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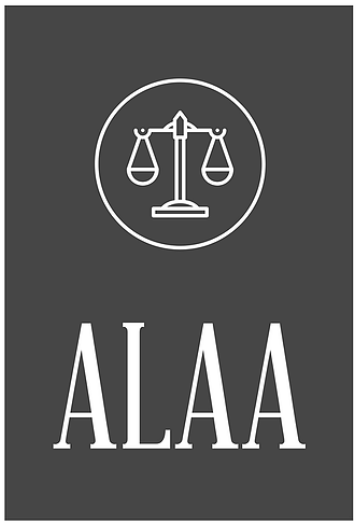

JOURNAL OF THE AUSTRALASIAN LAW ACADEMICS ASSOCIATION

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Editorial Objectives and Submission of Manuscripts

The Journal of the Australasian Law Academics Association (JALAA) is a double-blind refereed journal that publishes scholarly works on all aspects of law. JALAA satisfies the requirements to be regarded as peer reviewed as contained in current Higher Education Research Data Collection (HERDC) Specifications. JALAA also meets the description of a refereed journal as per current Department of Education, Employment and Workplace Relations (DEEWR) categories.

Copy-edited and typeset by Barbara Graham

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FOREWORD

Dr Jonathan Barrett

On behalf of the editorial team (Dr Sean Goltz, Dr Jackie Mapulanga-Hulston and myself), I am pleased to welcome readers to the 2019 issue of the *Journal of the Australasian Law Academics Association* (JALAA), previously titled JALTA. We aim to build on the work of Professor Dale Pinto, who edited the first 11 editions of JALTA. JALAA is a double-blind refereed journal that publishes scholarly works on all aspects of law. This edition presents a snapshot of the research and teaching interests of a broad range of ALAA members, from reflections on leading law educators by Professor Emeritus David Barker to peer reviewed articles by experienced subject specialists and early career researchers.

I would like to acknowledge some of the key people who have contributed to this issue of JALAA. A journal of this nature is not possible without the authors and peer reviewers, who give up their time to constructively engage with submissions. In addition to the members of the ALAA Executive, I would like to thank Sarah Parker and others at ANU for administrative support. My thanks are also due to Barbara Graham, copy-editor and typesetter for this issue.

Dr Jonathan Barrett
Editor in Chief
JALAA

REFLECTIONS ON THE LIVES AND ACHIEVEMENTS OF MICHAEL COPER, DAVID WEISBROT, ROSALIND CROUCHER AND CHRISTOPHER ROPER, FOUR OUTSTANDING LEGAL EDUCATORS OF THE MODERN ERA OF AUSTRALIAN LEGAL EDUCATION

*David Barker, AM**

ABSTRACT

Two previous JALTA articles considered the achievements of eight legal educators who have provided both inspiration and leadership in Australian legal education from the time of first European settlement in 1788 until 1989. This article reviews the achievements of a final four outstanding legal educators — Michael Coper, David Weisbrot, Rosalind Croucher and Christopher Roper — who have been outstanding educators and leaders in the last three decades.

This article considers the challenges these academics faced in a drastically changed legal education setting, in which law schools have transformed from their early role as small entities within universities that trained legal practitioners to institutions with vastly more complex present-day functions. These challenges included an emphasis on students developing legal skills rather than merely accumulating knowledge, and a growing participation in high-level postgraduate research.

* Emeritus Professor of Law, University of Technology Sydney.

I INTRODUCTION

In two previous JALTA articles,[1] I have discussed eight law academics who provided both inspiration and leadership within the Australian legal education community. The first four academics progressed legal education from European settlement to the Second World War, and the last four were active in the post-war period until 1989. In making the difficult decision of selecting the final four outstanding legal educators, who have stood out in the last three decades, I have chosen people who have recently retired from legal education, namely Michael Coper,[2] David Weisbrot, Rosalind Croucher and Christopher Roper. It is submitted that they would probably also have been selected by a cross-section of their peers. I have not considered law academics who are still actively involved in legal education, as their contribution is ongoing.

Of the four educators selected, three have been conferred emeritus status: Coper by the Australian National University ('ANU'); Weisbrot by the University of Sydney; and Croucher by Macquarie University. Roper is a former Director of the Centre for Legal Education, and previously headed both the College of Law, Sydney and the Leo Cussen Institute, Melbourne. All four have been awarded the Order of Australia, Coper as an Officer and the others as Members.

In compiling this list, I have taken into account their involvement in the most unprecedented and unexpected expansion of law schools in Australia. This increase resulted in an additional 16 law schools being established between 1989 and 1997, with a further 10 in the first 18 years of the 21st century. It is a phase that has been described as the 'Third Wave' law schools or, in my phrase, 'Avalanche of Law Schools'.[3] The academics selected have, therefore, participated in one of the most challenging times for legal education, when it has had to retain and enhance its status as a major university discipline while at the same time maintaining the role of law schools as the only recognised providers (other than the New South Wales Law Extension Course) of the academic stage of the three phases of training for the legal profession. These academics have been charged with ensuring that law schools have been able to retain their relationship with the legal profession while also complying with increasing demands placed upon them and their staff in terms of performance appraisal relating to teaching/learning and research. This reconciliation of conflicting objectives has been achieved in an era in which universities have been subject to increasing bureaucratic control over resources, curricula and funding.

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[1] David Barker, 'Reflections on Four Leading Early Australian Law Academics' (2017) 10 *Journal of the Australasