, including a discussion of feminist jurisprudence, and feminism and pornography. The course, "Introduction to Law" (1996) at the University of Western Sydney, Macarthur, covered the topics normally included in the introductory subject, but this core element was extended by the inclusion of more critical and contextual perspectives of the law, including feminist, Marxist, class and race or ethnicity themes. The course also considered the various notions of law that have existed including customary law, natural law and positivism. The final lecture of the course asked students the question: "why have law?".[134] Students were also asked to consider whether law is a system of morality and control.

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132 For example, *Richter v Walton* (New South Wales Court of Appeal, 15 July 1993, unreported), *Scandrett v Dowling* (1992) 27 NSWLR 483 and *R v L* (1991) 103 ALR 577.

133 Two courses at the University of Technology, Sydney, cover the material usually included in single introductory law courses, "Legal Process and History" and "Legal Research". Seminars are used in the former course to "provide an opportunity for students to focus on particular issues of interest in relation to the legal system and the legal process and to develop their skills in legal problem-solving and critical analysis in a more informal context": from information provided to me by Faculty of Law, University of Technology, Sydney. "Legal Research" covers the usual material of a course of this nature, for example, location and use of primary and secondary legal sources, and computerised legal research.

134 University of Western Sydney, Macarthur, *F1001 Introduction to Law, Subject Outline*, (Sydney: University of Western Sydney, Macarthur, Law School, 1996) 8.

In the context of a discussion of the development of the equitable jurisdiction and the equitable doctrine of unconscionability, "Law in Society" (1996) at the University of Wollongong considered the relationship between law, justice and morality. "Introduction to Law" (1998) at the University of Canberra also held classes on legal theory and the "differing theorisations of law", including natural law, positivism, Marxism and post-modernism, but not feminist legal theory. "Research and Legal Reasoning" (1996) at the Queensland University of Technology taught critical theory, including positivism, realism, Marxism, and Critical Legal Theory, but, again, no feminist jurisprudence. "Law in Context" (1996) at the Queensland University of Technology held similar classes, with some emphasis on liberalism, but again it would appear that no feminist legal theory was taught.[135]

Courses with Innovative Content or Methodologies

Worthy of special note are several courses that stand out because of particularly innovative approaches to the subject-matter.

"Law and Legal Obligations" (1997), Griffith University

This course consisted of two streams of instruction. The first stream taught the usual topics of the introductory course. The second stream taught aspects of civil legal obligations in contract and the tort of negligence, and also restitution and equity. According to Marlene Le Brun, one of the first teachers of this course, it provided "an example of an attempt in Australia to design an interdisciplinary, holistic, integrated and student-centred, if not humanistic, approach to first year legal education."[136] The first semester of this course taught basic principles of contract law, including contract formation, offers, acceptances, consideration and privity of contract, and also some issues of negligence, including duty of care and its breach, causation, remoteness of damage and defences as well as damages. Concurrently with these topics, students were taught legal reasoning, and how to deal with statute and common law. Ms Le Brun observed that —

135 My ability to comment on the exact scope of this course is limited as I had only available to me the first semester materials for this full year course.

136 Le Brun, *supra* note 8, at 15.

> the course has been designed to introduce students to the various interpersonal relationships which law regulates by concentrating on Contract Law as the backbone of the year of study. Contract operates as the lens through which students consider the nature of law, legal obligations, and the legal process as well as an area of study in its own right. Wherever possible, information about introductory legal concepts, illustrations of the process of law, and the development of legal skills appropriate to the first year of study flow from Contract Law so that students can integrate introductory and process knowledge with their increasing understanding of substantive law. In addition, in order to minimize any propensity to "pigeon-hole" law, students explore the nature, construction, and reproduction of legal knowledge while they learn about the interrelationship between contract, tort, restitution, and equity.[137]

The second semester developed both streams of instruction and dealt with identification and interpretation of contractual terms and exclusion clauses, performance, discharge and breach of contractual obligations, vitiation and frustration of contracts, and remedies. The second stream, in the second semester, dealt with legal theories such as liberalism, natural law, and positivism. It also discussed critical legal theories and their application to contract and the tort of negligence. Other issues such as access to justice, legal ethics, and the law and indigenous peoples were also taught in this segment of the course.

Despite the innovation taken in teaching the introductory topics, this course did not include any feminist content on these topics, nor any critical feminist commentary on any of the several areas of substantive law covered in the course.[138]

"Legal Process" (1996), Northern Territory University[139]

This course was also taught in a unique fashion. In first semester, students were given instruction in some of the major

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137 *Id* at 22.

138 However, this finding is subject to the caveat expressed earlier concerning the possible fallibility of conclusions drawn from the material course teachers were able to provide me.

139 The companion course to "Legal Process" is "Legal Research and Writing" (1996). This latter course, as its title suggests, provided skills-based instruction in the use of a law library, legal analysis and legal expression: Northern Territory University Faculty of Law, *LWO101 Legal Process, First Semester Course Outline* (Darwin: Northern Territory University Faculty of Law, 1996) 4.

fundamental issues common to the introductory subject, such as the sources of law, judicial precedent and statutory interpretation. Teaching in the second semester, however, put to the test the ideas discussed in the first semester. Course materials for the second semester explained that —

> for the purposes of Semester 1 it was assumed that a legal system comprising the concepts and institutions that were examined [in the course] was desirable. In this semester we critically analyse this assumption as well as the concepts and institutions explained in Semester 1.[140]

The objective of the second semester was for students to understand and critique the influence of liberal political theory on legal concepts and institutions.[141]

Challenging the fundamental ideas of law and legal institutions is not an uncommon pursuit in the introductory subject. However, "Legal Process" set out to do so by adopting a particular perspective in its analysis — that of women in society. The teacher of the second semester of this course, Martin Flynn, explained to students in their course materials why he had chosen a feminist perspective.

> I have decided that the most efficient and (hopefully) interesting way of realising the objectives of the unit is, for the most part, to focus on the operation of the legal system in a particular context, namely, in relation to women. There are a number of reasons for doing this. First, there is a range of legal literature concerning women and the legal system that deals with issues raised by each of the unit objectives. Secondly, the issues raised by the unit objectives are vast. It may assist your understanding to focus on the practical application of the issues to a particular context. Finally, listing a selection of the headings of an introductory chapter of the recently published report of the Australian Law Reform Commission "Equality Before the Law: Justice for Women" (1994) indicates the relevance of the [sic] this topic to the unit objectives: "Women suffer inequality in the workplace", "Women are restricted in contributing to legal and political institutions", "Women experience violence".[142]

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140 Northern Territory University Faculty of Law, *LWO101 Legal Process, Semester 2 Unit Outline* (Darwin: Northern Territory University Faculty of Law,1996) 1.

141 *Id*.

142 *Id* at 2-3.

Consequently, lecture and tutorial topics in the second semester included feminist critiques of liberal philosophy and the Australian legal system, and considered how the legal system has dealt with issues of law reform, women's equality, discrimination, bias, and violence against women.[143] Lecture and tutorial readings, in this part of the course, were drawn largely from the Australian Law Reform Commission Report No. 69, earlier related publications[144] and three other major feminist sources: Regina Graycar and Jenny Morgan's book, *The Hidden Gender of Law*;[145] their report, *Work and Violence Themes: Including Gender Issues in the Core Law Curriculum*;[146] and Ngaire Naffine's *Law and the Sexes*.[147] Graycar and Morgan's report, as its name suggests, includes feminist and critical material directly relevant to the topics commonly found in the introductory subject.

"Legal System – Torts" (1994-1996), University of New South Wales[148]

This is one of three introductory courses among Australian law schools that combine the usual introductory topics with teaching in an area of substantive, private law.[149] "Legal System – Torts" (1994-1996) dealt with some of the usual introductory topics within the context of a particular theme, namely, the road to Australian legal independence and nationhood. The course discussed aspects of Anglo-Australian legal history, the effects of European settlement and the reception of English law on the Aboriginal inhabitants and the early European settlers, and the development of responsible self-government in the colonies. However, many of the skills of statutory interpretation, legal research, legal reasoning and problem-solving were taught through the medium of the numerous cases and statutes that operate in the area of tort law.

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143 *Id* at 3.

144 Australian Law Reform Commission, *Equality Before the Law* Discussion Paper 54 (Canberra: AGPS, 1993) [referred to as ALRC Discussion Paper]; ALRC Interim Report, *supra* note 104; and ALRC Report Parts I and II, *supra* note 97.

145 Graycar and Morgan, *supra* note 9.

146 Graycar and Morgan, *supra* note 44.

147 Naffine, *supra* note 11.

148 The lecturer of this course kindly provided me with extensive course materials which were derived from the 1994, 1995 and 1996 courses. The companion first-year course to this course was "Public Law".

149 The others are "Law and Legal Obligations" (1997) at Griffith University and "Torts and the Process of Law" (1996) taught at the University of Melbourne.

The substantive tort law component of "Legal System — Torts" (1994-1996) was considerable and was taught later in the year after some of the fundamental introductory topics were discussed. Tort topics discussed included the intentional torts, negligence and damages.

The conjunction of the introductory topics with a substantive area of the law allowed for the introduction of social issues and critical themes in the teaching of this course. Critical material appeared in sections on court process and legal reasoning and the latter included some Critical Legal Studies and feminist critiques.[150] Later in "Legal System – Torts" (1994-1996), there was a discussion of feminist and Critical Legal Studies critiques of the law as an institution.[151] Critical feminist material figured prominently in this course including in a discussion on the impact of Western law and society on Aboriginal women,[152] the disparate experiences of transported convict women and first settler European women in Australia's early history of European settlement,[153] and the status of convict and settler women as sexual commodities for convict and settler men.[154] Also discussed was the early exclusion of women and some men from suffrage.[155] Feminist material, or material concerning women, also appeared in case studies in the topic "Courts in Action".[156]

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150 University of New South Wales Faculty of Law, *Legal System – Torts, Topic 5 Reading Materials* (Sydney: University of New South Wales Faculty of Law, 1995) 28-48, 56-71.

151 This discussion is largely supported by extracts from Davies, *supra* note 112: University of New South Wales Faculty of Law, *Legal System – Torts, Reading Materials, Volume 2 Topic 8* (Sydney: University of New South Wales Faculty of Law, 1995) 71-89.

152 University of New South Wales Faculty of Law, *Legal System – Torts, Reading Materials, Volume 1* (Sydney: University of New South Wales Faculty of Law, 1996) 108-11.

153 *Id* at 120-27, 142-44.

154 Discussed in an extract from M Aveling, Bending the Bars: Convict Women and the State, in K Saunders and R Evans eds, *Gender Relations in Australia* (Sydney: Harcourt Brace Jovanovich, 1992) 120-22 and in an extract from J Kociumbas, *The Oxford History of Australia Volume 2 1770-1860: Possessions* (Melbourne: OUP, 1992) 123-27.

155 University of New South Wales Faculty of Law, *Legal System – Torts, Session One, Topic Three Reading Materials* (Sydney: University of New South Wales Faculty of Law,1994) 29-35.

156 These included *R v L* (1991) 103 ALR 577 (a case on spousal rape); *Nguyen v Nguyen* (1990) 169 CLR 245 (compensation for loss of domestic services after accidental death of wife and mother); *Chamberlain v R* (1984) 153 CLR 521 (regarding the conviction of Lindy Chamberlain); *Mangion v James Hardie & Co Pty Ltd* (1990) 20 NSWLR 100 (action by three women to recover compensation for the industrial disease related deaths of their husbands): University of New South Wales Faculty of Law, *supra* note 150, at 22-27.

Feminist issues or critiques also appeared in the substantive tort law teaching of "Legal System – Torts" (1994–1996). This included the issue of sexual harassment as a tort;[157] recovery by mothers for nervous shock caused by the negligent deaths of or injuries to their children;[158] the liability of public authorities for failing to protect citizens from harm;[159] compensation for child sexual abuse or incest;[160] the concept of the "reasonable person";[161] and women and the quantum of damages.[162]

"Torts and the Process of Law" (1996), University of Melbourne[163]

Like "Legal System – Torts" at the University of New South Wales, "Torts and the Process of Law" (1996) taught the topics of the introductory law subject in the context of a substantive area of the law, in this case, the tort of negligence, and the recovery of damages or compensation. This course incorporated to a very high degree feminist, cultural and economic criticisms of its subject-matter, although critical content was largely limited to the torts issues raised in the course. For example, the following issues were discussed critically from feminist, cultural or socialist perspectives: the breach of duty; the standard of care; nervous shock; the concept of the so-called reasonable man; foreseeability and proximity; assessment of damages; mitigation; and migrants and workers' compensation schemes. Contentious feminist issues raised were a mother's tortious liability toward her foetus; liability of the police service toward rape victims; loss of consortium; domestic violence; sexual abuse; and medical injuries.[164] Printed course

157 University of New South Wales Faculty of Law, *Legal System – Torts, Topic 6 Reading Materials* (Sydney: University of New South Wales Faculty of Law, 1994) 27-40.

158 University of New South Wales Faculty of Law, *Legal System – Torts, Topic 7 Volume 1 Reading Materials* (Sydney: University of New South Wales Faculty of Law, 1994) 140-57.

159 University of New South Wales Faculty of Law, *Legal System – Torts, Reading Materials, Volume 3*, (Sydney: University of New South Wales Faculty of Law, 1995) 6-16.

160 *Id* at 95-114.

161 University of New South Wales Faculty of Law, *Legal System – Torts, Reading Materials, Volume 4* (Sydney: University of New South Wales Faculty of Law, 1995) 32-38.

162 *Id* at 167-69, 180-95.

163 This course has been designed to complement another full-year, first year course taught at the Law School, namely, "History and Philosophy of Law".

164 University of Melbourne Faculty of Law, *Torts and the Process of Law, Subject Outline and Reading Guide*, (Melbourne: University of Melbourne Faculty of Law, 1996) 4, 16, 19, 23-25, 37, 38, 39, 40, 42, 46, 49.

materials incorporated approximately 20 newspaper cuttings and some case law relating to women's encounters with tort law, including doctors' liability for undetected cervical cancer; product manufacturers' liability for injuries caused by silicon breast implants and dangerous Intra-Uterine Devices and for toxic shock syndrome caused by tampon use; a mother's liability for injury of her foetus; and a sexual abuser's liability in tort to their victim.[165]

There was some critical consideration of the usual introductory topics in "Torts and the Process of Law" (1996). Feminist themes arose in the discussion of the judicial system and the selection and appointment of judges, and of the notion of objective and value-free decision making among the judiciary.[166] Here, students were referred to readings about gender-bias and the judiciary and the training of judges in these issues, including the Commonwealth Attorney-General's *Discussion Paper: Judicial Appointments – Procedure and Criteria* (1993), which referred to Australia's judges as being predominantly males of Anglo-Saxon or Celtic background.[167] Also, some of the hypotheticals and library research exercises involved women, including those who had been victims of domestic violence.[168] In undertaking legal writing, students were referred to a publication on gender-neutral communication.[169]

Conclusion: A Bias in Legal Education?

My findings suggest there is some validity in the feminist argument that legal education is gender-biased in favour of men.

The Relative Absence of Feminist Critical Commentary in Introductory Courses

Feminist scholars have argued that legal education is gender- biased because it portrays men as the human norm whereas women are depicted as different and inferior to

165 University of Melbourne Faculty of Law, *Torts and the Process of Law, Printed Materials* (Melbourne: University of Melbourne Faculty of Law, 1996) 16-25, 143-56.
166 University of Melbourne Faculty of Law, *supra* note 164, at 13-14.
167 University of Melbourne Faculty of Law, *supra* note 165, at 73-97.
168 University of Melbourne Faculty of Law, *Torts and the Process of Law, Assignment and Research Materials* (Melbourne: University of Melbourne Faculty of Law, 1996) 21.
169 That is, University of Melbourne Equal Opportunity Committee, *Watch Your Language: A Guide to Gender-Neutral Speech and Writing* (1987).

men.[170] In Anglo-Australian and North American societies masculinity traditionally denotes power, aggression, independence, assertiveness, and activity in the public sphere of life. Femininity, on the other hand, is equated with weakness, nurturing, timidity, dependence, and passivity in the private sphere. The purpose of this study has been to test, from a feminist perspective, whether these stereotypes of men and women are reproduced in legal education or whether, in respect of the introductory subject, Australian law schools have developed a model of legal education that assists students to "evaluate the law and legal institutions in their social context and to assess their interactions with social, economic and other forces".[171]

In 1994, Craig McInnis and Simon Marginson found that, since the Pearce Report, most law schools had attached "considerable importance to students developing a critical perspective of the law in a social context."[172] My curriculum study essentially reflects the findings of McInnis and Marginson in relation to the period 1995 to 1998. I have found that the majority of the introductory courses have been taught with a critical approach to the subject topics and, as foreshadowed at the beginning of this article, there is also a considerable diversity of approach taken, consistent with the freedom teachers of this subject have to design their courses. There is a strong tendency among law schools to teach the introductory subject critically with theoretical analyses of its topics. I found that there are more courses that took a critical perspective than those courses that were wholly uncritical in their attitude. However, although there was some feminist discussion in most law schools, feminist critiques relevant to the introductory topics were not incorporated in the curriculum as frequently, or to the same extent, as other critiques. In many introductory courses, there was no feminist content, nor any content concerning women's distinct, yet diverse, legal needs or experiences. These courses have failed to demonstrate a feminist application of the Pearce Report's Suggestion 1. Areas of major concern among these courses generally were the failure to incorporate discussion on topics of critical importance to women. These include the public/private distinction, access to justice, and adversarial and alternative dispute resolution processes.

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170 See MacKinnon, *supra* note 10; Mossman, *supra* note 11; and Naffine, *supra* note 11.
171 Pearce Report, *supra* note 4, at 18.
172 McInnis, Marginson & Morris, *supra* note 13, at 157.

Importantly also, there was inadequate attention to the socio-economic constitution of Australia's parliaments, courts and legal profession, and the effect of this on decision-making and law-making in the community. Generally, inadequate regard was given to women's specific, diverse legal needs and experiences. These courses stand in contrast to those that incorporated significant feminist critiques. Notable for the extent of their feminist content are "Foundation of Legal Studies" (1995) at La Trobe University and "Legal Process" (1996) at Northern Territory University. The teaching of the Northern Territory University course, in particular, might give heart to feminist scholars as, in the second semester, there was a deliberate feminist focus on the introductory law subject topics.

The failure of some courses to incorporate, to a significant degree, women-centred issues explains the continuing feminist concern that legal education is gender-biased, that it marginalises or excludes women, regarding them as the "other". By ignoring the reality that women have discrete and diverse legal experiences and needs, and by presenting the law as having universal applicability despite the differences among and between men and women, all women are reflected as having needs and experiences that are the same as those of some men, the paradigmatic legal persons. While one can excuse an introductory course for not being "A Feminist Introduction to Law",[173] an inadequate feminist critique acts to the disadvantage of women in our community.

What should our Expectations be of those Involved in Legal Education?

We all have particular cultural understandings of the world, biases derived from our upbringing, education and life experiences. Whether we are female or male, we are affected by moral and social issues, our sexuality, our religion and our level of affluence. Those involved in legal education and legal practice are no different. Moreover, legal educators and practitioners constitute a homogenous, privileged and socially-unrepresentative group with limited experience of the world outside that group. This may lead members of this group to misrepresent and stereotype women, unintentionally and unavoidably. It is important to acknowledge

173 Christine Boyle argued in her book review that "the authors did not set out to write feminist books so why should they be criticized for not having done so?": Boyle, *supra* note 21, at 429.

the characteristics of this group or subculture for, essentially, this subculture creates and defines the law and influences the content of legal education.[174]

Identifying the social characteristics of the subculture that predominates in the law commences with an examination of the locus of law making and interpreting activities, that is, courts, parliaments and the legal profession. The legal academy also contributes with the education of future judges, legal practitioners and some politicians, and in the influence upon legal thinking of the writings and research of academic staff. One characteristic of these institutions is that they are largely or, in respect of the judiciary, overwhelmingly, constituted by men.[175] Moreover, in all these legal institutions, as in most professions, even where women have recently come to be represented in reasonable numbers, males dominate in the higher, more powerful, echelons.[176] The dominance of males in the formation of ideas of law is further emphasised when the historical and philosophical foundations of Anglo-Australian law are considered. Contemporary ideas of law derive from Judeo-Christian principles, Roman law, Greek philosophy,[177] and from clergy and philosophers who were virtually exclusively men. Moreover, not only are the individuals belonging to these legal institutions mainly male, but they are also homogenous in other respects. Those who inhabit Anglo-Australian legal institutions have been found to share several common

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174 "The law inevitably reflects the values, concerns and interests of the present and past lawmakers": ALRC Report Part II, *supra* note 1, at 14.

175 ALRC Discussion Paper, *supra* note 144, at para 6.3 and *Gender Bias and the Judiciary*, *supra* note 16, at para 5.47.

176 For example, women legal practitioners tend to be found segregated in areas of legal practice which carry less prestige, power, remuneration and influence in the profession, namely, family law, welfare law and administrative law. Women constitute only a fraction of partners in law firms and are far less likely than men to practise at the Bar. This phenomenon has been extensively documented. See House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*, (Canberra: AGPS, 1992) paras 3.3, 4.1.5-4.1.6, 4.6.11-4.6.12; ALRC Discussion Paper, *supra* note 144, at paras 7.3, 7.4, 7.8-7.9; Australian Law Reform Commission, *Equality Before the Law: Justice For Women* Report No 69, Part I, (Canberra: AGPS, 1994) para 2.24; ALRC Report Part II, *supra* note 1, at para 9.23; *Gender Bias and the Judiciary*, *supra* note 16, at para 5.54; and NSW Department for Women, *Report: Research on Gender Bias and Women Working in the Legal System* (Sydney: New South Wales Department for Women, 1995) paras 2.5.1-2.5.2, 2.7, 2.9.2, 2.11. See also M Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Melbourne: OUP, 1996).

177 Cook et al, *supra* note 109, at 2.

characteristics: their general acculturation has been very similar. These individuals are mainly privileged, Christian, politically conservative and Anglo-Celtic.[178] These characteristics describe the archetypal individual of the subculture that creates and dominates the law. This individual's characteristics, values and priorities are those predominantly reflected in the law and hence legal education.

It is important to emphasise, though, that I am describing a general tendency of members of this subculture to exhibit certain biases and preconceptions. Not all individuals belonging to the subculture that dominates the law will possess the characteristics I have described above. Not all are privileged, Christian, politically conservative, Anglo-Celtic men. For example, the subculture includes women and non-Anglo-Celts. It may include others who do not share all the paradigmatic characteristics, but who nevertheless identify politically with, or who have partaken of similar acculturating experiences as, the paradigm individual. The converse is also true. Some of those similar in characteristics to the paradigm individual may hold views that differ to some extent, or wholly, from this subculture. Here, another subculture or subcultures has had greater influence upon the formation of the views of the individual.

Any cultural bias that might be detected in legal education should not necessarily be interpreted as an individual fault or wrong-doing of the person concerned. For those individuals, that cultural point-of-view is the normal and natural way of seeing or thinking about the law and its related social issues. They may feel that their standpoint is capable of achieving the best outcome for all individuals in society. Those engaging in legal education may, therefore, themselves be oblivious to any gender-bias or other cultural

178 On the social and cultural origins of Australian judges, see ALRC Report Part II, *supra* note 1, at para 9.40 and *Gender Bias and the Judiciary*, *supra* note 16, at paras 5.48-5.52. The British experience is that judges have tended overwhelmingly to originate from the upper and upper middle classes: J Griffith, *The Politics of the Judiciary* 4th ed (London: Fontana Press, 1991) 30-35. David Sugarman has written about the subculture of early English law dons. He argued that they displayed an obvious social homogeneity and were "a highly cohesive group. Nearly all were personal acquaintances for a considerable number of years. They shared, to a remarkable extent, the same social origins, clubs, universities, the sprinkling of practice and similar politics": D Sugarman, Legal Theory, the Common Law Mind and the Making of the Textbook Tradition, in W Twining ed, *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) 33. Sugarman was not explicit that they were also all men.

biases it contains and to its consequences. However, the Law School is placed within an institution, the University, one of whose central functions is to encourage reflective deliberation. Therefore, legal educators should endeavour, and perhaps they are duty bound, to reduce the influence on their work of their own particular socialisation. This is, admittedly, a difficult task as we wear our cultural socialisation like spectacles: we see the world through it. What expectations therefore can we legitimately hold in respect of legal academics? It is not difficult to imagine academics setting about their task with enthusiasm and a sincere desire to impart as clearly and succinctly as possible the often difficult legal rules and doctrines operating in a particular area. This is perhaps the minimum we should expect of any legal scholar. The issue of how much more than this we can reasonably expect is quite contentious, including whether legal scholars should go about their task self-consciously and reflectively. Not every course can include feminist, class and race critiques of its topic. Not every legal scholar is capable of such an analysis, or concurs with it or sees it as their task.

I do not argue that legal education should or can reflect a non-biased position for, as many have argued, the condition of freedom from bias – called objectivity, impartiality and neutrality – is highly problematic and probably does not exist.[179] Nor do I argue that legal education should only reflect the position that I prefer, that is, one based upon my understanding of the world. This would only be replacing one set of cultural biases with another. Even the findings in this study would not lead me to advocate, as a model for all introductory courses, a course similar to that taught in the second semester at the Northern Territory University. No law subject can be taught ethically from either a wholly androcentric or a wholly feminist perspective; both these positions may exclude or marginalise the perspectives of other social and political minorities, those based, for example, on income, race or religion. What I do argue for is an extension of what has already begun to occur in Australian

179 The objection to objectivity is not new. Mark Tushnet wrote that the argument that objective knowledge exists is "confronted by the reality that knowledge is produced by individuals located inextricably within the arena about which they are said to have knowledge": M Tushnet, Legal Scholarship: Its Causes and Cures (1981) 90 *Yale LJ* 1205, at 1220. There is a very substantial literature on this point. For an idea of the nature of the scholarship in this area see Naffine, *supra* note 11, at 44-47; Davies, *supra* note 112 *passim*; and the work of Catharine MacKinnon. See also the discussion in Enright, *supra* note 112, at 214-15.

law schools by academics engaged in critical legal scholarship. This is a challenge to rules and doctrines that are inherently gender-biased, a recognition of, and resistance to, the presentation of the law as objective and impartial, and a greater role for women and issues of special relevance to women throughout legal pedagogy.

The community as a whole is entitled to expect that all those involved in legal education should, at the very least, acknowledge the culturally-specific perspective of the law. There needs to be an open self-consciousness about the fact that legal education does tend to disclose the understandings of a particular cultural group to the exclusion of other cultural groups. It follows that there needs to be a corresponding endeavour to embrace other perspectives. Legal scholars should refrain from claiming that the law can be taught, harmlessly, "the way it is".[180] The self-conscious and reflective legal educator (and, as we have seen, there are already many in Australia) will appreciate the culturally-derived partiality and specificity of the law and legal education. He or she will appreciate that, without a careful consciousness about their discourse, in their teaching they will themselves reflect the understandings of a particular cultural group to the exclusion of others. Good legal education is conscious of, and reflects upon, its prejudgments and the effect they have on different cultural groups. This, of necessity, will involve a discussion in all discrete law subjects of the social effect of the relevant rules in operation, and their impact upon women, the poor, the Aboriginal members of our society – in short, the non-paradigm Australian. Isolating feminist material in courses that might be called "Women and the Law" is no longer adequate. Further, courses like these also risk reinforcing the difference and deviance of women from the paradigm Australian – the affluent, educated Anglo-Celtic male.[181]

If the legal subject is the affluent, educated Anglo-Celtic male — the person whose experiences, values and needs informs the law and legal knowledge — then all women

180 "But why don't we just teach law the way it is?" was the approximate response of a senior male academic to the suggestion, at a meeting at which I was present, that a minor assignment in the introductory law course include questions about the specific court room experiences of women generally, and men and women from non-English speaking backgrounds.

181 ALRC Report Part II, *supra* note 1, at 144-50. By the same token, it is equally objectionable to restrict the perspectives of other socially disadvantaged groups to "[insert name of socially disadvantaged group] and the Law" courses.

and most men are excluded from the paradigm. The Law School, by failing to take a reflective and critical approach to the teaching of law, must accept that, to a certain extent, it is complicit in this exclusion. This suggests the enormous power of the Law School to participate in the creation and development of the law to reflect a limited set of values and experiences.

Legal educators, as University teachers, should be reflective and inclusive. It follows that they should not present any point-of-view as a universal, objective truth about the whole world, and all those who live on it.[182] Good legal scholarship will endeavour not to be complicit in propagating culturally constructed stereotypes about women and falsehoods about the reality of women's lives and their place in the world.

182 Christine Boyle argues that "'Men and the Law' is tolerable as an area of intellectual activity, but not if it is masquerading as 'People and the Law'": Boyle, *supra* note 21, at 430-31.

TEACHING NOTE

Teaching Evidence: Inference, Proof and Diversity*

*Kathy Mack***

Introduction

When issues of diversity are raised in a law topic, they often appear — or will be regarded by the students — as not central to the substantive legal or doctrinal aspects of the topic. Thus, a preliminary teaching question which arises is the specialisation/mainstream debate: should such material be presented in a separate segment of the topic (ie: specialisation) in order to give it some overt visibility, or should it be "mainstreamed" by including references to it throughout the topic? Either approach can lead to marginalisation, as we see students putting down their pens or not attending class where such material is going to be covered.

The approach I have attempted to take in teaching evidence[1] is to show how such issues of diversity are not marginal, but central, by:

- considering diversity from the very beginning, as embedded in the fundamental evidentiary questions of relevance and the logic of proof;
- referring to race and gender issues in a range of evidentiary contexts;
- having at least one specialist section which focuses intensively on diversity; and
- including consideration of race and gender in assessment.

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* An earlier version of this paper was given at the Second National Evidence Teachers Conference, 19–20 February 1999, Sydney, where participants made many helpful comments. Thanks also to James Wyatt and Steven Clark for editing assistance.

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1 In 1998, Evidence was taught as one semester of the full year 9 unit topic Litigation. In 1999, Evidence became a separate 3 unit one semester topic. It is taken by final and penultimate year students.

Reasoning From Facts: What Evidence Law is About

Evidence is the law of facts. It regulates the use and production of information at the common law adversary trial and the reasoning available from such information.[2] Evidence law determines the information which can be received by a court, the form(s) in which that information may/must be presented, and the use(s) to which that information can be put.

The objectives stated in the topic guide reflect this emphasis on facts:

> By the completion of the course, students should be able to:
> - identify information which is and is not relevant to a material fact in issue;
> - describe the specific use for which information is tendered;
> - articulate the chain of reasoning which makes information relevant (or not);
> - select and apply appropriate exclusionary rules;
> - choose, analyse and apply the correct cases and statutes to a particular evidentiary issue; and
> - recognise the impact of personal characteristics and social attitudes on evidentiary issues.

These objectives reflect what Andrew Palmer calls a "fact-sensitive" rather than a "rule-sensitive" approach. As he quite sensibly points out, evidence rules about what cannot be done with facts and inferences make no sense to students unless they first know how to use facts and to draw inferences from them.[3]

This approach to evidence law requires teacher and student alike to investigate how we think and why we think a certain way, and to expose unacknowledged assumptions, beliefs and ideas. Analysing the intuitiveness of reasoning about facts orients us towards understanding people, ourselves and others, and it is an infinitely generalisable ability. Understanding this reasoning about facts for the purpose of

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2 A Palmer, *Principles of Evidence* (Sydney: Cavendish Australia, 1998) 1.

3 A Palmer, comments at the Second National Evidence Teachers Conference, 19–20 February 1999, Sydney.

evidence law creates insights which will assist students every day in their future personal and professional lives.

Although this is not an advocacy-centred approach, it still allows consideration of the adversary trial as the primary context in which evidence rules operate, thus creating opportunities for varied teaching and learning activities. Trials are the public drama of the law which we see in film, television and books, and so they have some inherent appeal to students.

Another consequence of this approach is to allow room for the social, philosophical and theoretical inquiries which are such an important part of modern evidence scholarship.[4] One aspect of power in society is the ability to determine what amounts to knowledge.[5] The law of evidence is a manifestation of that epistemological power in the legal system.[6] By formally determining who can speak within a legal setting and what they can say, the law of evidence reflects and constructs the social and cultural context in which it functions. The law of evidence, like law generally, has a constitutive function — it tells us who we are, and by telling us, helps to make us so.[7]

Assumptions of the Law of Evidence

"Natural" Rules of Fact Discovery

Ligertwood states:

> [T]he fundamental principle behind the law of evidence is the effective employment of *natural rules of fact discovery* to determine the occurrence of those facts upon which claims depend. The common law assumes that this effective employment can be best achieved through the … adversary trial …[8]

The course begins by asking what it means to call this reasoning process "natural"? Certainly, drawing inferences from observations or information is a kind of reasoning or

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4 J Jackson, Analysing the New Evidence Scholarship: Towards a New Conception of the Law of Evidence (1996) 16 *Oxford Journal of Legal Studies* 309.

5 M Davies, *Asking the Law Question* (Sydney: Law Book Company, 1994) 175–176.

6 *Id* at 226.

7 A Taslitz, What Feminism Has to Offer Evidence Law (1999) 28 *Southwestern University Law Review* 171.

8 A Ligertwood, *Australian Evidence* 3rd ed (Sydney: Butterworths, 1998) 42 (emphasis added).

thinking we all do all the time, and this very "naturalness" can make it hard to identify. However, in another sense, this process is not "natural" at all, as it often depends on personal and cultural assumptions and beliefs which are not the same for everyone — what is a natural inference for you may not be so natural for me. My approach is to focus on and challenge these so-called natural processes, to make visible what we assume, to articulate what we accept as natural, inherent or given.

In its deployment of these so-called "natural" process of fact discovery, the law of evidence makes a number of explicit and implicit assumptions about human behaviour and reasoning processes.

Rationality[9]

Evidence law assumes that fact finding is and should be entirely "rational" in the sense that it is governed by principles of logic.[10] "True" facts are ascertained by drawing logical/rational inferences, based on consideration of all relevant information, and excluding that which might distract from rational assessment, perhaps because it is unreliable or encourages an emotional reaction, such as lurid photographs of a crime victim. The assumption is that evidence can be evaluated solely as an objective, logical exercise.

Correspondence Theory of Truth[11]

An implication of this rationalist approach is the correspondence theory of truth: events occur and exist independent of human observations, and true statements correspond with these facts. Such objectively true facts are revealed through direct sensory observation. If the event is not experienced directly, it is revealed by logical inference from another's direct experiences as described in testimony. This assumption is reflected in evidence law by the importance placed on direct observation by a witness and the exclusion of opinion or hearsay evidence.

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9 M Aronson and J Hunter, *Litigation: Evidence and Procedure* (Sydney: Butterworths, 1998) 670; Ligertwood, *supra* note 8, at 50; Jackson, *supra* note 4, at 314–315.

10 For example, s 55 of the *Evidence Ac*t 1995 (Cth) states that "The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."

11 Jackson, *supra* note 4, at 314; Ligertwood, *supra* note 8, at 6.

Universal Cognitive Competence[12]

A further assumption of the law of evidence is what Marilyn McCrimmon has called "universal cognitive competence": the assumption that normal, ordinary and unbiased people are able to assess information presented and come to much the same conclusion.[13] The underlying assumption is that common experience gives rise to universally accepted generalisations about human behaviour that are available to all triers of fact. These generalisations then become the basis of inferences and conclusions of fact.

Challenges to the Assumptions of Evidence Law

Modern commentators have shown that these assumptions about objectivity, rationality and universal cognitive competence are profoundly flawed.[14]

Diverse Perspectives

First, there is the recognition that "[e]ach of us carries along our own set of beliefs, values, standards, sense of acceptable behaviours and customs".[15] These perspectives arise from a number of sources, for example: family, ethnic background, class, education, gender socialisation, physical and mental abilities, age, sexuality and other factors. This perspective may be shared with few or many other people, but it is not universal. There are diverse "natural" perspectives which are derived from our varied experiences and different locations within social structures.

However, "much of our cultural perspective is not obvious to us".[16] In part, this is because those we regularly spend time with, at work and socially, tend to share our values. Thus, we may assume our own perspective is universal

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12 M McCrimmon, The Social Construction of Reality and the Rules of Evidence (1991) 25 *University of British Columbia Law Review* 36, at 37. See also J Cohen, Freedom of Proof, in W Twining and A Stein eds *Evidence and Proof* (Aldershot: Dartmouth, 1992).

13 See examples in discussion of "Perspectivity and Evidence", below.

14 Jackson, *supra* note 4.

15 B Fraser, New Diversity in the American Workplace: A Challenge to Arbitration (1992) 47(1) *Arbitration Journal* 9. See also: R Delgado and J Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error? (1991) 68 *Texas Law Review* 1929; and the comment "We are all situated actors, whose selves, imaginations, and range of possibilities are constructed by our social setting and experience", as cited in L Sarmas, Storytelling and the Law: A Case Study of *Louth v Diprose* (1994) 19 *Melbourne University Law Review* 701, at 725.

16 Fraser, *supra* note 15, at 10.

and mistakenly treat specifics derived from our own perspective as widely shared or universal. One example of this is journals from the northern hemisphere which label their issues as "Spring" or "Winter" as though the seasons necessarily indicated the same months of the year throughout the world.

We may become aware that others have a set of cultural practices, when those practices or beliefs differ from our own. However, we may continue to regard our own perspective as normal or neutral or better, and that other perspective as different or even wrong. The editors of the journal mentioned previously may be aware that seasons differ in the southern hemisphere, but may assume that the northern hemisphere is the "normal" pattern and that those elsewhere in the world will be aware of and translate the season into the "correct" northern hemisphere months. Similarly, speakers of English, in its various forms, sometimes regard their own speech as without accent, whereas someone who speaks another form of English has an accent. As a small child in the south of the United States of America, I was well aware of those who spoke with "Yankee" accents, but had no strong sense of my own "Southern" accent, until I became older. Even when I moved to Australia, I was certainly aware of all the Australian accents around me, but did not immediately realise just how "American" I sounded.

Perspectivity and Evidence

Because we inevitably "see a world … through a lens shaped by our … experiences",[17] we tend to fit new information into personal or culturally derived "schemas" or narrative structures, rather than to interpret information in a way which challenges these structures.[18] These "schemas" organise and interpret information for us and fill gaps in information.[19] Recognising the importance of pre-existing narrative structures challenges the rationalist assumption of objective knowledge and "normal" inferences based on a "universally" available stock of knowledge about the common course of events.

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17 Jackson, *supra* note 4, at 319.

18 *Id*, citing A Tversky and D Kahneman, Causal Schemas in Judgements under Uncertainty, in D Kahneman, P Slovic and A Tversky eds, *Judgements under Uncertainty: Heuristics and Biases* (Cambridge: CUP, 1982) 117.

19 Jackson, *supra* note 4, at 319.

The impact of diverse perspectives has been considered in the context of investigations, which depend on initial assessments of credibility and plausibility.

> The more consistent a particular allegation is with our experience, the more plausibility we are likely to accord it. … [W]e have little or no difficulty empathising with the person telling us the story. Our own experiences, values and attitudes "fit" with those of the person making the allegation. …[W]here there is considerable cultural or experiential disparity, the absence of such a stock of shared experiences is likely to negatively influence a story's plausibility. The cultural resources for circumstantial corroboration of the allegation are just not present. Empathy and understanding under these conditions are much more difficult.[20]

Thus, when we evaluate another's words or actions against our own "universal" or "normal" standard, that person's statement or behaviour may be labelled as not credible or wrong, simply because it differs from our own perspective.

The influence of this unexpressed or unacknowledged perspective is not neutral or random, but will inevitably be influenced by beliefs about race, gender and age and, worse still, by negative racial or gender stereotypes. United States research suggests that a person who is bumped by another person in a crowd is more likely to interpret the bump as clumsy or accidental if the person doing the bumping is white.[21] If the person doing the bumping is black, it is much more likely to be interpreted as hostile. Age and gender are factors as well, with young black men being perceived as most hostile in such an interaction.

Thus, our assumptions and inferences about what words and conduct mean, when measured intuitively against our own personal perspective or that of the cultures in which we participate, can be seriously inaccurate. Worse, they can be biased against those whose personal or cultural characteristics differ from our own, or to whom negative stereotypes can be attributed. When such allegedly "universal" or "natural" judgements are made by those who exert power

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20 A Goldsmith, What's Wrong with Complaint Investigations? Dealing with Difference Differently in Complaints against Police (1996) 15 *Criminal Justice Ethics* 36, at 45–46, citing D Binder and P Bergman, *Fact Investigation: From Hypothesis to Proof* (St Paul: West, 1984).

21 J Armour, Colour-Consciousness in the Courtroom (1999) 28 *Southwestern University Law Review* 281.

in the legal system, as police or lawyers or judges or jurors, systematic injustice to those who are "different" can result. Since we cannot be sure that "common sense" assumptions are universal, reliable or fair, we need to scrutinise evidence principles, and their applications that are supposedly based on such "common sense", as they may in fact reflect stereotypical assumptions and discriminatory generalisations about certain kinds of people.[22]

In spite of the diversity of "natural" perspectives, so-called "common" understandings are regularly used in law.[23] "Common sense" and untested or unstated generalisations inform decisions on whether particular pieces of evidence are relevant;[24] when determining whether to accept certain facts as proven; or in choosing what inferences to draw from proven facts. Such "common sense" is also crucial in credibility judgements of our own clients or potential witnesses, as well as in formal hearings. The law may assume that rape victims will complain promptly, or that children are less reliable witnesses. Judges may make these assumptions explicit. In a highly publicised rape case in Victoria, a judge remarked "… in the common experience … 'no' often subsequently means 'yes'".[25] More recently, a three-judge panel in Italy is reported as having similarly emphasised common or universal experience regarding the impossibility of jeans being removed from a woman without the consent of the wearer.[26]

Yet, as we all know, much experience is not "common". Behaviour, reactions and perspectives are all governed, to some extent, by sexual difference[27] — as well as differences based on age, race, ethnicity, class, sexuality and other qualities. Hence —

> not all triers of fact will accept the same generalisation. For example, from evidence that a witness has made a prior inconsistent statement, one trier of fact may infer

22 Jackson, *supra* note 4, at 325.

23 McCrimmon, *supra* note 12; R Graycar, The Gender of Judgments: An Introduction, in M Thornton ed, *Public and Private: Feminist Legal Debates* (Melbourne: OUP, 1995).

24 A Althouse, The Lying Woman, The Devious Prostitute, and Other Stories From the Evidence Casebook (1994) 88 *Northwestern University Law Review* 914, at 924; K Kinports, Evidence Engendered (1991) *University of Illinois Law Review* 413, at 431. See also Sarmas, *supra* note 15, at 726, discussion at n 157.

25 Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (Canberra: AGPS, 1994) 8–9.

26 Jeans on Trial in Rape Case, *The Weekend Australian*, 13–14 February 1999, at 17.

27 McCrimmon, *supra* note 12, at 39.

> that the witness is uncertain and thus not credible, while another may infer that the witness is thoughtful and flexible, and therefore more credible.[28]

"Common sense" knowledge, as used in law, does not acknowledge these specificities, but substitutes the knowledge, experience and perspective of the group which has dominated legal and public life, that is, older, white, educated, heterosexual males. The experiences and perceptions of this group are defined as normal and common and universal. Other experiences or perceptions are regarded as unreasonable or aberrational. In contrast, "[w]hat 'everyone knows' when they live life as a person of colour, a woman or a person in poverty, turns out to be surprisingly hard to prove under conventional rules of evidence".[29]

In the United States there have been instances where a black judge or a woman judge was asked to disqualify themselves from hearing employment discrimination cases on the basis that they would not be neutral.[30] This request assumes that the white males who are usually judges have no experiences or point of view at all, or that their experiences and point of view, however uniquely determined by their own experiences as a white male person, represent neutrality and do not constitute a distinct perspective at all. These "ordinary" judges see through a "clear pane of glass", when others are "tinted". The assumption underlying these cases is that only blacks have a race (which gives them a point of view); only women have a gender; only the poor or uneducated have features determined by class; and only "ethnics" have a language and a culture or an accent.[31] The reality is that every one of us is part of a race, a gender, an age group, a class, and a culture, which profoundly affect our own values and perspectives and the ways that others respond to us.

The very automatic and inarticulate nature of these thinking and emotional processes makes it difficult for us to see and examine them, but it is essential to an understanding of evidence law that we do so.

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28 D Binder and P Bergman, *Fact Investigation: From Hypothesis to Proof* (1984) 135, as quoted in Goldsmith, *supra* note 20, at 45.

29 K Scheppele, Manners of Imagining the Real (1994) 19 *Law and Social Inquiry* 995, at 997.

30 M Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors (1992) 33 *William and Mary Law Review* 1201, at 1207.

31 *Id*.

Developing Awareness of One's Own Cultural/Social Assumptions

Thus, part of the project for my evidence class is one of self-analysis: getting the students to look inside themselves and to see that they are equipped with a whole set of personal and cultural beliefs they may not be aware of, but which profoundly influence the way they think about the world around them and the people in it, and to see that others have beliefs which may be very different, but seem just as completely "natural" and self evident to them.

Two exercises are used in lectures to illustrate the use of culturally specific knowledge to draw inferences and to raise awareness of assumptions.

Exercise 1: the Birthday Party[32]

> Billy went to Johnny's birthday party. When all the other guests were there, Johnny opened his presents. Later they sang "Happy Birthday" and Johnny blew out the candles. Was there a cake at the party?

Is the only valid answer "don't know?", or is "yes" a reasonable inference, based on Australian cultural practices about children's birthday parties? What are the various basic facts and intermediate generalisations used to draw a "yes" conclusion? Examples might include the names: these are names usually used for younger, rather than older people, and they are widely used among people from a background where children's birthdays are celebrated a certain way.

Exercise 2: the Surgeon[33]

The second example is used to raise some awareness of how these assumptions may depend on stereotypes of gender, race or age.

> A father and his son were out for a day's drive. As they returned home, their car was hit by on oncoming car. The father is killed outright and his son is seriously injured. The boy is rushed to the hospital for emergency treatment.

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32 N Pennington and R Hastie, A Cognitive Theory of Juror Decision Making: The Story Model (1991–92) 13(2) *Cardozo Law Review* 519, at 523.

33 C Maughan and J Webb, *Lawyering Skills and the Legal Process* (London: Butterworths, 1995).

> The hospital's top orthopaedic surgeon is prepared and waiting, in the operating theatre. As the boy is wheeled in, the surgeon turns, sees the boy's face says "oh no, it's my son". Who is the surgeon? [Assume there are no step or adoptive relationships in the story.]

Examples Used in Other Parts of the Topic

Having used the earlier classes to introduce students to the "natural" process of evidence reasoning as an everyday process, and also to raise their awareness of the diversity of such "natural" processes, I then attempt to reinforce these insights with other examples throughout the semester.

One such approach is to play excerpts from popular songs. "Lipstick on Your Collar" is an excellent example of drawing inferences from circumstantial evidence, with the middle steps in reasoning supplied by general cultural knowledge/beliefs, especially about gender and heterosexual dating/mating conduct. "I Heard It on the Grapevine" illustrates many concerns about hearsay evidence, as the singer points out "you could have to-o-old me yourself" as the preferred alternative for presenting the information.

Another approach is to choose examples which raise issues of difference as part of teaching a particular doctrine of evidence. For example, the material from Graycar and Morgan, *Work and Violence: Including Gender in the Core Law Curriculum*[34] is helpful on a number of topics, such as judicial notice, and is readily available on the internet. Similarly, the Queensland Criminal Justice Commission Report, *Aboriginal Witnesses in Queensland's Criminal Courts*[35] provides extremely valuable information about the experiences of Aboriginal people, with some attention paid to Aboriginal women.

Appellate decisions taught in the evidence course are partly determined by the need to ensure that the leading cases are included, but where cases are used essentially for their illustrative purposes, it is possible to choose cases that can also generate discussion and insight on issues of diversity. For example, *R v Plevac*[36] illustrates the res gestae principle vividly and in a particularly horrific context, which

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34 (DEET, 1996); http://www.anu.edu.au/law/pub/teaching_materials/genderissues/

35 Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (Toowong, Qld: Criminal Justice Commission, 1996).

36 (1995) 84 A Crim R 570.

allows and, indeed, requires addressing issues about women, men and violence. A similar choice is possible when developing the facts in tutorial, workshop or assessment problems.

Oral Evidence, Demeanour and Credibility

The requirement that evidence at trial be given orally by a witness who is physically present rests, in part, on the belief that observation of demeanour is essential to assessing the credibility of the witness.[37] This belief is well entrenched in Western culture. Examples include the recent consideration by the United States Senate of whether to call live witnesses in the impeachment trial of President Clinton, and the popularity of the Eagles song "Lying Eyes" (which was played to the class). This leads to a detailed consideration of demeanour, speech and credibility judgements in light of diverse perspectives, as a way of challenging evidence law's assumptions about truth, credibility and oral testimony.

Readings and lectures include social science research in interpretations of demeanour and speech patterns as well as an in-class demonstration of a particular example of gender and speech. This information is linked back to the ideas about diversity of perspectives from the beginning of the course. Considerable research has established that signals sent by demeanour or non-verbal behaviour are not interpreted in the same way by different cultural groups. Further,

> [t]here is no body motion or gesture that can be regarded as a universal symbol. [Researchers] have been unable to discover any single facial expression, stance, or body position which conveys an identical meaning in all societies.[38]

For example, silence can be quite ambiguous or carry many different meanings in different social and cultural contexts. Among many Aboriginal people, " … silence is a common and positively valued part of conversation" which can show thought, discomfort, lack of understanding, lack of cultural authority to speak on the topic (because of age, gender, kinship factors) or disagreement. However, in court

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37 L Re, Oral v Written Evidence: The Myth of the "Impressive Witness" (1983) 57 *Australian Law Journal* 679; J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (Sydney: Butterworths, 1995) 326–31.

38 R Birdwhistell, *Kinesics and Context: Essays on Body Motion Communication* (Philadelphia: Uni Pennsylvania Press, 1970) as cited in Fraser, *supra* note 15.

silence can be "misinterpreted as agreement, … insolence, or guilt".[39]

Similarly, many of the behaviours most commonly thought to indicate deception, such as avoidance of gaze, postural shifts or head movements, actually occur less often in those consciously attempting to deceive, while qualities such as tone of voice, which are harder for most of us to control, can be more helpful in identifying deception.[40] Research suggests that "few people do better than chance in judging whether someone is lying or truthful … and most people think they are making accurate judgments even though they are not".[41]

The assumptions about the naturalness of one's own perspective described above contribute to erroneous judgements of credibility. Research indicates that if an observer assumes the speaker is telling the truth, the observer will focus on the face and other less reliable visual cues, which may simply reinforce the pre-existing assumption of truthfulness.[42] If the initial assumption of truthfulness and the expectations about appropriate behaviour are based on assumed similarities to the observer's personal and cultural perspectives, or if an initial concern about reliability is based on a negative stereotype, interpretations of demeanour can lead to mistaken evaluations of credibility. When the experiences and socialisation of a decision maker are different from those being evaluated, and if those making decisions are not sufficiently aware of their own cultural beliefs and expectations, serious injustice can occur. Because the law has the power to label its perceptions as truth, all of us who are involved in the legal system have an obligation to ensure that our judgements about credibility are as accurate and as fair as possible.

Speech Patterns and Credibility

Misperceptions of demeanour and erroneous judgments of credibility are not mere misunderstandings, nor are they simply random errors which any system will inevitably have. These differences reflect and reinforce systematic social

39 Queensland Criminal Justice Commission, *supra* note 35, at xii, 23–24, 27.

40 J Blumenthal, A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Evidence (1993) 72 *Nebraska Law Review* 1157.

41 P Ekman, *Telling Lies* (1985) 13, cited in Fraser, *supra* note 15, at 5–15.

42 Blumenthal, *supra* note 40, at 1200.

disadvantage and distinctions imposed by our society upon men and women. A particular example which I explore in some detail is the nature and effect of different speech patterns,[43] to illustrate how difficult it can be to perceive the distinctions in our world and to show the harm which can be caused by not being aware of these distinctions. The discussion emphasises gender. Much, though not all, of what is said about women and the sources of their disadvantage may be applicable to other individuals or members of outsider or subordinated groups who suffer from social disadvantage, such as poor people, migrants, young people or those subject to racial discrimination. Note that these categories are not necessarily mutually exclusive. Women are more likely to be poor and Aboriginal women suffer distinct disadvantages. Also, any discussion of gender or disadvantage in generalities needs to be undertaken with care. Not every woman all the time is disadvantaged as against all men in all situations. Nonetheless, there are characteristically gendered patterns of disadvantage in our society, and speech patterns provide one example of how difference can become disadvantage.

Assessing the credibility of a particular speaker is affected by social expectations about how a credible speaker is supposed to sound. Research has identified some of the qualities which are associated with more powerful or more credible speech.[44] Examples of language features associated with powerlessness include: superlatives ("the greatest"), intensifiers ("so", "such"), fillers ("um", "you know"), qualifiers ("maybe", "perhaps"), empty adjectives, tag questions with rising intonation (even with an accurate assertion, for example, "Tasmania is part of Australia, isn't it?"), hedges ("sort of"), and politeness markers.[45]

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43 The information about speech patterns described here has been included in previous research which considered its implications for women's testimony about sexual assault and for alternative dispute resolution. See K Mack, Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process (1993) 4 *Criminal Law Forum* 327, at 330–31 and K Mack, Alternative Dispute Resolution and Access to Justice for Women (1995) 17 *Adelaide Law Review* 123, at 130–32.

44 J Conley, W O'Barr and E Lind, The Power of Language: Presentational Styles in the Courtroom (1978) *Duke Law Journal* 1375.

45 S Ross, Proving Sexual Harassment: the Hurdles (1992) 65 *Southern California Law Review* 1451, at 1455, citing Conley, O'Barr and Lind, *supra* note 44, 1380–81, 1386; C Morrill and P Facciola, The Power of Language in Adjudication and Mediation: Institutional Context as Predictors of Social Evaluation (1992) 17 *Law and Social Inquiry* 191, at 193.

Other research suggests that women and men are expected to and do display some differences in speech. It appears that the speech qualities associated with power and credibility are more likely to be displayed by a male speaker, whereas the qualities more likely to be used by, and socially appropriate for, women are those associated with powerless and lessened credibility. This is not to assert that all women speak a certain way, and that all men speak a certain other way. What differences exist may be slight; there are large areas where speech patterns are common, and class, age, education and context, including the particular power relationship between the speakers are all significant factors. Indeed, in many contexts, these other factors will be more important than gender.[46] Nonetheless, certain qualities or behaviours are more often or more likely to be displayed by men or women, in part because of different social expectations about appropriate masculine and feminine behaviour or different social experiences of men and women. These differences, when they occur, can have negative consequences for the evaluation of women's credibility and are part of a pattern of disadvantage.

When I give lectures or speak at conferences or in professional legal or academic settings, I use speech styles associated with powerful (for example, masculine) speakers. If I were to speak in a characteristic (socially appropriate) female style ("um, y'know, like this"), and in a softer, higher pitched voice with a rising, questioning intonation at the end of statements or, worse, in the accent of my native American South, listeners would take what I say much less seriously. A brief demonstration of the different styles usually makes the point.

The link between speech and cultural power is clear:

> We would suggest that the tendency for more women to speak powerless language and for men to speak less of it

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46 Morrill and Facciola, *supra* note 45; C Epstein, *Deceptive Distinctions: Sex, Gender and the Social Order* (1988), ch 10; B Preisler, *Linguistic Sex Roles in Conversation : Social Variation in the Expression of Tentativeness in English* (Berlin, NY: Mouton de Gruyter, 1986) ch 8, discusses hedges and tag questions, chs 9 and 10 discuss age. Some criticism of this research is contained in D Spender, *Man Made Language* 2nd ed (London: Routledge and Kegal Paul, 1985) ch 1, and in S Mills, Discourse Competence: Or How to Theorise Strong Women Speakers (1992) 7 *Hypatia* 4. See also C Morrill, M Johnson, and T Harrison, Voice and Context in Simulated Everyday Legal Discourse: The Influence of Sex Difference and Social Ties (1998) 32 *Law and Society Review* 639.

> is due, at least in part, to the greater tendency of women to occupy relatively powerless social positions … [F]or men, a greater tendency to use the more powerful variant … may be linked to the fact that men much more often tend to occupy relatively powerful positions in society.[47]

The cumulative effect of these patterns makes it much harder for a woman (or any person lacking social power) to be perceived as an effective speaker and will cause her to be regarded as less credible, even when she is accurate and honest. Denial of credibility in this way is not aberrant or unusual behaviour; it is but one instance of an overall social context in which some are powerful and others are subordinate, a hierarchy that is accepted as natural. It is also self-perpetuating: "[p]owerless language may be a reflection of a powerless social situation, but it also would seem to reinforce such inferior status".[48] However "natural" these assessments of credibility may seem, it is still a form of bias which effectively denies equality in society generally, and specifically in law. This denial of equality is reinforced by the rules of evidence law which insist on oral evidence from a witness physically present in the courtroom.

Classes Specifically on Gender/Race/Evidence

I have been discussing ways in which I attempt to embed issues of difference into the basic concepts of the evidence course and the fundamental nature of reasoning about facts. There is also a lecture and a workshop specifically on gender and race, which also consider some aspects of sexuality and class.

For many of us, issues of race/sex are difficult to think about, to speak about and to teach about. It requires exposure of aspects of life regarded as private and exploration of attitudes and experiences that may be painful. Nonetheless, it must be directly taught, because beliefs/views/experiences about race/gender constantly impact on the law generally and evidence law specifically, both within the practical operation of the adversary trial and at the levels of doctrine and theory. This impact does not occur only in the law relating to sexual assault, though that is perhaps the most visible area, and is the focus of the lecture and the workshop.

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47 W O'Barr and B Atkins, "Women's Language" or "Powerless Language" in S McConnell-Ginet, R Borker and N Furman eds, *Woman and Language in Literature and Society* (New York: Praeger, 1980) 104.

48 *Id* at 110.

The classes are explicitly linked back to the earlier exploration of the ways social and cultural perspectives impact on reasoning about facts, as in the birthday party story and the surgeon story. They are also linked to readings from Graycar and Morgan,[49] McRae,[50] the Queensland Criminal Justice Commission[51] and Pia van de Zandt.[52] The readings describe the reality of court room experience for some Aboriginal people and for witnesses testifying about sexual assault, with particular recognition of the specific barriers facing Aboriginal women. The lecture clearly acknowledges that others suffer from the indignities of the legal system, and that there are many sources of social disadvantage. The choice to concentrate on gender/race and its intersection is explained on the basis of my own experiences and perspective and the relative availability of a range of materials to be used for teaching. The particular doctrinal areas addressed are "prompt" complaint, cross-examination — especially about prior sexual history — and corroboration issues. The basis for these lectures is largely drawn from a work edited by Easteal,[53] which reviews recent changes to rape law and associated evidence rules. A few of the main points are set out below.

Prompt Complaint

The exceptional nature of some of the evidentiary rules in sexual assault cases are pointed out. In general, prior consistent statements are not admissible in the examination-in-chief of a witness.[54] One exception to this is a "prompt" complaint from a victim of sex assault (adult or child), where the complaint is used to support the credibility of the complainant.[55]

What is the logical relevance of a prompt complaint to support credibility? Drawing an inference of enhanced credibility depends on the assumption that a person who has

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49 "Evidence, Fact, Truth", "Fact finding", "Judicial Notice", "Credibility" in Graycar and Morgan, *supra* note 34.

50 "Court Testimony", in H McRae, G Nettheim and L Beacroft, *Indigenous Legal Issues: Commentary and Materials* 2nd ed (North Ryde, NSW: LBC, 1997) 366–71.

51 "Executive Summary", "Aboriginal Women" and "Proposed Directions to Jury", in Queensland Criminal Justice Commission, *supra* note 35.

52 P Van de Zandt, Heroines of Fortitude, in P Easteal ed, *Balancing the Scales: Rape, Law Reform and Australian Culture* (Leichhardt, NSW: Federation Press, 1998).

53 Esteal, *supra* note 52.

54 Ligertwood, *supra* note 8, at 480–81.

55 *Id* at 482.

been sexually assaulted will behave in a certain way — complain immediately. Therefore, a person who acts in that way is more credible, and conversely, a person who does not act that way is less credible.[56]

As an assumption of fact regarding typical victim behaviour, this is clearly wrong.[57] There are many barriers which prevent victims of sexual assault, whether man, woman or child, from speaking to anyone. In the lecture, I ask the class to reflect on and discuss what some obstacles might be, and what additional barriers might be faced by Aboriginal women, or members of other marginalised social groups.

Cross-examination

Wigmore's characterisation of cross-examination as "the greatest legal engine ever invented for the discovery of truth"[58] continues to haunt the adversary system and assumes particularly damaging importance in sexual assault cases. In general, the cross-examiner may ask any question relevant to an issue, such as the victim's consent, the accused's belief in the consent, the sexual contact alleged, or any questions relevant to the witness's credit. The importance of cross examination is a key factor in the law's emphasis on oral testimony from a witness who is physically present in the court.

Heroines of Fortitude describes in some detail the nature and extent of cross examination facing women who testify about sexual assault.[59] The complainant must repeatedly describe the smallest details of sex acts, endure repeated suggestions that she is lying, even if corroboration and/or injuries are present, as well as defend her allegedly sexually provocative behaviour and clothing, such as wearing a swimsuit. Research suggests that jurors are clearly influenced by information about drinking, drug use, sex outside marriage and prior social acquaintance between the defendant and victim, and will deem the victim at least partly to blame, whether the defence is claiming there was consent or that there was no sexual intercourse.[60]

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56 *M v R* (1994) 181 CLR 487, 513 per Gaudron J in dissent.

57 S Bronitt, The Rules of Recent Complaint: Rape Myths and the Construction of the "Reasonable" Rape Victim, in Easteal, *supra* note 52, at 41–58.

58 Ligertwood, *supra* note 8, at 503.

59 Sexual Reputation and Sexual Experience, in NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Woolloomooloo, NSW: NSW Department for Women, 1996) 223–52.

60 GD LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (Belmont: Wadsworth, 1989) 226–28.

Often, such questions attempt to reinforce certain stereotypes of women: as liars;[61] that she asked for it; that she has an ulterior motive, a grievance, or has been scorned by her alleged attacker; (if the accused is wealthy) that she is a golddigger; and that she is an exaggerator, a fantasiser or is simply delusional.[62] "[B]ecause women lie" she becomes the wrongdoer, and "it is really men who need protection".[63]

The experience of such cross examination is very distressing to the witness. In 65 per cent of trials studied in *Heroines*, breaks were needed to assist witnesses in distress. The experience is especially difficult for Aboriginal women, because of language differences, such as unfamiliarity with the English terms for sexual acts or parts of the body, and a cultural reluctance to discuss some sexual matters in the presence of men.[64]

One especially distressing feature is questioning about sexual experience and prior sexual acts. At common law, sexual reputation and sexual experience were regarded as relevant to credibility and to the issue of consent.[65] The alleged "logic" was that, in a woman, a bad character for chastity equalled a bad character for truth and might also show a propensity to engage in sex. Now, most jurisdictions have enacted a so called "rape shield" law, to limit cross-examination about prior sexual conduct which could be the basis for these clearly unfounded inferences. However, the impact of rape shield laws has been less than reformers hoped, and it appears that judges are readier than one might think to find relevance in questions about prior sexual conduct.[66] Research suggests that evidence of prior sexual acts was raised without applying for leave in 30-40 per cent of trials.[67]

In this area, evidence law assumes and constructs a particular pattern of heterosexual sexual relations in which voluntary sex is presumed to be repeated, making it difficult for sex to be credibly refused — a particularly damaging construction, as most rapes occur between acquaintances.[68]

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61 AD Ronner, The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in *Jones v Clinton* (1997) 31 *UC Davis Law Review* 123.

62 *Id*.

63 *Id* at 140.

64 Queensland Criminal Justice Commission, *supra* note 35.

65 Ligertwood, *supra* note 8, at 164–70; T Henning and S Bronitt, Regulating the Use and Abuse of Sexual History Evidence, in Easteal, *supra* note 52, at 77–80.

66 Henning and Bronitt, *supra* note 65.

67 *Id* at 90.

Corroboration

There is an inherent obligation on a trial judge in a criminal case in Australia to warn the jury in relation to certain kinds of evidence thought by law to be inherently unreliable and/or especially likely to appear more reliable to a jury than it really is. At common law, there was no fixed legal requirement of corroboration of the testimony of a complainant in a sexual assault case, though judges were expected to warn that it would be unsafe to convict without corroboration.[69] The usual form of warning given in Australian courts was derived from the English case of *R v Henry*[70] in which Salmon LJ said:

> … in cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone … because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.[71]

This requirement for corroboration has been formally abolished in most jurisdictions,[72] based on a clear recognition that such generalisations have no basis in fact.[73] Thus, Australian law no longer officially supports the worst myths about women as subtle malicious liars in sexual matters.[74] However, judicial interpretation of the legislation abolishing corroboration warnings emphasises the inherent power of courts to give guidance in relation to such evidence.[75] This has meant that continued warnings are the norm, not the exception, in

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68 Easteal, *supra* note 52.

69 Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (Melbourne: Law Reform Commission of Victoria, 1988) 39; Ligertwood, *supra* note 8, at 203.

70 (1968) 53 Cr App R 150.

71 *Id* at 153.

72 *Evidence Act* 1929 (SA) s 34I(5); *Crimes Act* 1958 (Vic) s 61; *Evidence Act* 1971 (ACT) s 76F; *Sexual Offences (Evidence and Procedure) Act* 1983 (NT) s 4(5), (6); *Evidence Act* 1995 (NSW) ss 164–65; *Criminal Code* 1924 (Tas) s 136; *Evidence Act* 1906 (WA) s 50; *Evidence Act* 1995 (Cth) ss 164–65.

73 K Mack, "You Should Scrutinise Her Testimony with Great Care": Corroboration of Women's Testimony about Sexual Assault, in Easteal, *supra* note 52. For a clear judicial recognition of this, see Coldrey J comment in *Ware*, "[i]t may be doubted whether the historical rationale advanced … was ever founded upon more than … specious generalisation": (1994) 73 A Crim R 17, 30.

74 *Longman v R* (1989) 168 CLR 79.

trials. The current practice appears to be for judges to direct juries that they should be careful of a complainant's testimony and evaluate it in the light of human experience, or that they should scrutinise it with care, though they may act on it even without corroboration if they are satisfied.[76] If there is no corroboration, judges continue to warn juries that it would be dangerous to convict on the woman's testimony alone.

Thus, judges still cast unwarranted doubt on women testifying about sexual assault in ways that construct and maintain a particularly negative image of women as lacking the capacity for speaking truthfully about sex and being particularly adept at concealing their falsehoods.[77]

Casablanca

To lighten up what can become a very intense and negative message, at the end of the lecture I show a short excerpt from the film *Casablanca.* In the clip, we see Rick (Humphrey Bogart) and Ilsa (Ingrid Bergman) together in Rick's apartment in Casablanca during World War II. She begs him for documents needed to allow her husband to leave safely, then draws a gun and threatens to kill him when he refuses. He steps closer to her and urges her to go ahead and shoot, whereupon she begins crying and recalls how much she loved him in Paris, when they became separated by the war. They embrace and the film cuts away to show a lighthouse with a blinking light, then returns to the apartment where Rick, still in white dinner jacket and tie, is smoking a cigarette and looking out the window, and Ilsa is sitting on the couch explaining how she came to leave Paris.

The students are asked whether Rick and Ilsa have had sexual intercourse.[78] The ensuing discussion raises a number of the cultural assumptions about heterosexual intercourse (as well as film-making conventions) and views can be sharply divided, though not necessarily along gender lines.

The Workshop

The problem set for the workshop is technically and emotionally challenging. It is set in a university and involves a sexual assault allegedly perpetrated on a first year female

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75 *Id*.

76 Easteal, *supra* note 52.

77 J Temkin, *Rape and the Legal Process* (London: Sweet & Maxwell, 1987) 134.

student by a group of final year male students. The students are asked to respond in the role of defence counsel. I consulted widely when preparing the problem, to avoid reinforcing stereotypes or creating particular and inappropriate discomfort for students. In 1998, the problem involved an Aboriginal student as complainant and a wealthy white student as the accused. In 1999, no racial or class characteristics were given, and one of the discussion questions asked students what characteristics they had attributed to the participants. In the lecture, I explain the reasons for setting the problem, including the importance of learning to discuss difficult issues in a professional setting and the need to practice doing so in a relatively protected space before being confronted with such a challenge in a more demanding setting. I also make clear that, although workshop contributions are usually assessed, any student who did not wish to be assessed for this workshop should simply indicate as such to myself or the tutor, and they could choose to attend or not. I found that students did attend and the discussion was generally quite thoughtful and respectful, and conducted in a generally distant, professional voice, rather than a more personal one, as other classes sometimes were.

Assessment

The fourth step in the treatment of issues of race and gender in the evidence class is to ensure that these ideas are assessed, as that, realistically, will drive student learning.[79] The assessment in 1998 consisted of class participation and an end of year examination, which included a problem worth two-thirds of the examination mark and an essay worth one-third. In 1999, a written assignment, which required problem analysis and consideration of assumptions about human behaviour, was added.

The assessment problems are drafted with care, to avoid raising personal emotional difficulties for students. Issues which might be distressing, such as those relating to sexual assault, are raised only in the essay question, where students have a choice. Issues of gender, race, diversity and cultural assumptions will arise in the problem, usually as part of initial determinations of relevance, as well as in an essay. Students who are able to discern and test unreliable generalisations as part of their reasoning about facts will see more issues and

78 Thanks to Prof Richard Maltby, Screen Studies, Flinders University of South Australia for suggesting this teaching exercise.

will receive a better mark. This is made clear to them in classes when discussing what is expected in the examination.

Student evaluations of the course were generally favourable. There was very strong agreement that the subject was challenging [6.5 on a 7 point scale], and there was also strong agreement that the subject was difficult [5.4], with a fairly heavy workload [5.2] and was presented at a fast pace [5.7]. At the same time, there was substantial agreement that the assessment was fair [5.7], that they understood the subject matter [5.8], and that they had a positive attitude to the subject [5.8]. There was a strong view that the aims of the topic were implemented [6.0], which suggests that the basic focus on facts and reasoning from facts was accepted. Taking these findings together suggests that the students were willing to accept and even be enthusiastic about a subject which is both doctrinally difficult and which deals in a serious way with issues of diversity.

Conclusion

Because issues of race, gender and diversity are considered to be central to the fundamental evidentiary concepts of relevance and proof, they are raised from the very beginning of the evidence course and are re-emphasised in different ways throughout the semester. In this way, the issues are not marginalised and do not take time away from aspects of doctrine which we must cover. Inevitably, fewer exclusionary rules, or fewer exceptions to them, are covered, but it appears that the approach used enables students to recognise, understand and apply those variations when they come across them.

We live in a world where personal characteristics and social attitudes have an impact on everything we do. By formulating objectives largely in terms of student ability to work with facts by identifying relevance, use and the chain of reasoning employed, I hope to enable students to reason better about information, and the conclusions which can be drawn from it, in any context.

TEACHING NOTE

Student-Led Classes and Group Work:
A Methodology for Developing Generic Skills

*Alison Greig**

Introduction

The challenge for any educator is to make the process of learning interesting. In practice, this entails acceptance of the fact that the "purpose of education is to stimulate inquiry and skill in the process of knowledge getting [rather than requiring students] to memorise a body of knowledge".[1] While traditional legal education emphasised the acquisition of knowledge or "cognitive learning", today professional legal education must seek to achieve other goals, including "the ability to use that knowledge in a legal context; and the cultivation of other social and interpersonal characteristics and qualities".[2]

As a Torts[3] teacher two imperatives are kept in mind. My faculty emphasises student centred learning as the focal point of all its teaching, and the University requires graduating students to have developed identified generic skills. It was my challenge, whilst fully engaging the students, to build a subject which integrated some of the relevant generic skills, and covered the elements and reasoning of tort law. I was also keen to encourage students to develop social and interpersonal skills which, though they have not always been actively cultivated in law curricula, are desirable for legal practice as well as for other work environments.[4]

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 (2000) 11 *Legal Educ Rev* 81.

1 DA Kolb, *Experiential Learning* (Englewood Cliffs, NJ: Prentice-Hall, 1984) 27.

2 S Kift, Lawyering Skills: Finding Their Place in Legal Education (1997) 8 *Legal Educ Rev* 43, at 49.

3 At the University of Wollongong the Law of Torts is a third year subject in the combined undergraduate program and a second year subject in the graduate program.

4 See Kift, *supra* note 2, at 52-59. Kift identifies skills which are "transferable" to many work environments and makes the important point

Over the last two years I have used an assessment task where students studying Torts were required to take charge of the "teaching" of seminars. The students worked co-operatively in groups of three to five and were each assigned two weeks of classes to conduct. I had a high level of involvement "behind the scenes" in supporting the development of their ideas and in clarifying legal principles, but I left the creative processes largely up to them. The groups were required to submit a plan of their meetings and intended tasks, keep a record of meetings and provide a "Reflective Diary" at the end of the process.

The outcome became a true celebration of the creativity of our students, and illustrated how innovative assessment can be used in core law subjects to develop generic skills and to increase the depth of student understanding of the material. Students were given free reign as to how they were going to conduct the classes. They were given a number of tasks but with one vital instruction and mission: to actively engage the rest of the class in learning. By encouraging the students to be creative and to trust their own judgements and initiatives, the classroom became a dynamic and exciting learning environment.

Students also developed skills which would be useful in a variety of work environments and were not simply provided with knowledge about the subject.[5] These "generic" or "transferable" skills "provide a basis for lifelong learning".[6] Skills such as problem solving, critical thinking, effective communication, teamwork, and organisational, personal and interpersonal relations are not subject specific and complement students' acquisition of professional knowledge.[7]

This note falls into four main sections. In the first section I describe and discuss aspects of the formal structure of the group work program: the objectives and the assessment scheme. In the second section, my special approach as a teacher is outlined. I discuss here my assumptions about learning, and issues arising from the need to establish an appropriate class setting and dynamics. In the third section,

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that many law students will work outside of legal practice and thus "transferable" skills are important, at 53.

5 *Id* at 52.

6 Final Report of the Generic Skills Working Party, Submission to the University Education Committee, University of Wollongong, October 1997.

7 *Id*; also see G Gibbs et al, *Developing Students' Transferable Skills* (Oxford: Oxford Centre for Staff Development, 1994) 9 identified a number of transferable skills. See Kift, *supra* note 2, at 53.

the students' efforts are described and analysed through the reflections on their learning styles and how they approached the performance of group tasks. The final section, leading up to a conclusion, discusses the various evaluations of the program as apparent from student reflections in their reflective diaries and in the formal subject evaluation.

Objectives

A key function of the group work was to develop identified generic skills. The objectives for the group exercise were principally to:

- create an interesting learning environment
- integrate course material at a much deeper level by preparing the material for a "teaching" situation
- provide opportunities for students to work independently with the course material
- develop teamwork
- develop oral communication skills
- encourage student centred learning.

In satisfying these broad objectives, there were a broad range of generic skills which were developed through the use of co-operative groups and class leadership. These are outlined below.

GENERIC SKILLS DEVELOPED THROUGH THE CO-OPERATIVE GROUP ASSIGNMENT

Generic Skill	***How Demonstrated in Group Assignment***
Oral and written communication	Working with an audience; developing videos and visual aides; organising and synthesising information in a manner suitable for presentation in a logical format; formulating questions relevant to discipline; speaking in the language of the discipline; writing Reflective Diary.
Teamwork	Working co-operatively; taking leadership role with own education and with the classes as a whole; taking responsibility for own learning and that of others; relating to others in group; decision making; developing management strategies; compromise and negotiation; engagement in constructive criticism and argument; social responsibility fostered by the recognition of the importance of each member's contribution; valuing the opinions of others.

Generic Skill	*How Demonstrated in Group Assignment*
Personal	Recognition of own abilities and skills; development of self-confidence; self-reflection; independent development of ideas; interacting with others in group and class.
Organisational	Time-management; setting objectives; evaluating effectiveness of seminar leadership; making appropriate changes; application of problem solving strategies.
Information gathering and learning	Locating sources of information and extracting relevant information; initiating research; researching relevant material; critical evaluation of material; devising solutions to problems.
Problem solving	Identifying and devising solutions to various problems, for example by devising ways to work in a group, managing large volumes of information, working with the material and presenting it.
Information technology	Using word processing, video, PowerPoint® presentations, and other technology.

Assessment

The group assessment item was allocated 20 per cent of the total number of marks in the subject. One reason to limit the marks allocated to 20 per cent is that there is usually a narrower spread of marks between group marks than there is with individual grades, and the marks tend to be high.[8] This trend is balanced out by using other assessment tasks, such as examinations and assignments. Ten percent of the total marks were also allocated for assessment of overall class participation.[9] Thus marks were awarded for both leadership and participation.

The way marks are allocated can subtly affect student behaviour.[10] I wanted to encourage students to work as a team, and in that case awarding the same grade is appropriate.[11] However, I was sensitive to students who felt that in group projects they tended to undertake most of the work.

8 G Gibbs, *Assessing Student Centred Courses* (Oxford: Oxford Centre for Staff Development, 1995) 19.

9 Class participation is assessed on clear criteria and students received feedback mid semester on their general progress.

10 Gibbs, *supra* note 8, at 16.

11 *Id*.

Thus, each group was given an option to elect one of two assessment regimes: either each student would be awarded the same mark for the project, or, alternatively the group could elect to be given a global figure, the group then being responsible for allocating the marks between themselves. This latter option was intended to cater for complaints that some students did not pull their weight, a common problem in group assignments.[12] However, no students adopted the latter option. Most expressed concern that they would not want to go through such a process with their peers.

The seminars were assessed on the following criteria:

- preparation of materials
- handling questions
- content (having regard to time restrictions, purpose and organisation)
- quality of contribution (clear and well researched)
- relating to audience (including audibility and eye contact)
- generation of class discussion
- overall cohesion of group.

In the past two years there has been no mark awarded for the Reflective Diary. This item has become more important in the group process and it will be included as part of the assessment in the future. Because feedback is an essential part of the learning process, students were provided with feedback both from their fellow students and from the lecturer as to what aspects worked well and what might be improved. The lecturer also provided written feedback on each of the assessment criteria and on the Reflective Diary.

Assumptions About Learning

In developing the group assessment process I relied upon a number of assumptions about learning. First, that learning is an active process and students only really learn through constructing knowledge in ways that are meaningful to them.[13]

Secondly, individual students learn in different ways.[14] Traditional law teaching has favoured a particular learning

12 *Id*.

13 C Meyers and TB Jones, *Promoting Active Learning: Strategies for the College Classroom* (San Francisco: Jossey-Bass, 1993) at 20-21; see also J Piaget, *The Psychology of Intelligence* (London: Routledge & Kegan Paul Ltd, 1950) at 7-13, 119-55 and RR Skemp, *Intelligence, Learning, and Action* (Chichester: John Wiley & Sons, 1979) 212-21.

14 Kolb, *supra* note 1, at 61-98.

style which emphasises an individual's ability to obtain a "body of knowledge" on a particular subject through the process of reading legal materials and selecting the "relevant" principles from those sources. I was keen to try to adapt some assessment methods to value a wider range of abilities and learning styles.

Thirdly, there is value in teaching and learning in small groups. Leading educators have identified many benefits of group work,[15] such as:

- personally engaging students in initiating discussion and activities
- engaging students in clarifying and solving problems which may involve evaluating or analysing legal materials
- allowing students to develop their expression in the "language of the subject"[16]
- encouraging independent thinking
- fostering a student's sense of social belonging, which can promote motivation and commitment to learning
- providing the opportunity to understand group dynamics and how participants operate in a group
- promoting skills such as listening as well as persuading and presenting ideas[17]
- developing transferable skills such as time and task management, creative problem solving, and written and oral communication skills.[18]

Fourthly, a teacher who has the role of an authority figure in the classroom can stifle student discussion and the most effective way a teacher can increase participation is to remove herself or himself from the discussion.[19] Personally, I was convinced that if I could remove myself from the centre of the classroom and create a situation where the students were individually responsible for each other's learning the classes would be both more interesting and a better learning experience. There are a number of challenges to removing oneself from the centre of the class, however. There is a personal fear that students will not cover the course content. Over the last two

15 See M Le Brun and R Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Sydney: Law Book Co Ltd, 1994) 292.

16 *Id* at 291.

17 *Id*.

18 Gibbs, *supra* note 8, at 13.

19 G Webb, The Tutorial Method, Learning Strategies and Student Participation in Tutorials: Some Problems and Suggested Solutions (1983) 20 *Programmed Learning and Educational Technology* 117, as cited in Le Brun and Johnstone, *supra* note 15, at 288-89.

years I have come to trust that the students are more than capable of coming to terms with the content! Furthermore, I have seen that coverage of content is often less important than the students' analysis and treatment of what they do cover. Another pressure from some (although remarkably few) students is the desire to be "taught". I always get one or two student surveys returned with a request that I "teach" them. In academia today, where some weight is placed upon these student surveys, they can act as an uncomfortable control on innovation. The desire to get good survey results may overwhelm any pioneering spirit to assist the students to put in the hard work. It is gratifying however to report that student surveys of the course have highlighted a positive reception to student-led teaching.

Fifthly, it is important to encourage self-reflection so that students can identify what abilities they have and where they need to develop skills to work co-operatively. In teaching and assessing first year students I had noticed that many found self-reflection difficult. That is, they had difficulty in identifying the position or role they had taken in carrying out certain activities and in fairly assessing what skills had been used (or might have been used) to resolve problems or to complete tasks. To assist the students, I started the course by using a short exercise to help students to identify their learning style. This gave them an active experience of self-reflection. Another means of encouraging self-reflection was the requirement that each group keep a diary or journal of their progress. Journal writing allows students to "step back from an incident, a conversation, a reading or something heard or seen and reflect upon it with understanding".[20] The diary was to include reflections upon what each student felt he or she had gained from the group experience as well as what were the limiting or negative factors.

Sixthly, students should be assisted to develop skills which can be useful in a variety of work environments and not simply provided with knowledge about the content of a particular subject.[21] These "generic" or "transferable" skills are desirable for legal practice or other future employment because they are "relevant, useful and durable".[22]

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20 J Lukinsky, Reflective Withdrawal through Journal Writing, in J Mezirow (ed), *Fostering Critical Reflection in Adulthood: A Guide to Transformative and Emancipatory Learning* (San Francisco: Jossey-Bass, 1990) 213.

21 Kift, *supra* note 2, at 52. It is noteworthy that some institutions have formal policies in place requiring that students be given the opportunity to develop such skills by the time they graduate. Kift, *supra* note 2, refers to the Queensland University of Technology. The University

Finally, the best way to learn a topic is to teach it.[23] Student-led seminars are not always effective however, for the class as a whole. I had experienced situations where one or two students would "present" a seminar paper and (and apart from being extremely boring) all this did was stifle participation of class members. So the challenge was to create student-led classes which actively encouraged the whole class to participate. I was keen to foster an environment of mutual responsibility where the students were inspired to keep the classes running well. This was largely achieved by the way the assessment task was set. Since each group was responsible for creating an environment where all members of the class participated, it was clear to the whole class that to achieve high grades they all needed to support the process as presenters and participants. The classes operated, as Le Brun and Johnstone have suggested, by encouraging students to be creative and to choose their own way of developing the material. Getting the class to interact as a whole meant that "everyone in the class works as teacher and learner, which gives the students a better understanding of the learning process and enables students to work cooperatively".[24] In one whole semester, with five different groups running, there was only one "dead" class, which was explicable because those students had an assignment due in another core subject.

Establishing Class Dynamics

In order to create an appropriate setting for the group leadership of seminars I provided a wide range of activities in the early classes to give examples of ways to stimulate learning without "lecturing". They included small group exercises involving case analysis and legal problem solving, asking the groups to present their solutions to the class as a whole, and mooting the different sides of the case. We discussed newspaper reports of current legal cases and had quizzes (with prizes) on different topics. A key to these first classes is that students actively participate with each other. Although I was actively involved in the learning process, such as providing them with in-depth questions on cases and with problems, and by setting time limits for the tasks, I sat back from the "action" and allowed them to create their own classroom

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of Wollongong also has identified "tertiary literacies" which students should be able to apply in appropriate circumstances: *supra* note 6.

22 Final Report of the Generic Skills Working Party, *supra* note 6.

23 Le Brun and Johnstone, *supra* note 15, at 290.

24 *Id*.

environment. I only responded to questions and gave assistance when required. After a few weeks the classes found their own dynamic and were very lively!

Once the class dynamics were established my role was mainly one of adviser in the developmental process and provider of feedback during (and at the end of) the project. I encouraged students to come and discuss ideas with me before their presentations and provided feedback on what might work best. My primary aim was to allow the students to find their own solutions to group problems, so they were always invited to discuss their problems first with each other. I would only intervene if all else failed. All groups completed the project and some reflections suggested that valuable lessons were learned from difficult situations.

Lectures were held in the week preceding each seminar and were intended to present an outline of the legal material in each topic so as to build student confidence with the material to be worked with in the seminars. I considered the lectures to be an important aspect of the learning process as they provided a framework for understanding the material to be covered in more depth in seminars. The lecture outline for the course provided a wide range of material, and included cases, specific questions on each topic and a large number of problem questions. Students were not restricted however to using the material in the Course Outline, and often developed their own problem questions or scenarios from which to discuss the material.

Reflecting on Learning Styles

Numerous writers have identified a cycle in experiential learning.[25] They have suggested that, since students have distinct learning styles, they will each have different capacities and strengths at various stages in the learning cycle. Research in active learning emphasises the need for reflection to assist the learning process. Personal reflection helps students in a number of ways. It helps them analyse and understand new information or experiences.[26] It allows them to critically assess their own skills and abilities in a given situation. It also assists "the learner to develop the necessary skills to enable

25 See Kolb, *supra* note 1, at 61-98; Gibbs, *supra* note 7, at 13; I McGill & L Beaty, *Action Learning: A Practitioner's Guide* (London: Kogan Page, 1992) 26-27; Kift, *supra* note 2, at 26-30 and 62-63.

26 Meyers and Jones, *supra* note 13, at 29.

them to operate within the full range of learning styles, furthering their ability to learn lifelong".[27]

There are numerous models for classifying learning styles[28] and it is beyond the scope of this paper to detail the model adopted other than to say that it was based on four broad groups of learning style. The students answered a simple questionnaire, scored their marks and then placed their scores on a graph. This enabled them to identify their dominant learning style. Students were asked to reflect on their learning style and on how it might affect their study patterns in a group and in the study of law generally. Students were also asked to consider the sorts of qualities that might be needed in successfully working in a group. Commonly identified abilities were: communication skills, time management, organisation, research and writing, creativity, and the ability to get on in a group. They were invited to identify their own strengths and weaknesses, and discussion focussed upon how they might build a group using that knowledge. Students were instructed to use each other's strengths in developing the material and in leading the seminars. They were informed of the importance of identifying any difficulties in the group and, if these could not be resolved, of the availability of their lecturer. This process was important in setting an environment for self-reflection and heightened student awareness of how they interact with legal material and learning environments. I have found that the students have often been very enlivened by this process.

Students then self selected groups of four to five students and each chose class times for their individual seminar leadership.[29] Ordinarily, most students will choose to work with friends or others with whom they have worked before. Gibbs reflects on the problems of allocating groups, suggesting that the educator allocate groups to avoid friends working together.[30] My experience, however, is that students are capable of creating a

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27 Kift, *supra* note 2, at 64.

28 See P Honey & A Mumford, *Using Your Learning Styles* (Maidenhead, Berkshire: Printique, 1986); J Atkin, *How Students Learn: A Framework for Effective Teaching*, Seminar Series for the Incorporated Association of Registered Teachers of Victoria, No. 22 (Jolimont, Victoria: Incorporated Association of Registered Teachers of Victoria, 1993); RJ Sternberg, *Thinking Styles* (New York: Cambridge University Press, 1997).

29 In smaller classes groups of three are permitted, but the best dynamic, in practice, has been four. Le Brun and Johnstone, *supra* note 15, at 294 point to research which suggests that group dynamics change in groups of more than six.

30 Gibbs, *supra* note 8, at 17.

group within which they can work, and that to allow them to choose their own groups avoids later complaints that the group was forced upon them. Many groups of friends have had valuable learning experiences. Gibbs also criticises allocating groups on the basis of learning style, suggesting that it is "unlikely to be effective".[31] In the group projects, however, the students' awareness of their learning styles appeared to benefit group dynamics and how they worked together, even though it was never used as the sole basis for group selection. One student reflected that this awareness had set her agenda for how she worked with her colleagues in future courses. In that sense it had become a transferable skill.

Problem Solving

As part of the active learning approach, the group identifies the tasks that are to be performed and constructs a method of problem solving to perform those tasks. Thus the groups were asked to set up their first meeting time to prepare a group plan. This set the framework for later interactions and also engaged the students in the planning process — setting goals and making early decisions as to how tasks were to be divided. The work plan outlined dates and times for group meetings and the tasks to be completed at each meeting, as well as the group's personal objectives and how tasks were to be assigned. Students were asked to keep a diary of their meetings to assist them in preparing their "Reflective Diary" which was to be handed in a week after their seminar leadership was completed.

Group Approaches

It is impossible in a short article to give coverage to all the innovative approaches the students took. A number of groups developed their own problems and then enacted them on video — cleverly integrating the legal issues to be covered — and then dividing students into "law firms" to advise and argue the cases of the numerous plaintiffs and defendants. The students' videos were entertaining and engaged the classroom interest in the fictional clients' plight. Other students used television programs in similar ways. For instance, one group developed a mock trial on causation based on two "Seinfeld" episodes, while another drew up a series of

31 *Id.*

problems on the duty of care based upon highlights from SBS's "South Park". Other students used game show formats and prizes to engage student participation. Another group ran their class like a current affairs program, dressing up as roving reporters, asking the class questions about what they thought of particular legal incidents that they had play acted. Another group divided the class into couples to work out damages claims and then asked the groups to negotiate a settlement of their cases with opposing teams. What is significant is that in each class there was a high level of participation. Every class was extremely responsive to their peers' efforts in making the material accessible and interesting. What is more, from a teacher's perspective, there was no compromise in the quality of learning. Quite often the tasks that group leaders asked students to participate in were very challenging and might have met with resistance if they had been assigned by a "lecturer".

Student Reflections in their Reflective Diaries

The classes involved 90 students who were divided into 25 groups. Overall, student reflections suggest that most found it a rewarding and fulfilling experience. One commented that it had given her a "new and positive experience working with groups". Another student rated parts of the group process "amongst the most enjoyable exercises" of his university career. Another commented that "working as a team is a much more interesting and fun way to learn than trying to understand a topic on your own". Some commented that they noticed that their abilities to work within a group improved as the weeks passed. They identified common goals, commitment, co-operation and reaching consensus through discussion and flexibility, as important skills that had been developed and used.

Identified "positives" for working in groups were that members could bounce ideas off each other and learn to appreciate different ways others approached problems. One student, who had always left work until the last moment, had positive experiences in working with more organised colleagues. She found she could get her work done "without being stressed". Another student identified that she had "developed interpersonal skills through group discussion … recognising the contribution that each person makes".

Some problems were identified. A common problem was arranging meeting times around work schedules. (Strategies for dealing with this included having smaller meetings for

particular tasks.) Another difficulty was time management — this was a problem in differing degrees for many groups. Four groups fell into difficulties because not all members of the group understood all the material for the assigned class. As one student commented:

> Group work is exactly that … group work! Therefore all of our members should have been aware of all of each other's material. However, we also learned that whatever happens in a presentation, you are a group and therefore have to stick together and continue the presentation without causing discomfort in the group.

In this particular case the problems surfaced in their first week of leadership and they were able to remedy the problems in the following week, identifying the issue of lack of communication with each other. This was also a positive outcome of leading the groups over two weeks. It gave an opportunity to evaluate and reflect on the success of the first week and make changes for the following week.

Most groups were very happy with how their classes had gone and the confidence that had been built through the process was tangibly evident in the reflections. A number of students commented on their "increased levels of confidence" to present material and interact with a large group of people. One student commented that "it was encouraging for us to find we could put together four hours worth of seminar, which seemed quite intimidating at the beginning", and that students found it interesting and absorbing.

Even some groups that had not functioned particularly well considered that their experience was valuable. Many found the creative process to be rewarding, noting a sense of achievement on a personal and group level. They were often gratified to learn that other students found their leadership had really helped them understand the subject material covered. Most felt that they had gained a thorough understanding of the material covered through the process of creating a learning environment for other students.

Subject Evaluation

In the teaching evaluation surveys conducted by the university, the Law of Torts has received consistently high ratings, even though lecturers have stepped out of the traditional teaching role. But the use of the group leadership of seminars met with mixed responses as a form of teaching and

learning. Many students liked the "student-centred approach", identifying this as one of the most positive aspects of the course and an "excellent method of teaching" which "should be put in more law subjects". However, a number of students commented that they wished to be "taught" in a more traditional way and some students suggested that the group work component of the course be removed. Concerns were expressed that student-led discussion was not sufficient and left them too much on their own to grapple with difficult material. This feedback appeared to be brought about by concerns that students were not learning enough in seminars, and by a lack of confidence in their peers' ability to present the material. But from my perspective it was only rarely that students were confused and they never misled the class about the meaning of any legal principles. I was generally impressed with the quality of the presentations and the overall agility students displayed in dealing with the material. I had offered myself as a resource to all groups and spent a lot of time outside classes with many students assisting them to prepare material for classes. Since I had been fully involved in what the students were doing, most seminars illustrated how well the students had understood the material.

A number of students wanted me to take a more dominant role in the classes. There is a tendency for students to treat teachers as the oracle of knowledge, which is something we are trying to step away from in student-centred learning. It is often difficult to find a balance that suits all students. Using a group process will always be controversial. One student pointed out that the student focus in groups forced people who would not normally participate to do so, which could be seen as a "good or bad aspect of the subject". From an academic point of view, the increased participation is probably a good thing! The group process certainly places the emphasis of learning upon the students.

Conclusion

The model of group work I used has many benefits as a teaching and learning strategy. The process certainly develops the generic or transferable skills identified in the table above. Student-led classes make learning a more interesting exercise for the students. The attendance in classes was almost 100 per cent, and students arrived with a sense of anticipation and excitement as the groups tended to keep as a surprise what they were going to do with the classes.

Focussing the teaching and learning of the subject on group projects is an intensive teaching experience, since it requires a lot of time to be spent with students outside of classes. Embarking on such an experiment also requires much thought to be given to dealing with the many problems which arise. But it has been extremely rewarding to see the development of the students' confidence and to participate in their creative processes. As one group commented:

> we all learnt a lot more about the topics by presenting the seminar than we otherwise would have done. The seminar showed us how important interaction and feedback are when assimilating a topic. People learn a lot more when they are "doing" than when they are just listening. We have learnt a lot about running a seminar, from both our own and other groups' experiences, and feel that group discussions and a problem based seminar are most effective for class participation and learning.[32]

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TEACHING NOTE

Evaluating a Change to Seminar-Style Teaching

Kirsten Anker, Catherine Dauvergne,** Mark Findlay† and Jenni Millbank††*

Introduction

While the use of small to medium-sized seminar-style groups has long been a feature of some Australian law faculties, such as the University of New South Wales, it is a recent innovation in others, including the University of Western Australia and the University of Adelaide. In March 1996 the Faculty of Law at the University of Sydney made a decision to move from a traditional lecture and tutorial structure to seminar-style classes of limited size.[1] This article discusses the reasons for the move away from a traditional lecture/tutorial format to an interactive seminar-style model of teaching. The paper explains the 1999 review of the new model and presents highlights of the review.[2] It provides an opportunity to reflect on both the shift in teaching paradigm and the means of assessing such broad-based program shifts. At the

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1 The motion was carried in a Faculty Meeting by 44 to 3.

2 A full report of the review is available from the Faculty of Law of the University of Sydney on request. See K Anker, C Dauvergne, M Findlay and J Millbank, *1999 Faculty of Law Teaching Audit Final Report*. This paper presents many issues raised in the report, but does not attempt to summarise it, nor does it dwell on matters of relevance only to an internal faculty audience. The 1999 Faculty of Law First Year Teaching Audit was made possible by funding through a University of Sydney Vice Chancellor's Award for Teaching Excellence. The University of Sydney College of Humanities and Social Sciences provided additional funding. The funding from both of these sources made it possible to conduct an intensive research effort. We greatly appreciate this support and recognise that it provides a rare opportunity for this type of work. Thanks also to more than 25 members of staff, and many students, who took the time to participate in interviews, focus groups and surveys.

time the review was completed the model had been in operation for three years.

We sought to examine how the model was working in practice, how it was being received by staff and students, the problems and concerns that were arising from it, and the solutions that could be directed to those issues at both a micro and macro level. Concerns at a micro level focused upon the actual teaching and learning environment in each classroom through the use of the new model. At a macro level, issues of concern revolved around the implications of the use of the model for the delivery of courses and the program as a whole. Specifically, these included the implications of increased specialisation, with varied course content and assessment, upon the coordination of the degree program as a whole.

In this paper we examine these various concerns in turn and note some of the recommendations which the audit produced to deal with these issues. Our aim is to explain and explore the challenges posed by a transition from a lecture/tutorial model to interactive medium sized seminar-style groups. We argue that the change to seminar-style teaching is a positive step, but that considerable energy and resources must be invested to change the culture of teaching and learning in order to make the transition a successful one. In addition, an evaluation of any change in teaching model is an essential step in ensuring the on-going success of the new model, in building support for a new teaching culture, and in fine-tuning the inevitable hiccups of such a change.

A New Model for an Old Faculty

The Faculty vote to adopt what was termed "seminar-style" (small-medium group) teaching followed a long process of curriculum review. In 1995 a Discussion Paper indicated that major issues for the Faculty included a desire to integrate skills and substantive knowledge within units, and to build up a synergy between all aspects of a unit — information, teaching methods, materials and assessment. Rather than trying to cover all theoretical and skills aspects in each unit, specialisation of approaches in different units was also sought. It was in part these aims that pointed to the need for a teaching model which would allow for greater experiential learning than the traditional lecture/tutorial model.

These recommendations arose out of a perception that the Faculty goals and methods were not necessarily in synchronisation. The statement of goals for the Law School is:

> The University of Sydney Law School should seek to produce Bachelors of Laws graduates who are legally imaginative and creative, with a high level of critical and analytical ability, historically and socially perceptive, as well as being competent technical lawyers. The graduates should leave this Law School with a well-rounded and broad grasp of the law and the necessary knowledge to satisfy requirements for entering legal practice. They should be able to see the law in its social context and have the skills to respond to and direct change in law and society where necessary. The graduates should have a sense of professional responsibility and a sensitivity to the human element in legal problems. The emphasis in legal education should be on producing graduates who can question and challenge, and who can also apply their legal skills to the increasingly varied environments in which the law is developing. Knowledge of law and thinking about law should be combined into an integrated teaching of the law. An evaluation of existing law should be part of this process.

While knowledge of rules and legal reasoning is an element in these goals, they contain far more emphasis on diffuse skills such as sensitivity, perception, adaptability, creativity and responsibility, learning to see law in a broad context, and learning to think independently and analytically. The Introduction to the Faculty Handbook also adds that the degree program aims to develop communication skills through "written assignments, mooting, tutorials, seminars and class participation assessment".[3]

The Curriculum Review Report to Faculty in 1995 argued that:

> It makes no sense to employ teaching methods and assessment methods that contradict — to teach research skills through lectures alone and then assess by closed-book examination.[4]

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3 University of Sydney, *Faculty of Law Handbook* (Sydney: 1999) 3.

4 Teaching & Curriculum Committee, Curriculum Review Report, para 3.34, in University of Sydney, Faculty of Law, *Faculty Minutes*, 13 June 1995, at 43.

This view was supported by educational theory and recent literature on legal education in Australia. Experiential learning assists in the development of cognitive knowledge, and the situation in which learning takes place is also integral to the knowledge that is developed.[5] Knowing, it is argued, can not actually be separated from doing. Johnstone describes the development of this kind of situated knowledge as a "cognitive apprenticeship", where students learn to use the tools of legal culture through the modelling of authentic activity and then conscious participation in that culture.[6] The teacher's role is to make explicit their own tacit knowledge of meaning and purpose within the discipline so that students then have access "to the standpoint that allows the practitioner to act in a meaningful and purposeful way".[7] The legal knowledge students gain is integral to the skills used to exercise that knowledge.

If students learn by doing, then in the traditional lecture format learning is largely limited to listening, note-taking, bulk reading and summarising, and verbatim regurgitation of information in an exam (particularly when it is readily admitted by students that "knowledge" gained in this way is often not retained in the long term).[8] The Pearce Report's call in 1987 for more practice and more "experiential learning" in legal education[9] is also supported by the contention that in the rapidly changing legal domain, specific subject knowledge is becoming less valuable to the practitioner, since "that knowledge can only be a tiny portion of the whole, can be understood only superficially … is rarely needed in practice in the form it is learnt [and] is of little use when new problems arise to be solved".[10] It is, rather,

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5 M Le Brun, Law at Griffith University: The First Year of Study (1992) 1 *GLR* 15, at 19.

6 R Johnstone, Rethinking the Teaching of Law (1992) 3 *Legal Educ Rev* 17, at 40.

7 Le Brun, *supra* note 5, at 20.

8 71% of students surveyed at QUT thought the main reason for lack of memory of a subject was either due to "exams which simply require you to rote learn rules and cases which are then easily forgotten within a relatively short space of time after the exam" or "large volume of content covered makes it impossible to remember". See N Rogers, Improving the Quality of Learning in Law Schools by Improving Student Assessment (1993) 4 *Legal Educ Rev* 113, at 131.

9 See D Pearce et al, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra: AGPS, Canberra, 1987).

10 P Wesley-Smith in F Martin, The Integration of Legal Skills into the Curriculum of the Undergraduate Law Degree: The Queensland University of Technology Perspective (1995) 13 *JPLE* 45, at 48.

the cognitive and affective skills and teaching students "how to fish" which are transferable to new situations and will enable them to become flexible, life long learners.[11]

Extrapolating back from the work that lawyers do produces a vast list of abilities ranging from knowledge, application, synthesis and analysis of legal rules; information gathering and research; problem identification and solving; communication and persuasive argument in speech and in writing; drafting of legal documents such as contracts; to dispute resolution, negotiation, interviewing clients and examining witnesses; methods of managing and planning for social change; leadership and team-work skills; managing time and resources; using information technology; and the ability to learn from experience.[12] Many commentators now also stress the non "litigation-oriented functions"[13] of the lawyer which should inform the exercise of the above skills and be developed alongside them, such as client empathy, open-mindedness and a willingness to accept other cultures and view-points; the identification of ethical dilemmas and potential responses to them; and a recognition of the social responsibility of lawyers. Although adoption of values is essentially a personal process, students can be encouraged to explore implicit and explicit ideologies in the law, and to reflect on "how lawyers think".[14] The repeated incorporation of such reflective practices can make ethical considerations "reflexive and subconscious" as well as "more defensible by being systematised orally and in writing thereby finding organisational and historical roots".[15]

These abilities may be broken down into categories, such as cognitive and skills objectives and objectives relating to values and motivation,[16] or cognitive/experiential and

11 N Gold, Are Skills Really Frills? (1993) 11 *JPLE* 1, at 1.

12 For some taxonomies of the objectives of legal education, see J Wade, Legal Skills Training: Some Thoughts on Terminology and On-going Challenges (1994) 5 *Legal Educ Rev* 173, at 175-77; S Kift, Lawyering Skills: Finding Their Place in Legal Education (1997) 8 *Legal Educ Rev* 43, at 50-51; Nancy Schultz, How Do Lawyers Really Think? (1992) 42 *Journal of Legal Education* 57, at 59-62; R Hyams, The Teaching of Skills: Rebuilding — Not Just Tinkering Around the Edges (1995) 13 *JPLE* 63, at 66-67; and Johnstone, *supra* note 6, at 23-28.

13 C Menkel-Meadow, Narrowing the Gap by Narrowing the Field: What's Missing From the McCrate Report — Of Skills, Legal Science and Being a Human Being (1994) 69 *Wash L Rev* 593, at 605.

14 Johnstone, *supra* note 6, at 26.

15 Wade, *supra* note 12, at 179.

16 Johnstone, *supra* note 6, at 22-28.

17 Menkel-Meadow, *supra* note 13, at 623.

affective/normative learning with technical competence.[17] When this is done, it becomes clear that the generic goals for educating lawyers are in fact the same as the "ideals of a good University education" — the liberal education of the whole person.[18] Wade argues that any form of cognitive learning requires the exercise of some type of skill, even if it is at the most basic level: "the activity of training memory by strategies, pneumonics, behavioural modification (rewards with exercise, chocolate and television) and above all, repetition".[19] This is to say that legal education has always taught "skills", so the question is not whether skills should be taught, but what skills fulfil the educational objectives of our law school.

Student interaction in class discussion has radical implications in shifting the focus away from teachers as authoritative transmitters of meaning, to students as constructors of meaning. The inclusion of different voices in the classroom, different experiences and different perspectives undermines the idea that law is an internally coherent, independent body of rules, and demonstrates instead that law itself is a continual process of constituting meaning.

If student participation in discussion can help produce a degree of critical reflection necessary to put law into a wider theoretical context, then experiential exercises can provide the complementary context of law in operation. Not only can practical exercises demonstrate the uses to which law can be put and consequently make it more meaningful,[20] they can highlight the complexities of law in operation in a way that is more effective than being told, for instance, that the outcome of a contract negotiation can very much depend on the personalities and bargaining power of the parties.[21] In addition, Collins, Brown and Newman note that "learning in multiple contexts induces the abstraction of knowledge [and that this] unbinding of knowledge from a particular context fosters its transfer to new problems and new domains",[22] thus allowing students to be adaptable to different working contexts. As experiential learning is a

18 Carter in Kift, *supra* note 12, at 49.

19 Wade, *supra* note 12, at 178.

20 S Kift and G Airo-Farulla, Throwing Students in the Deep End or Teaching Them How to Swim? Developing "Offices" as a Technique of Law Teaching (1995) 6 *Legal Educ Rev* 53, at 57.

21 J Lipton, Role-Playing Exercises in First Year Legal Process Classes (1998) 16 *JPLE* 97, at 110.

22 In Kift and Airo-Farulla, *supra* note 20, at 57.

holistic integration of experience, perception, cognition and behaviour, what is important in maximising the benefit to students of this cycle is the "links between the doing and the thinking" stages.[23]

The literature on adult learning and the objectives of legal education indicate that a good learning environment in law should include:

- high levels of student activity
- student discussion to allow an engagement in the construction of knowledge and legal discourse
- tasks which are of clear, practical and career-related relevance to increase motivation
- activities which are as close to the authentic situation as possible to help to enculturate students
- a variety of contexts in which knowledge is applied
- a variety of teaching methods which accommodate and foster different learning styles
- a degree of student choice
- opportunities for students to direct their own learning, activities which foster communication skills and the ability to work as a team
- maximum opportunities for providing feedback.

There is nothing which prescribes the seminar method as the only model for teaching law. The thrust of educational research is, as Biggs stresses, not to advocate "the adoption of particular techniques and methods, but to reflect on teaching",[24] and to consider what the teaching goals might be and what methods might best achieve the desired learning outcomes.[25] Johnstone comments on the importance of variety in teaching methods and assessment, not only to avoid favouring some learning styles above others, but also to challenge students to develop different learning styles "so that students develop all-round learning, problem-solving and decision-making skills".[26]

Some examples of teaching models and techniques which have been implemented in law schools around Australia indicate a variety of ways in which these issues can be

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23 Kift, *supra* note 12, at 62.

24 J Biggs, Teaching for Better Learning (1991) 2 *Legal Educ Rev* 133, at 145.

25 A Black, Student Perceptions of Teaching Methods: An Analysis of How Perceptions can Impact upon the Learning Process (1996) 14 *JPLE* 203, at 223.

26 R Johnstone, Rethinking the Teaching of Law (1992) 3 *Legal Educ Rev* 17, at 32.

addressed. Skills teaching through experiential learning takes places in integrated programs at the University of Western Sydney, Queensland University of Technology and Monash University. Monash has used role-playing exercises to teach elements of their first year Legal Process Course (such as Dispute Resolution and Federal Constitutional Law and History).[27] The first year course at Griffith University is structured to have a combination of large and small group classes as well as teacherless "offices" which utilise situated and student-directed learning.[28] And the University of NSW has long encouraged interactive learning through seminar-style teaching. More recently, the University of Western Australia and Adelaide University have also changed part of their program to seminar style teaching.

The adoption of the seminar method does not guarantee that most or even many of the above elements will be incorporated into the classroom environment. It does, however, provide a space that is much more amenable to student participation, to student/instructor and student/student interaction, and which can be used to encourage variety and experimentation in method and assessment. In addition, it is helping to change the culture of teaching and learning in the law school by initiating reflection on what the process is all about, what we want to achieve, and how we can improve students' learning in law.

An internal impetus for change within the Faculty was the feeling that there was an urgent need to improve the quality of the teaching and learning experience of both staff and students. Course Evaluation Questionnaire ratings over previous years had placed Sydney very low, and student feedback for compulsory courses indicated a negative student response to large lectures with low levels of student participation, particularly for classes where student numbers were often upwards of 200. Yet those staff who were receiving poor feedback for these large groups would often get excellent feedback when they taught smaller optional groups. Anecdotal evidence was also received about —

> the alienation of … Law students, the inability of even … top honours graduates to find members of staff who [were] sufficiently familiar with their work to serve as referees, and the perception that [the] main competitors

27 Lipton, *supra* note 21.

28 See Kift and Airo-Farulla, *supra* note 20.

29 "Restructuring Teaching at the Law School: From Lectures and Tutorials to the Seminar Method", Teaching and Curriculum Committee Report to Faculty, 12 March 1996, at 14.

> for prospective students [were] much more concerned with teaching and student welfare.[29]

These factors indicated that a change in culture at the Law Faculty was imperative. Limiting group size and adopting a seminar model was decided upon as a means of providing a catalyst for this process. This arrangement was intended to give staff heightened responsibility for their class and encourage them to try a variety of approaches in the use of theory, method and assessment, thus exposing students to a range of learning experiences and the likelihood of greater enthusiasm from the instructor. The previous arrangement, where one or two instructors "set" the course and dictated its content through lectures followed by tutorials, was abandoned.[30]

The decision to limit undergraduate compulsory units to 40 (30 or less in the first year subjects) and to increase teaching hours to a standard of eight hours per week was seen by those Faculty members responsible for managing the change as the most practical option that would make a seminar model work with the resources available. At around the time this shift was being contemplated (1996) a change in Federal Government brought about funding cuts to tertiary education resulting in an effective loss of one-third of the Law School budget. However, the University was simultaneously persuaded by the Faculty to change the internal distribution of funding to incorporate changes in teaching delivery. This change to the funding model meant that the Law School was able to maintain approximately the same level of resources.

Essentially the change in teaching paradigm was achieved through the impetus of the Dean, the Head of Department, and the Teaching and Curriculum Committee. It was pursued for three main reasons: the evidence of negative feedback about the LLB program at Sydney Law Faculty from both staff and students; the belief that the teaching model and methods used at the Faculty were not those that optimised a productive teaching and learning environment; and lastly, that the move to a new interactive model to address these issues was supported in spirit and in funding by the University.

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30 With the exception of the first year courses, which adhered to a common course policy.

The Teaching Audit Project

The new model has been in operation since 1997. In 1999 our review of how this model was working in practice was funded by a research grant from the Vice-Chancellor's Fund for Teaching Excellence and Innovation. The aim of the "Teaching Audit project" was to review the adoption of a seminar-style ("small") group teaching model by the Faculty of Law, and to investigate the delivery of the initial law program as a whole. Because of the particular impact of the new model on compulsory, early year units,[31] and the needs of students in these years, we decided to limit the scope of the audit to the subjects that students would normally take in their first year in the graduate LLB program, or in their first three years of a combined law degree.[32]

The general aims of the audit were to take stock of the opportunities provided by seminar-style teaching, identify when and how generic skills were being taught, and to reflect on how the discrete units fitted together to constitute our degree program. Through listening to the concerns of teachers and students and examining existing statements of goals and aspirations at the level of unit, faculty and university, we aimed to:

- harmonise our teaching objectives
- facilitate communication within the Faculty
- rationalise our use of scarce teaching resources
- identify areas of concern for students and teachers
- make the audit information work for us in future years.

An intended outcome of the project was to gather information about the implementation of "small" group teaching and make recommendations to the Faculty which would further our educational objectives within the chosen teaching model. The data gathering process included examining University and Faculty policy documents on teaching and learning issues, and discussion papers, reports and other information within the Faculty (including the collation of course outlines, assessment regimes, and assessment criteria). It also included a review of both legal and general

31 Many optional subjects and some later year units were already taught in seminars prior to the 1997 shift to seminar-style teaching.

32 The project therefore covered the subjects Legal Institutions; Law, Lawyers and Justice; Contract Law; Criminal Law; Federal Constitutional Law; and Tort Law, together with Legal Research and Legal Writing. The University of Sydney does not offer an "uncombined" LLB to school leavers.

educational literature. Once this process was completed the research focused upon staff and student experience and expectations of the new model.

We sought student views through a combination of surveys[33] and focus group research.[34] Focus groups were chosen to explore student views in greater depth because

33 Two surveys were used. The first, an "Entry Survey", was given to selected classes of students in their first week of Graduate Law I, or Combined Law I, II or III, and focussed on students' expectations of their law degree, the skills they hoped to learn and their preferred teaching method. The second, an "Exit Survey", asked questions directed more towards students' actual experience at law school, such as which aspects of a unit, teaching method or assessment scheme had been most helpful to them as learners. This survey was administered in two stages: at the beginning of semester I to students starting Graduate Law II/Combined Law IV and at the beginning of semester II to the student cohort which had been given the Entry Survey. As the main purpose was to get a sense of student concerns on various issues, open-ended survey questions were used together with a qualitative analysis, rather than questions which would produce quantitative data. This format was preferred because there was already a lot of quantitative data available indicating the problem areas for students and we needed to explore the reasons behind these concerns and think through some alternative approaches. Copies of the surveys can be found in the Appendix. The results of the surveys, interviews and focus groups are qualitative and are integrated in the Audit Report, available from the authors, *supra* note 2.

34 Students were "recruited" in three ways: by an invitation made through the email group that had been set up when the first surveys were administered; by asking students to add their name to a list circulated in class; and by directly contacting students whose names had been suggested by teachers as being people who might be interested and willing to share their opinions. The groups were then divided into three cohorts – Graduate Law I, Graduate Law II together with Combined Law IV, and two campus groups with a mix of Combined Law I transfer and Combined Law II students. Although groups were originally organised with around eight or nine participants in each, due to difficulties in guaranteeing attendance on the day, the groups in practice ranged from three to eight students. A handout was given to students at the beginning of the group which outlined issues raised by the surveys that we were interested in exploring (see Appendix). The discussion was initiated by two open questions directed to each student in turn: "What have you found most helpful in your law degree so far", and "What has been least useful?"

35 Because we did not have a lot of information on the problems that certain students faced, particularly overseas students or those from non-English speaking backgrounds, we had initially been keen to hold a separate focus group to discuss language and cultural issues within the law school. No students volunteered to participate in this proposed group and we judged it inappropriate to have instructors select individuals on the basis of incomplete language skills. The lack of volunteers highlights that such students may be less inclined to identify themselves, or are already finding the demands of the course too great to be able to spare additional time.

student responses to open-ended survey questions were often contradictory and tended to give the "what" but not the "why".[35] Once student survey responses had been reviewed, and in light of their comments and concerns, staff members teaching in the relevant units were asked to participate in in-depth interviews. These interviews were planned as a progression of topics rather than a structured series of questions. Topics included:

- the position of their subject in the degree progression
- what role skills and ethics teaching had in their subject or the degree as a whole
- how instructors evaluated the move to "small group" teaching
- what teaching methods and assessment practices instructors found most useful and why
- workload issues
- what they felt about the Faculty's responsibility to students with language difficulties
- issues of coordination, integration and harmonisation within and between units.

We qualitatively analysed the responses to develop the major themes of concern.[36]

Because it was not just the outcome of the project, but also the process of working through these issues as a Faculty that was important, staff were involved in the various stages of planning, discussion and developing recommendations.[37] An email group was set up to enable us to inform staff and students of the progress of the project throughout

36 A breakdown of interview topics can be found in the Appendix. Nearly all of the staff teaching in the units were interviewed, including most of the part-time and casual instructors. A total of 30 interviews were conducted.

37 Drafts of proposed student surveys were circulated, and ideas sought from staff about the sort of information they were interested in eliciting from students, and what they considered would be useful to the audit. There was on-going liaison and communication between the audit and the Teaching and Curriculum Committee. An Issues Paper was presented to faculty at a mid-year meeting, in which we described the progress of the project and our findings up to that point. We also put forward some interim proposals for discussion, based on the issues that had arisen in the surveys and the interviews. The proposals offered varied and alternative options which were workshopped by participants and were accepted, modified or rejected for the final report on the basis of the consensus reached through the discussion at the meeting.

38 About 100 students joined the group and many have used this as a way of directing their feedback about different aspects of the course in a less restricted format than the classroom surveys.

the year and to receive on-going feedback.[38] An audit web-page was established, linked to the teaching home pages on the Faculty web-site, as a means of providing information about the audit to students and other interested people.

The Findings

Many staff and student concerns centred upon what was actually happening in the classroom as a result of the new model (such as difficulty in initiating, or controlling, student interaction, and assessing student participation). These "micro" concerns were manifold and engendered positive and reflective feedback, as instructors offered suggestions and methods for dealing with such challenges. We will discuses these concerns and suggestions first, before noting some of the recommendations which the audit developed in response to them. The second area, in which concerns were raised mostly by instructors, related to the impact of the changes upon the degree program as a whole. The proliferation of groups and instructor approaches made coordination and consistency across groups and across the program more of an issue. These "macro" concerns were not only a result of the change to seminar-style teaching, but had certainly been exacerbated by it. To some extent these issues invited a reconsideration of how the law degree is delivered as a whole. These issues will be discussed later.

What is Happening in the Classroom: Micro Matters

Within the constraints of a decreasing budget and steady enrolment numbers, the new model in practice has meant classes of around 25 for the first year foundation units (which are Legal Institutions in first semester and Law, Lawyers and Justice in second semester). For the four substantive units we examined it has brought about classes of around 40.[39] The review found that both staff and students felt that the model had benefits for them in terms of the environment it produced. Staff and student experiences of difficulties encountered with the model varied somewhat, although there was a common concern about overcrowding and ensuring participation (particularly participation marks) was handled fairly and predictably.

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39 1999 saw significantly increased numbers in some classes and units in an unbalanced fashion.

Benefits

The majority of instructors expressed the view that the seminar model offered advantages over the previous lecture/tutorial format. Benefits included a more relaxed teaching environment, with groups offering far more scope for personal interaction, questions, and student contribution than "large" lectures. Staff reported that:

> It is less intimidating as a lecturer.
>
> Students are more engaged.
>
> Small groups can create an environment where students feel they can participate. This is important as oral skills are a really important part of teaching people to make arguments about law, which is often undervalued in the system with a large emphasis on written work.
>
> Having the student for 4 hours a week rather than just one, you start developing a very personal relationship, that is fundamentally important in [understanding] why the interaction in a small group is different.

The presumption of participation in the new model meant that students were required to take more responsibility for their own learning.[40] Staff reported that:

> Students tend to be a lot less prepared in lecture/tutorial format. In a small group, students are quite aware that their lack of knowledge is going to be apparent.
>
> The educational experience is much more diffuse when there's a fluid discussion in class and the teacher is not playing the authority figure. It puts much more pressure on students to work it out for themselves.
>
> This year's group who have had their whole foundation in small group teaching take this approach seriously. The expectation now is that they will have to be prepared and the information won't just be dished out.

In addition, staff noted that seminar groups allowed for flexibility in a number of ways:

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40 It was evident in the responses to the second round of Exit Surveys from students who have had seminar-style teaching right from the beginning of their degree that there is less resistance to discussion-based methods of learning than in the cohort who are further advanced in the degree and who have "learned to learn" in the lecture format.

> Small groups allow for the teaching of a greater number of skills — discussion, interviewing, debating, problem solving.
>
> Small group teaching enables you to achieve a variety of teaching techniques.
>
> Small group teaching allows for a variety of teaching and assessment methods to accommodate individual differences in learning styles and abilities of students — I try to give everyone a bit of what they like.
>
> You can do more innovative things.

In surveys and focus groups, students were not asked direct questions about the benefits of seminar-style teaching, or the differences between lectures and tutorials. Rather, they were asked what teaching style or method they found most helpful in their learning (see Appendix to this paper). In the Exit Surveys, the most common response to this question was that interactive, structured discussion and participation were preferred, or classes which contained a combination of lecture, discussion and group problem work.

Students reported that:

> Seminar-style teaching which relies on student participation I believe is the most effective way to teach and learn law.
>
> Seminar/discussion form leads to greater understanding since it forces one to actively consider the issues and develop one's opinions.
>
> Interactive seminars [work the best for me]. Discussions enable students to flesh out arguments orally and interrogate their own responses to issues.
>
> Discussion is best. It engages me, whereas formal dictation bores.
>
> Seminars are less intimidating, more thought provoking and raise questions that I may not think of at the time.
>
> Definitely seminars which presume reading has been done and focuses on discussion. Forces me to work harder and I am more absorbed in the subject through discussion. However the discussion has to be ordered and controlled by the tutor.
>
> Seminar-style — teacher providing input but drawing out our opinions and knowledge in a non-threatening way.

> The lecturing style with classes spent reinforcing the lectures through interactive problem solving, group tasks. Gather all the info first, and then get participation by application and working through principles.

> Interactive teaching, with class participation being assessed — it makes me do my reading each week!

Issues of Concern

While there was generalised support for the new model, students and teachers both identified some reservations. Student concerns were directed more towards what happened in each individual class rather than the model as a whole, and reflected anxiety about their own performance and marks. Staff concerns were focused on the difficulties of putting the model into practice — how to generate (and to appropriately assess) participation, manage discussion, interact with an often sizeable group, and structure classes so that the range of desired material was covered.

Student Concerns

Students tended to take one of two contrasting positions on the new model, depending upon the delivery style they were experiencing. Those who were experiencing the new model in a fully interactive manner expressed some resistance based on fears that they would not "learn enough" from discussion, while those who were receiving less interaction were often frustrated and bored. Students also felt that discussion was difficult in groups of 40 or more, and were anxious about being assessed on such participation. This issue was also a major concern for instructors, and will be discussed in the section below.

Where, due to class size or the preferences of the instructor, the main mode of teaching tended to be lectures focussing on "delivery of content", students expressed frustration at losing the opportunity for greater activity.

> In the changeover to seminars, many seem to be simply lecturing, losing the tutorial aspect entirely.

> While some lecturers try to get participation, others are content with spoon-feeding still.

> A lecturer standing out in front of the class, reading out parts of the text book or from his/her notes is never effective. We might as well be reading the text ourselves.

> Discussion [is best]. There seems to be too much "lecturing" going on in [subject x] at the moment.

This is an issue for the Faculty in terms of staff training and development, as the model was adopted with little training or change-over period in which to reskill and adapt to the new teaching and learning environment. Some instructors have clearly transplanted their old methods into the new environment.

The contrasting concern when classes were more interactive in style was that discussion-based learning was confusing, irrelevant or a waste of time.

> [I prefer] lectures. They are the most informative and time efficient. Discussions waste time and only confuse the issue.

> [I prefer] lectures rather than open discussion. A good set of notes is more valuable than other students' sometimes incorrect perspectives.

> To me, the purpose of going to class is to learn from the tutor, not read by myself and explain what I have learnt to others.

> Lecture style because the person in front of the class has a vast knowledge and should be permitted to use it.

> To be honest, I most appreciate lecturers who simply lecture, rather than trying to involve the class in other types of teaching/learning styles, simply because class sizes are too large to sustain any other styles.

These reservations express a particular perception of learning law which emphasises the teacher as authority figure, and learning the right facts and covering the subject matter as the ultimate goal. The learning culture associated with the lecture format used in previous years privileged the transmission of "legal knowledge" (rules and principles drawn from legislation and select appellate court decisions) and subsequent resubmission of that knowledge in a formal exam. The features of the teaching context which were valued by students were those which would assist in reaching those ends. Comments about the new teaching model from students and instructors must be understood in light of that culture, and the priorities and objectives associated with it. For example, even students who indicate that they appreciate having smaller, more informal classes and feel they benefit from student discussion, may still prefer the instructor

to walk them through the material. These students may value exercises which are directed towards preparing them for examinations, if that is still the dominant assessment mechanism. Evidently, also, students desire a certain level of structure in any teaching method, to focus and guide their learning. The anxiety that is created by feeling "lost" in class discussion is obviously exacerbated by the degree to which the rest of the course continues to imply that ascertaining a set of "the right" rules for the exam is the major goal.

In an initial review of their Faculty's similar move to seminar-style teaching at the University of Western Australia, Judy Allen and Paula Baron note that much of the student feedback about their new class structure revolved around whether or not it conformed to the priorities of the lecture paradigm, such as getting a good set of notes or finding the "right answer".[41] They link it to a pervading theme that they identified in many of the negative responses from staff and students — "fear of failure" and "fear of the unknown". They also observe that many of the concerns directed towards seminar-style teaching, such as workload or insufficient time to cover the subject, were in fact also present in the previous system, but had been given a focus with the introduction of change. Students have particular expectations about legal education that are informed by their previous educational experience and their perception of law as a discipline.

In our research we found that there was observably less resistance over time as students became accustomed to the different requirements of seminar-style teaching, and both students and instructors gained experience in the new format. Student expectations are particularly shaped by how we teach them to learn from the beginning of the degree, and it is therefore critical that we utilise, as a priority for the earlier years, methods which will encourage students to adopt independent and deep learning skills.

Instructors' Concerns

For some instructors, the shift in teaching culture was a fairly abrupt one, and they felt the stresses of trying to make it work in practice and to adapt both their own and the

41 "Innovation and Resistance: the Implementation of Change": Paper delivered to the Legal Education Interest Group at the Australasian Law Teachers' Association conference, Wellington, July 1999.

students' expectations to the new model. Concerns centred on generating, and guiding, interaction with and between students, covering the course content, overcrowding, and assessing participation fairly.

Creating interaction

Generating and controlling discussion was seen as something which was not always easy, for instance if the subject did not relate to students' prior knowledge or was something about which they could not readily form an opinion:

> [Small group teaching] works better in [courses] based on issues rather than cases.

> I give mini-lectures because of the amount of material and the fact that students seem very unsure of the concepts — it is their first substantive subject.

> Small groups are good for more advanced subjects — students are more sophisticated with a greater knowledge base, there's more opportunities to talk about issues.

One instructor expressed frustration that —

> They won't even discuss general issues about [subject x], even though they are capable, because they are scared and think [it] is something that lawyers talk about and they have to know all the cases … How do you get people to participate? Force them to prepare by sitting there in embarrassing silence until they speak? But they all say they can't do the work – if you believe them, then you have to help them out with lectures and notes.

Workload pressures were felt to impact significantly on the students' ability to prepare and perform. Pressures both from within the university and from the paid workforce meant that students were not always able to prepare adequately:

> We should assume that law school is a full-time occupation, although that doesn't fit with their needs in reality. Given these pressures, we probably try to cover far too much ground. We need to understand that process is equally important.

> It's hard to work on interaction progressively, because just as they are starting to get into the habit of preparing and asking questions, the assessment is due and they don't have time to prepare.

Experiential learning was felt to be far less workable in current class sizes:

> The best way theoretically to learn those skills [communication, negotiation] is in the context of substantive law, but time constraints make it difficult to even get through the content and requirements for admission. Also it requires very small classes to give students a chance to complete the cycle of learning, doing, feedback and practice. This is impossible with 45, so proper skills teaching can't happen effectively in the current context of teaching.

Coverage of material

Many comments from staff indicated apprehension that class time dedicated to discussion, student presentations, group work or other interactive exercises meant less time available to cover the subject content of the unit:

> Because of the amount of material, it felt like you were falling between the two methods – not getting the benefits of small groups, or the benefits of tutorials under the old system, there is not enough time.

> I don't like to break into small groups – there is so much material to get through that you can't finish the course if you teach like that.

> Using this method [lecture outline, questions, problem application] the class only got through two thirds of the course in the time.

As can be seen in the student comments comparing lectures and discussion-based methods above, this pressure to cover the course is often also communicated to students, either overtly or implicitly through the structure of the course and materials.

In order for the shift in the learning paradigm to be effective, other elements in the teaching context may need to be reconfigured so that all aspects work in consonance towards the objectives inculcated in the new class structure. In part this is an issue of redesigning curriculum rather than simply transplanting old course designs to the new teaching model. It was clear that all aspects of the course — assessment, materials, questions for discussion, teaching method — had to work in harmony to produce interaction. Careful structuring of the course, and particularly the amount and type of materials, are crucial in order to help rather than hinder the attainment of these objectives.

Class size and participation

The most constant concern from both staff and students was that the size of groups in practice frustrated the objectives of seminar style teaching. Half the instructors who took classes of around 40 said they found it difficult to teach interactively because of the lack of time to let everyone speak, the unmanageability of experiential exercises, or because the dynamics of a class that size make discussion more unlikely than in a true "small" group:

> 40 is medium sized where it is impossible for everyone to contribute to discussion — it's more personal in a way, but it's not a small group.
>
> Even with 26 the discussion only works because a third of the class doesn't want to talk, so there's enough time for the others to talk.
>
> Even using all the techniques for small groups, it's still very difficult to do a lot of group work with 40 or 50 students.
>
> With 40, the debriefing process [after small group work] can't hear everyone – this is unsatisfying for students who have done the work in small groups and have got answers but can't say their piece.

The number of students in the class affected the ability of the instructor to remember names. Knowing names is essential for class participation marks, and was seen by many as a key to transforming the teaching environment:

> 30 is the number, for practical reasons — you can remember 30 names fairly quickly, which is very important as a confidence building exercise … to know that they are listened to if you can address them personally.
>
> Effective class participation depends on low enough numbers and also things like being able to remember names, being good at keeping track of who's been talking and who hasn't.

Undoubtedly most instructors and students would prefer smaller classes across the board, and it is clear that the target of 40 students per class was a pragmatic accommodation of numbers and resources rather than the implementation of an absolute pedagogical ideal. Some suggest that, given the difficulties of teaching interactively with 40 students and the tendency of many instructors to utilise at least some level of didactic teaching, the same objectives could be better met

under the old system of large lectures and truly small group tutorials of 15 or 20. Here, however, we come back to the initial problem that where lectures set up a certain educational paradigm, the potential of small tutorials to be an active learning experience "is doomed if the lectures have already promoted a surface approach", and students will tend to use tutorials "for reasons of expediency – to get a method of solving problems, answering exam questions or to clarify issues from the lecture".[42]

Given that there are not unlimited resources, we believe that some standard is necessary and that 40 is a realistic target. However, problems have been exacerbated in a few units when some classes have approached or even exceeded 50. The creep above 40 has made it increasingly difficult to achieve seminar-style teaching and, because "40" has symbolic significance as evidence of the Faculty's commitment to seminar-style teaching, both staff and students have perceived these larger sizes as a breach of undertaking by the Faculty. In addition, tension is created over issues of equality when it is only some groups in a particular unit which have significantly more than 40. Given these factors, we stress that class sizes of 40 in substantive units must be treated as a ceiling rather than a floor. Our recommendations also strongly endorse limiting class sizes in the first year subjects to 25. Particularly for those commencing law from a secondary or tertiary education system in which they have been unused to interactive teaching methods, classes of under 25 provide a vital transitional arena to practice oral skills, develop confidence and become accustomed to contributing in class. This experience should set the climate and expectations for future learning in their law degree.

Second, interactive teaching methods represent a departure from the previous teaching experience, and often the legal educational experience, of some instructors. As was pointed out in some staff interviews and one student focus group discussion in particular, it is imperative to train instructors in the techniques that can be used in "medium sized" classes of 40 and to establish practices, such as peer class observation, which can help consolidate ideas and information on teaching practices within the Faculty.

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42 Black, *supra* note 25, at 220.

Assessing participation

Many concerns about time and scope for widespread contribution in class, particularly those expressed by students, were focussed around the issue of class participation marks. Not all classes included this as a form of assessment. In those classes where participation was assessed this was done either as an "unstructured" mark which assessed the student's contribution to general class discussion (often using criteria such as evidence of preparation for class and willingness to engage with the issues) or as a "structured" participation task involving a set exercise (such as class presentations or facilitation, debates or moots). Many students also complained that unstructured class participation marks encouraged "talking for the sake of it" to the detriment of the quality of class discussion, and both staff and students were concerned that it was unfair for less confident members of the class.

From students it was said:

> Perhaps too much emphasis on class participation. Some people are shy and some are not as good at spoken argument as written.
>
> I understand how [class participation] is helpful for students but I just hope you also consider the variety of confidence levels among students.
>
> Class participation assessment is extremely artificial. Not only does it create a tense environment within a class of eager to speak students, but it also gives no clear understanding of how much we the students know.

And from staff it was said:

> Class participation should be ditched as a form of assessment in a class over 35 — you are denying people the opportunity to participate regularly.
>
> I approve of class participation in principle, but I haven't found a fair way of assessing it with 40 people.
>
> It's difficult to apply the criteria in unstructured participation to shy students.

There were also instructors who expressed their unwillingness to mark class participation because of issues of objectivity or effectiveness:

> I'm not satisfied that the requisite degree of objectivity could be obtained [even] in giving everybody the same

> opportunity to be assessed, [or that we could succeed] in allocating marks that are more than just attendance.
>
> In structured class participation the tasks vary so much it's hard to compare marks.
>
> What are we testing? Oral presentation, engagement, attendance, eagerness to get involved, behaviour? These get conflated in class participation … if they don't want to get involved in class that's their choice. To make class participation compulsory is to endanger the quality of participation.

However, some felt that class participation marks helped the cultural transition for students where previously they had not been required to prepare for class:

> Class participation marks help focus their mind on reading materials and contributing.
>
> Class discussion is a crucial learning tool and students won't do things they're not assessed on, so class participation marks are necessary.

Many students also thought that class participation was a useful form of assessment:

> Some form of class participation requirement is helpful in that it provides incentive to do readings before class and ensures that you understand what you read.
>
> Class participation — I hate it at the time but it benefits me in the long run.
>
> When there is no class participation mark there is little impetus to contribute — this is compounded by heavily weighted exams which enable you to cover the course in stuvac and still do quite well. A brief oral presentation would break the monotony.
>
> The facilitation component provided incentive to communicate my personal feelings towards the reading material.

Assessment in general creates a lot of anxiety for students about performance and fairness, although class

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43 Some use a form of self-assessment to off-set claims of teacher bias, where students are to award themselves grades on the basis of the criteria, and where the teacher's mark would be reviewed if there was a significant difference. There was some concern, however, that such a method might contain a significant gender or cultural bias because of the socialisation of different groups with respect to self-evaluation.

participation in particular seems to have provoked diverse responses in our research. Staff also were unsure of being able to find a method for marking class participation neutrally and fairly.[43]

The common attitude that being assessed on oral contribution is unfair because people naturally have differing public speaking abilities and confidence levels seems to assume other forms of assessment, such as essays or exams, are inherently fair and equitable. In fact, concerns about fairness apply to most forms of assessment used at university. More "familiar" tasks may be unfair to students who are less able to structure written arguments, memorise information or work under pressure, and there are often complaints that essays are subjective to mark.[44]

Students need to have a clear understanding of the criteria on which they are being marked and why this form of assessment has been selected and what skills and values it supports. Ideally, written criteria need to be made available and students should be given the opportunity to self-assess and/or to query their marks. That is, the same rules of fairness apply as with written assessment. The instructor must also take an active role in controlling the discussion and be aware of the different abilities in the class in order to create a variety of spaces and opportunities for people to participate. The confusion and difficulties surrounding the management of class participation highlight the need for training in this area.

Responding to Challenges

As part of the staff interviews in our research, instructors were asked for solutions they adopted as well as the problems they faced. This discussion generated a great many ideas and demonstrated that the new model is being implemented in a wide variety of ways. Techniques to encourage student involvement include an open discursive style of teaching, question and answer, intuitive response exercises, brainstorming, group problem solving, debates involving the whole class, or alternatively an allocated number of student debaters. Instructors are solving the size/interactive teaching dilemma in a variety of ways. One of the useful

44 See discussion in M Armstrong and D Boud, Assessing Student Participation in Discussion: An Exploration of the Issues (1983) 8 *Studies in Higher Education* 33.

functions of the project has been to share information about these innovations and techniques.

Getting to know the class

Interaction is significantly assisted when instructors know their students' names. There were various suggestions for ways in which this process can be made easier, including:

- asking students to contribute passport-type photos of themselves to create a poster sized "map" of the class
- name plates on the desk
- getting students to say their name prior to a question or comment, or saying their names/asking them when you call on them.

Generating class discussion

Breaking down student resistance to discussion, whether through inertia or shyness, may require different approaches. Suggestions included:

- Questions which invite a response from students' own experiences, or which do not require specific technical understanding are generally less intimidating.
- Calling on people by name to make sure everybody gets a chance for their voice to be heard. This may be positive in that it makes the space more personal, shows that the teacher knows students' names and permits students who tend to be quieter to speak in class, although it is important that this be done in a non-intimidating way. One instructor commented that even asking basic questions just to get people talking was good, as the more people got used to hearing different voices and contributing themselves, the less nerve-racking it would seem.
- Asking for students' intuitive responses to problem situations as a way of allowing everybody to be able to make a contribution, but also to demonstrate an approach to problem solving which could make the law more comprehensible.
- "Brainstorming" a particular issue or question calls on the class to generate as many responses as possible which are collected on the board before the ideas are worked through critically as a class. It encourages creative think-

45 For an exploration of this technique, see E de Bono, "Brainstorming" in D Bligh (ed) *Teach Thinking by Discussion* (Surrey: SRHE & NFER-Nelson, 1986).

ing and the development of fresh perspectives, as well as stimulating student participation.[45]

Reducing size of discussion groups

A class of 40 need not be taught as a group of 40. Methods included:

- "Buzz groups" (groups of 3 to 6 students) can provide a space for quieter students to participate and develop communication skills, and when a spokesperson is elected to report back to the plenary discussion, it can be less intimidating for them to present group ideas rather than their own. Buzz groups can be used to discuss particular issues, solve problems or prepare for other activities such as debates. Because they require students to take initiative in performing the activity, it is important that the purpose is clearly communicated by the teacher. Although it is hard in larger classes to monitor each group, one instructor commented that they allow for much more intense discussion in which the lecturer doesn't necessarily have to be "in control", and wrapping up with a plenary session gives a chance to keep track of what has been discussed. The exercises need to be planned to allow enough time for all the groups to report back and gain a sense of closure. Reporting back can be done in writing as an alternative to, or as well as, orally.
- While buzz groups are used regularly in many classes, one particular strategy used was to keep the same groups throughout the semester as "syndicates" and encourage those students to work together both in and outside the class room. The instructor who used this strategy felt that these close-knit smaller groups added to the collegiate atmosphere in the class as a whole, and encouraged students to develop team work and study skills.
- "Pyramiding" is when an exercise is structured to take the student through different stages of individual and group activity. Work initially done by students on their own can provide ideas as the basis for discussion in pairs or groups, which can then be fed into a plenary class discussion in the final stage of the exercise. This structure can also facilitate a more comfortable transition from a relatively passive lecture to an active class discussion.
- Simple techniques such as moving around the room help change the focus away from the teacher at the front of the class and generate a feeling of greater activity and interac-

tion. Even in a lecture theatre, walking up the middle aisle "immediately gives you two groups of 20".

Structured class participation exercises

Many staff expressed frustration with structured student presentations because of their tendency to be of variable quality or because the rest of the class "don't listen as they don't value peer contributions, or are hesitant about how authoritative it is". Instructors who do use it, however, think it is valuable for allowing students the chance to prepare before they have to speak in front of the class. This is less intimidating for many, and also forces them to really come to terms with the materials. Some suggestions of ways which have worked were:

- A group does a presentation on the optional readings. People are interested because it is a fresh perspective, not just rehashing the materials that everyone is required to read.
- Selected students take primary responsibility for answering questions or generating discussion. Here they are not totally alone and get more "goes" at participating compared to a one-off presentation of a paper.
- Prepared team debates on broad topics. They have tended to be more interesting than straight presentations, as having to argue for one side or the other forces students to think critically about the issues and the process.
- Regular use of written problems to be solved in class. This is a good way of working through the issues and applying legal principles to fact situations. As was seen in the survey results, students really appreciate the chance to see how the law relates to "real life" examples.

Authentic activities

Authentic activities are those which aim to replicate in part the sort of tasks that students may be engaged in as professionals. Problem solving is the most common such activity in the law curriculum, although smaller classes have allowed greater innovation with the range of activities that can be conducted in class. Some examples of these are:

- Client interviewing exercise done as a "fish bowl", where a few students are selected for a role play and the rest of the class observe the performance. Observations can form the focus for small group or class discussions which follow.

- Negotiation exercises done as a one-on-one negotiation between two student "parties", or with a third student acting as negotiator. The results of different groups can be compared in class discussion, as well as students' experience of the whole procedure.
- Mooting as an extension of debate-type exercises. It likewise helps students to think critically about problems and find alternative solutions to them. The "real law" feeling can engage their enthusiasm and interest.
- Mock trial activities. They also have an authentic feeling for students and can incorporate problem solving exercises.
- Specific legal forms of writing such as drafting a contract or preparing a brief to a barrister. They can familiarise students with common aspects of legal practice, and can give them experience in putting substantive knowledge to different practical purposes, as well as writing for different audiences.

Lecturing

While most instructors still acknowledged the role of lecturing in some form in their approach to teaching, there were many ways suggested to make lecturing more effective:

- As lecturing "relies wholly on the oral skills of the lecturer and the aural and recording skills of the student",[46] the use of media such as handouts, overhead projectors or chalk/whiteboards can stimulate additional senses and make a lecture easier to follow.
- One instructor commented that her use of handouts to cover the main points in a particular class made students relax and actually engage intellectually with the materials, rather than be "stenographers".
- Many staff and students indicated a preference for having a mini-lecture at the start of the class to provide a context or framework for discussion or group work — a "mixed-modality" class.

Email and internet

Class email groups are used by some instructors as a way of communicating with the students outside class, and to create an on-going discussion forum which can feed back into class discussion.

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46 Johnstone, *supra* note 6, at 43.

Appropriately structured course outline and materials

As much of the anxiety about teaching in a seminar-style is created by a feeling of not having enough time to get through the materials, it was suggested that the course content needs to be reconfigured with the needs and priorities of interactive learning in mind. This might simply be a matter of cutting down on the quantity of materials, or structuring them more suitably, and may include:

- Material which aims to provoke discussion rather than generate a set of answers.
- Directed reading rather than just a list of cases or articles, so as to engage students in the material as they read.
- Questions or issues for class discussion included in the reading materials to enable students to think about them as they read.[47]
- Structured outlines for each class that clearly tie into the progression of the unit as a whole.
- Problems and activities with clear objectives and structure that are explicitly connected with the unit themes and aims.

Involving students in the management of the group

These strategies help to create a group dynamic by encouraging students to take responsibility for the operation and structure of their class. Suggestions included:

- Negotiating the ground rules for the class, including acceptable behaviour, and what is expected of students and of the instructor.
- Negotiating the forms of assessment and the criteria against which students will be marked.
- Conducting regular feedback surveys to ascertain areas that have been misunderstood as well as what the students feel is working in the class, or what needs to be improved, so that the instructor can adapt, where appropriate, to the specific needs of that class.

Recommendations for Better Teaching and Learning Within the Seminar-Style Model: Micro Reforms

Given the considerable feedback relating to both the challenges faced by staff and students and the solutions proposed by staff, various recommendations were formulated which

47 It was noted that course outlines which clearly direct the learning strategy not only help guide students but are also invaluable for casual or part-time teachers.

were directed towards making the new model work better in practice in the classroom. Several of these recommendations related to developing better staff training, both internally and externally. Internal training has the advantages of being on-going in nature, and providing support at a "peer" level, as well as through internal performance measures. External training was also favoured because it brought new skills into the pool, and permitted staff to explore areas of their own performance without the fear that it would reflect upon their opportunities for promotion or tenure.

Recommendations to improve and support teaching *externally* included:

- Send all new staff to ALTA teaching workshops and fund further spaces as ALTA will allow, with a view to making these workshops available to staff at all stages in their careers.
- Utilise other modes of external training, for example communications courses, to develop more diverse skills.
- Work with other Sydney law schools to develop and coordinate a pool of teaching/training sessions by using people from all institutions.

Recommendations to improve and support teaching *internally* included:

- Have an annual Faculty teaching retreat.
- Continue sharing ideas in the Faculty through structures such as a teaching library (which the audit has begun), a teaching e-mail group or shared drive on the Faculty server to facilitate idea exchange in a different medium, and on-going face to face meetings of small groups of colleagues facing similar teaching issues.
- Make the Teaching Handbook (initially developed by the audit project) available to all staff and casual teachers, and update it annually.
- Introduce a day-long orientation and training session for new teachers (required of casuals) at the start of each year. (For experienced teachers: a short session on Sydney policies; for new teachers: more detailed information on class planning and interactive teaching strategies.)
- Evaluate teaching in other ways besides student surveys, for example: peer review, lesson planning review, self-evaluation against set objectives and targets.
- Invite our colleagues to observe our classes and help us.
- Have a "teaching buddy" at own rank to provide support.

- Ask the Pro-Dean (Staff Development) to assemble a team of people willing to go and observe classes and provide support.
- Enhance support for the casual teachers who are responsible for approximately half of program delivery in these early units.

Other recommendations focused upon the provision of increased resources for teaching and structured methods of evaluation for teachers. These included:

- Fund development of undergraduate course materials (this is already done for Postgraduate materials).
- When money is allocated to the Faculty because of our teaching record, target it specifically to teaching matters such as training & course development, material preparation, and use of team teaching and mentors.
- Maintain the commitment to class caps of 40, and 30 or smaller for first year
- Make observation of teaching part of promotion/hiring process
- Make a yearly review of our teaching part of the Pro-Dean (Staff Development) job.

What is Happening in the Degree Program: Macro Issues

In addition to the changes within the classroom there are the gradually widening spread of issues concerning impacts across the law degree program as a whole. Simply put, there are more classes being taught in each subject, and the opportunities for specialisation within each small group has meant greater variety of content within courses, with more varied assessment. The review sought to investigate the extent to which co-ordination and consistency were issues for staff and students both within units and across the program.

The shift to seminar-style teaching has had effects at a structural level which have generated fundamental questions about what it is that the degree program is trying to convey as a whole, and how the units, together and in combination, deliver that program. This rethink has generated recommendations directed to a "foundation program" with clearly designated skills and outcomes. These issues will be addressed later.

Where the same unit was taught in different groups, co-ordination and parity issues were raised through questions

about the extent of appropriate commonality in units, for example the same course outline or the same assessment regime. The shift to seminar-style teaching involved the premise that each instructor would be responsible for their own group, and was in part supported by the idea that it would encourage academic independence and creativity. The second level of the coordination issue is the way in which different units integrate with each other.

These questions prompted diverse responses from staff interviewed. Particular areas of concern to staff were:

- overlap (of content and teaching materials)
- the extent to which instructors can know what others are doing in their classes
- student workload (involving overlap/overload in assessment style or due date)
- student choice as to which seminar group to register in
- communicating to students the reasons for variations and diversity.

One of the aims of adopting seminar style teaching was to allow instructors increased independence within their group, in order to encourage innovation and experimentation in teaching and assessment. Support for diversity was expressed in the Curriculum Review Report notion of "specialisation" where, rather than "the current strategy of trying to do everything in every course [each course in the core should] assume responsibility for emphasising one approach to information, teaching methods, materials and assessment which combine to form a coherent approach".[48]

A number of instructors felt that it was pedagogically healthy to show students the validity of diverse approaches, while others felt that an underlying presumption of "academic freedom" in the approach to teaching would benefit students by unleashing the full scope of the creativity and enthusiasm of their instructor. As long as assessment was internally appropriate and consistent, instructors felt it was positive to expose students to a wide range of tasks:

> It's important for students to recognise that there are many valid approaches to the same subject.
>
> Variation in approach is appropriate considering the personal leanings of the teacher.

48 Teaching & Curriculum Committee, *supra* note 4, at 53.

> If there's different outlooks among teachers, as long as there's broad agreement in the subject matter, it's OK to have different emphases.
>
> It's part of the strength of Sydney Uni law school that people have freedom in their own course.

However, the concept of academic freedom may be more important in some settings than others. Not only must it be balanced against other priorities, but it is also less meaningful to junior teachers and casual teachers. They have less teaching experience to fall back on in being able to judge appropriate perimeters for their "freedom" and probably have more to gain from being involved in a group-mediated teaching program.

Many staff views were based on concerns about student dissatisfaction or anxiety when instructors in different streams were not "doing the same thing". In fact, our research showed relatively low levels of student concern on this issue. However there was concern about the absence of communication, coordination and workload parity:

> In theory, uniformity is preferable, but still the teacher has a strong desire to teach what they see as the central and important issues. The only way to make it fair would be to let students choose … there is no one right way to teach [subject x], but if a student prefers a traditional course, then they are disadvantaged by being in this particular course.
>
> Student concerns are probably because some were [seen to be] given an "easy" time in assessment … diversity in assessment has to be a question of genuine unfairness.
>
> Students know which sort of learning suits them best, so they should be able to choose. But if the issue is comparability [of marks], you may as well complain that different units have different assessments!
>
> It's important for approach and assessment to be harmonised so students don't feel disadvantaged by the groups they've been placed in.

Staff were particularly sensitive to student dissatisfaction because students do not have a choice as to which group they enrol in:

> It's partly an issue of student choice, although that choice will always be constrained by other commitments like work.

> Genuine student choice would be good, but I'm concerned that some will be forced into a group … which is worse when some have had their choice.

Because of the current climate of competition for marks and jobs, many felt that coordinating uniform course guides and assessment in the interests of fairness to students overrode other interests in allowing variation:

> Uniformity in assessment is something students should claim — they are disadvantaged when they can't choose the group and form of assessment which suits them, and they are being pressured to get the best marks in a job-focussed environment.

> Uniformity is important where there is realistic pressure on students about marks and jobs.

Student Perspectives

We expected the questions of fairness, for instance with parity of workload and assessment, to be a major issue for students. However only 11 out of 322 students who completed the Exit surveys responded to the question "Have you any criticisms to make of the assessment regime in this unit, or overall in the Law degree so far?" with a reference to the lack of uniformity in content or assessment units with differently taught or assessed groups. These relatively low numbers do not necessary indicate the actual level of concern of students on this issue, however, considering the generality of the question, and the existence of several other major issues of assessment which tended to dominate the responses to this question. One student complained that difference encouraged "forum shopping" by some students who changed after the groups had started.

When the issue of uniformity came up in one of the focus group sessions, it seemed that the sense of division in the cohort created by not having a common ground on which to discuss their studies was more of a problem for those students than any sense of unfairness.[49] Most of the 11 survey comments about uniformity did, however, make general

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49 Considering the recruitment procedures for the focus groups, it might be possible to conclude that students who are more conscientious and reflective about their studies (and consequently more likely to volunteer or agree to participate in the groups) are less inclined to be anxious about the effect on their end performance of the form of assessment, particular course guide content, or teaching method.

references to fairness, with one student suggesting what may the source of anxiety for many:

> As we are all ultimately graded and compared against each other there should be one assessment regime for everyone doing a subject, not different assessments and different exams — as that is not a fair assessment.

As in the discussion on student anxieties surrounding class participation in the previous section, if there is a sound pedagogical basis for a particular curricular or assessment structure, then students benefit from it being made explicit. The instructor should carefully explain the reasons why the differences exist, maintaining an open dialogue with students through which their concerns, if any, can be addressed.

What is Meant by Parity between Different Streams?

Is the basis of the concern about uniformity the view that all students should learn the same things? The individual teaching styles of each instructor probably mean this is not an objective even when teaching from the same unit outline. A similar concern over fairness in assessment arises. Markers cannot guarantee complete objectivity and uniformity in their marking, and the Faculty has long debated the appropriateness or likelihood of achieving grade standardisation. Disparity in marking between different streams can occur regardless of having common assessment tasks, and the current absence of standardisation procedures within the Faculty means that having the same course guarantees nothing in terms of statistical measures such as the bell curve.[50]

If the primary requirement is that all students studying one unit should cover a core area of subject matter and skills, then some basic principles to guide consistency between groups can be drafted. Such a core would also allow consistency from year to year, and facilitate the efforts of other staff to form a picture of "what goes on" in different units. Greater parity between groups would also be effected by allowing students access to an agreed common range of assessment tasks.

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50 Instead, criteria-referenced marking, adopted University-wide as the marking paradigm, provides a means of accounting for some degree of equity in standards by allowing specific criteria to be developed collaboratively across streams which meet the agreed objectives of the unit without dictating the form of the assessment. See University of Sydney, Academic Policy, Principles of Assessment, http://www.usyd.edu.au/planning/policy/acad/256_AssPrin.html. Procedures such as control cross-marking can also be instituted to support claims of consistency and parity in assessment standards.

Other aspects of assessment are less central to questions of teaching method, but tend nonetheless to be important to a sense of equity between groups. For example, the same policy for extensions and penalties for late submission may be more easily agreed upon by instructors. There is a strong case for harmonising these highly visible indicators and little to tie them to academic freedom.

It is interesting to reflect on why staff are so sensitive to fairness issues in diverse courses and assessment programs. It is probably fair to say that the experience of many of us in our legal education would have been in lecture-based courses where there was only ever one course guide. In addition, the previous paradigm at Sydney Law School had a high degree of uniformity. Instructors' legal preoccupations make fairness an important issue in any setting, and we are also concerned with fairness because we take our work seriously and feel a high degree of responsibility to our students. However, given strong pedagogical arguments supporting some degree of flexibility or difference, which staff generally recognised in the interviews, there are few reasons to compel absolute uniformity. Aiming instead for reasonable parity, in terms of comparable assessment, skills and content, will go a long way towards addressing staff and student concerns over fairness.

The consensus in our research was that the focus should be more on encouraging communication and consistency in core content, skills, criteria, marking and feedback rather than establishing the same teaching and assessment regime. It may be the case anyway that unnecessary differences between groups could be minimised through discussion and negotiation between the instructors. Teachers in units which had a formal coordination process with regular meetings considered it to be valuable as an on-going dialogue about, and resource for, their teaching. These were especially important in units where there were a number of casual teachers who gained from having a forum to discuss issues related to the course, as well as a more structured involvement in the Faculty. And, as one instructor commented, the coordination process allowed an enunciation of reasons and objectives that would support the communication of principles of fairness to students:

> If students complain that it's unfair, you have to be able to sit down and demonstrate to them why it's fair, you have to have had that process of discussion to show that.

Through the consultation process, staff expressed a commitment to "parity" rather than "uniformity". They supported alternative means of attempting to balance the encouragement of creativity and enthusiasm in teaching, with a sense of fairness for students, by agreeing on some basic principles. They included a core set of topics to be covered in the subject ("dot points"); uniform policies on word length and lateness penalties; limits on assessment type and relative weighting; agreement on which skills are to be the focus of the unit; as well as on-going communications and sharing of resources during semester. There was also agreement on the need to maximise student choice through the provision of information prior to enrolment and early planning.

Implications Across the Degree Program

A major theme in the research was the need for greater communication between staff about teaching across the program as a whole and not just within each unit. The need for clearly articulated goals and channels of communication over the program as a whole was often expressed:

> It was difficult coming into the Faculty without knowing how your teaching assignment [fitted] into the overall program.
>
> It's hard to know what to teach without knowing what they've learnt already and what the overall goal of teaching them is.
>
> There needs to be more communication between subjects — no-one asks what is being taught in [subject x] or indicates what they expect will be taught.
>
> Teaching can get really functional, you focus on 13 weeks and 3 assignments. When there is no overarching structure and statements of goals it is easy to lose sight of good teaching and end up doing the antitheses of what we want to achieve.

In the interviews there were many staff who felt that greater attempts at integration could improve some aspects of the current degree structure and delivery. At the most basic level this would avoid unnecessary duplication of materials and content (although some level of deliberate overlap is generally appreciated by students). Greater integration could also help rationalise student workload (particularly in the context of continuous assessment) and coordinate the implementation of the degree objectives.

> We need an integrated approach in [the foundation] to assessment so that everybody's not doing the same thing, students are not overworked.
>
> Assessment has to be coordinated over the whole year, in terms of range of skills and workload.
>
> Coordination would be good to ensure they get a variety of experience over different subjects.

Thus instead of replicating the same range of tasks in each unit, or focussing disproportionately on one type of task, different subject areas would target different skills, or even try to design tasks which bridged two concurrent units.

To achieve such co-ordination of objectives and methods across subject areas and years, with different personnel and timing of delivery, it was clear that considerable structural changes were required. Instituting procedures for coordination across these areas required a single person, a foundation co-ordinator, to oversee the delivery of programs. The research process also highlighted the need for a major rearticulation of what that program actually is, and what it aims to deliver. We also recommended, therefore, the creation of a "Foundation Program" within the Faculty, covering the subjects we researched here, that is, the subjects comprising the first year of study in the Graduate Law program and first three years of study in the Combined Law program. A Foundation Program, convened by a single Co-ordinator, is seen by us as a major step towards developing a cohesive vision of the program and realistic management and communication structures with which to deliver it.

Recommendations

Our structural recommendations were divided into those that were directed to consistency and harmonisation within the units themselves, and those which were directed to the broader degree, or Foundation Program.

Within units, recommendations included:

- Some degree of student choice of group in enrolment (for example, preferential system and provide details of the course structure, assessment and instructor in advance to assist choice).
- Set out a timetable for important dates in each semester; for example, a least one unit meeting four weeks before term to discuss unit content, assessment regimes and

course outlines, and another at the end to discuss results and marking issues.

- Fostering of agreement on basic principles to guide co-ordination and parity between groups:
  - Basic 'dot points' or issues to be covered in each unit; and skills to be a focus in each unit
  - The modes of assessment, workload and due dates in each unit; no one assessment to be worth more than 60 per cent
  - Uniform policy for extensions and penalties for word length and lateness.
- Cross-mark in each unit for fails and other grades as well.
- Establish formal on-going communication and sharing of resources within units (teaching ideas, class strategies, problems, exam questions, etc) during semester.
- An enhanced role for the Unit Coordinator, and increased recognition of that role.
- Better coordination for the spread of due dates for assignments across the program.

Recommendations for coordination across units and the degree program included:

- Meetings within units, and then between Unit Coordinators, about skills to be acquired in each unit.
- The encouragement of variety in assessment (for example: research essay, "non-research" essay, problem question, examination, take-home examination, class participation, class presentation/facilitation, moot, negotiation exercise, interview exercise, court report, class diary).
- Overlap of staff across early units to be provided for, to facilitate flow of information.
- Unit Coordinators to meet prior to semester as a group (with Foundation Coordinator) to discuss unit materials and assessment.
- Appointment of a Foundation Co-ordinator to oversee the delivery of the "foundation program" (the first 3 years of the combined degree and first year of the graduate studies).
- Within the Foundation Program, assessment choices to be drawn from modes of assessment agreed upon with Foundation Coordinator and Teaching and Curriculum Coordinator.

Conclusion: A Change in Culture

The audit review found that the move to seminar-style teaching has necessitated a change of culture, both at the micro level of what is happening in the classroom and at the

macro level of program delivery. Within the classroom there have been issues of adjustment as staff and students become accustomed to the new model and struggle, at times, to make it work effectively. In part this is an issue of training and in part an issue of expectations. For example, from the instructor's point of view, it is difficult to embrace new methods in the classroom if to do so means "sacrificing" coverage of material. Likewise, it is difficult to expect students to embrace more unstructured, student-centred learning styles when courses remain content driven with the same, if not greater, amount of material as under the lecture format, and when the major assessment task is still an examination at the end of the course. There is also inertia in the student body in overcoming the "lecture note" culture, as well as a general fear that there would be more work involved in the seminar format. The cultural shift to seminar-style teaching is now mostly about understanding and tackling these issues.

Methods of didactic teaching have reflected and reinforced traditional conceptions of law as a discipline. The perceived need to find "the right answer" may undermine students' willingness to engage in discussion-based learning, even though many admit to finding it a more interesting way to learn. What becomes clear is that in implementing a model of learning which is unfamiliar to many students and instructors it is vital that students be given clear instructions as to what is expected of them and the purpose of their activities. Particularly with preparation for and participation in class, students may be unsure of what exactly they are being marked on, and this leads to anxieties about performance and participation marks. Clearer objectives and communication of these objectives are an essential part of course delivery in the new format.

At a macro level the growth of innovation and varied methods and content has meant that coordination and consistency are greater issues than they were before, although not entirely new. Consideration of how better to structure our coordination of units and across units inevitably prompted a rethink as to the meaning and aims of the law degree program as a whole.

We presented our report and recommendations to the Faculty in late 1999. The initial response has been enthusiastic. Throughout 2000 the Faculty will work toward digesting and implementing recommendations.[51] This continues the

51 As this article goes to press we are pleased to add that the Faculty passed the major set of recommmendations comprising a Foundation

process which produced the 1997 change in teaching model. Among the most significant achievements of that change is the fact that teaching is now firmly placed on the formal and informal agendas in our Faculty.

Program at its August 2000 meeting. The Program is scheduled to run from 2001.

APPENDIX

Part 1

Student Entry Survey

The University of Sydney
Faculty of Law
Unit:.....
Group No .....

Dear Students,

Welcome (back) to Law! This survey is part of a "teaching audit" of undergraduate courses in the Law Faculty this year. We are gathering detailed information about teaching and learning in the early part of the LLB program — and your experiences and expectations of the Course are an important part of that.

Your legal education should be a rewarding experience and student feedback is essential if we are to continue to improve the delivery of the course, so please give some time and thought to completing this survey — your assistance is appreciated. ***NB This is a voluntary survey and your responses are anonymous.***

Why did you choose to study Law? Why did you choose The University of Sydney?

What do you think, or expect, are some of the characteristics of a good university subject?

What do you think is the best way for you to demonstrate what you learn in a unit of study?

What knowledge and/or skills do you hope to acquire from your Law degree? Why?

How many hours of course work (preparation, reading, assignments), in addition to class time, do you think it is reasonable to expect students to complete each week for each unit of study?

How many hours per week do you spend, or plan to spend this semester, in paid employment?

What form of employment do you think you will seek when you finish your degree?

Part 2

Student Exit Survey

The University of Sydney
Faculty of Law
Unit: .....
Group No .....

Dear Students,

This survey is part of a "teaching audit" of undergraduate courses in the Law Faculty this year. We are gathering detailed information about teaching and learning in the early part of the LLB program — and your experiences and expectations of the Course are an important part of that.

Your legal education should be a rewarding experience, and student feedback is essential if we are to continue to improve the delivery of the course, so please give some thought to the questions below as your course progresses. Complete this survey in your own time and get it back to us by the end of August — you can hand it in to any of your instructors, or to the student counters at either Campus or Level 12 of the Law School.

Thank you, your assistance is appreciated.

NB This is a voluntary survey and your responses are anonymous. Please ignore those questions you think are inapplicable to your situation, eg. first year students who have only completed one subject etc.

What skills have you acquired in your Law degree so far?

What were some of the best elements of the Law unit(s) you have most recently completed?

What types of assessment have you found particularly helpful in your Law units so far?

Have you any criticisms to make of the assessment regime in this unit, or overall in the Law degree so far?

In relation to assessment and class preparation, has your workload been evenly spread over the semester? If not, please explain.

How many hours outside class did you spend each week on course work (preparation, reading, assignments) for the Law unit(s) you most recently completed?

How many hours per week did you spend in paid employment last semester?

Do you think that the order in which you studied your Law subjects is the appropriate order? If not, please give details.

If you have experienced overlap or repetition in content or assessment in your subjects, please explain.

If you have experienced, in any of your subjects, content or assessment which you believed was largely irrelevant, please explain.

By now you will have encountered various teaching styles. Which do you think works best for you and why?

Has your legal education met your expectations? Why/why not?

What form of employment do you think you will seek when you finish your degree?

*** e-mail contact ***

If you have any comments, suggestions or constructive criticism about any part of your Course, you can e-mail the audit researcher Kirsten Anker any time at kirsten@law.usyd.edu.au. Of course, correspondence by e-mail can't be entirely anonymous, but anything you say will be in the strictest confidence. We may pass on your concerns to people in the Law Faculty who are responsible for making changes, but your name will **not** be passed on or associated with your comments in any way.

Part 3

Student Focus Groups

Hi! Welcome to your Student Focus Group and thank you for participating. These groups are a chance to follow up in greater detail some of the issues that have been raised in the Teaching Audit surveys conducted earlier in the year. So that you can get a sense of the kind of things we might be discussing, some of the main issues and areas of interest are set out below. As you read through them, if you think of additional points you would like to raise, please write them down so that we can come to them during the discussion. We are not at all restricted to the list below, as the main

idea is to find out what concerns you, as a student, have. Student feedback gained in these sessions will be used in formulating recommendations to the Faculty as part of the Teaching Audit report. Confidentiality is assured, and although your comments may be passed on to the Faculty, your name will not be associated with them in any way.

NB – This research is directed towards the first 6 units, although many issues will be common to the whole degree program.

The Classroom Environment

- What do you get out of coming to class?
- What is it that you value in different methods/styles of teaching?

Choice

- How does freedom of/lack of choice impact on your studies? eg. in assessment, timetable, teaching stream (when there is more than one instructor in a unit)

Assessment

- How does continuous assessment help you to learn?
- Class participation attracted a lot of comments in the surveys. Can you help us understand why? How can it best be assessed fairly?

Legal Research Classes and Legal Writing Workshop

- Do these courses help your work in the substantive units (eg. Criminal Law, Torts)?
- How appropriately are they currently placed in the degree progression? Do they need to be repeated?

Orientation to Law School

- What sort of information did you have at the start of your law studies about law as a program? Was this enough information? What would have been useful to know?

Part 4

Interview Topics

Through these interviews and in listening to your concerns, we hope to consider how we can —

- take stock of the opportunities provided by small group teaching and semesterisation
- reflect on how the discrete units fit together to constitute our degree program
- harmonise our teaching objectives
- rationalise our use of scarce teaching resources.

Subject sequencing and integration

- Do you think the sequence of subjects matters?
- Do you think your subject comes at the appropriate time?
- Any changes you would suggest?
- Have you found any overlap or gap in these formative units?
- What are the alternatives?

Small group teaching

- Were you here when the move to small group teaching occurred?
- What do you think about a group of 40?
- What can you do with a group of 40?
- How would a move to greater than 40 affect you?

Method

- What are your principal teaching methods?
- What technologies do you use?
- How has your teaching changed over time?
- Is there anything you would do differently with more teaching resources?
- Are there any problems with the physical teaching environment?

Rationalisation of both student and staff time

Coordinating assessment tasks across the course

- Coordinating with other teachers — what do you do?

- (Question for course coordinators) How should the competing demands of academic freedom and course co-ordination be balanced?

Workload issues for staff and students

- Comment on your work load
- Are students under or over-assessed?
- How much time do you spend in consultation with students outside class time?

Assessment

- How do you assess your students?
- What works and what doesn't?
- How has your assessment changed because of small group teaching?
- Can you explain the way your assessment links with your teaching and learning strategy?

Generic legal skills

- What do you expect students to know when they get to your subject?
- What do you build on to that?

Ethics

- Where and how should they be taught?

Language skills

- Whose responsibility is it if students enter a course with a poor command of English?
- Should we have an entrance exam? If yes, what sort of content?

What do you think about the "Foundation Course"?

- Do we have one?

BOOK REVIEW

Negotiation: a Guide to Practical Skills

Nadja M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation – Theory and Techniques*, Sydney, Butterworths, 1998, pages 1-212. Price $45 (softcover) $33.75 (softcover at academic price direct from publisher). ISBN 0 409 31126 X.

Astor and Chinkin define negotiation as "where two or more people together attempt to reach agreement on some matter".[1] It follows that negotiation is central to daily life, be it in the supermarket, at school, in traffic, at home, or in the work-place. Even though negotiation is common place and practised widely (and often unwittingly) by lay people, over the last two decades negotiation has been professionalised. "Negotiation" has developed into a term of art; it is now a "process"[2] with discrete areas of theory and practice.

Although negotiation is widely practised in traditional forms of dispute resolution, such as the court system, it also forms the cornerstone of the alternative dispute resolution (ADR) movement. As lawyers are the main players in both traditional and alternate dispute resolution processes, focused and skilled negotiation, as never before, constitutes an indispensable part of legal practice.

This book by Spegel, Rogers and Buckley comprises the fourth part of the award winning Butterworths Skills Series. As the title indicates, the book's aim is to integrate the theoretical and practical aspects of negotiation, forming a comprehensive resource for law students and lawyers. Nevertheless, the authors' primary commitment is to skills-based learning (ix); the theoretical underpinnings of negotiation appear secondary. For example, the authors proffer the Fisher and Ury model[3] of "principled" negotiation (22), and do not explore any other theoretical perspective of negotiation. Furthermore, the book fails to consider

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(2000) 11 *Legal Educ Review* 145.

1 H Astor and C Chinkin, *Dispute Resolution in Australia* (Sydney: Butterworths, 1992) 77.

2 For example, see L Boulle, *Mediation: Principles, Process, Practice* (Sydney: Butterworths, 1996) 46.

3 See R Fisher and W Ury, *Getting to Yes: Negotiating An Agreement Without Giving In* 2nd ed (London: Century Business, 1991).

tensions that are inherent in negotiation,[4] such as those existing between empathy and assertiveness, and there is little discussion of issues concerning interpersonal relationships and interdependence. Although these comments may appear to be a negative criticism of the book, they are not a criticism of the quality of the substantive work. Rather, they illustrate that the book's title is somewhat misleading.

The work will succeed at a practical, if not theoretical, level. Law teachers, students and practitioners will find the work useful as a manual; its comprehensive index and plethora of tables, flow charts, figures and diagrams reinforcing the text. The book satisfies the needs of those who learn best by visual aids and representations. A range of practice-oriented facets of the negotiation process are addressed in detail, such as the preparatory regime, communication techniques, identification of negotiation styles and maximisation of empowerment strategies.

The ten chapters of the work divide evenly into two major parts. Chapters one to five concentrate on the process of negotiation. The preparatory stage, various negotiator strategies and, interestingly, confronting ethical issues are all covered in detail. The last five chapters comprise the "how to" or skills section.

The book is written in reader-friendly, "plain English" and in an almost conversational tone. It is well set out throughout. The authors seem to ascribe to the KIS principle — Keep It Simple. For example, they explain the difference between positions and interests as follows. "A position is what you want. An interest is why you want it". (22) Good use is made of bulleted points to summarise advantages and disadvantages. For instance, the advantages and disadvantages of interest-based bargaining are listed clearly and concisely. (30)

Interspersed throughout the text are "activities": practice-oriented exercises that provide either a useful learning and/or teaching regime, or food for thought and self-evaluation for the practitioner. A consistent formula assists the reader in using the book as a teaching and reference tool despite the authors' caveat that the work is "not a reference book". (ix) On the first page of each chapter is an inset containing an overview of the major sections. A cogent (and often amusing) quotation and illustration are also

4 See R Mnookin, S Peppet and A Tulumello, The Tension Between Empathy and Assertiveness (1996) 12 *Negotiation Journal* 217.

presented at the start of each chapter. A summary of major concepts canvassed in the chapter, a list of further readings, and a "mind map" depicted by a flow chart that chronicles the thought-processes, interests, and goals associated with the central concept discussed in the chapter feature at the end of every chapter.

The last chapter describes and analyses the emerging body of black letter law in Australia relating to negotiation. The authors summarise the law relating to "without prejudice" discussions, pre-contractual negotiating, and party liability for conduct during negotiation (including puffery, false statements and misleading and deceptive conduct). Provisions contained in the *Trade Practices Act* 1974 (Cth) and comparable state legislation are considered.

The appendix at the end of the work consists of three role play exercises that focus on developing skills in option generating. The exercises are a valuable resource for law teachers in a skills-based course. They can be used as the subject of peer review or can comprise part of the assessment criteria in a university subject.

The book's target market is both law students and the legal profession. Oddly, the authors assert that, despite negotiation being an important component of legal practice, it does not form part of the curriculum at Australian law schools. While this may have been true in the past, this is clearly not the case in the 1990s. Many law schools teach courses at undergraduate and post graduate level which address the whole spectrum of ADR processes.

In this work the authors make an important contribution to the teaching and practice of negotiation. The readability, excellent layout and plethora and variety of high quality assessment tools contained in the book will ensure that "Negotiation — Theory and Techniques" establishes itself as an essential resource for practitioners, teachers and students of ADR.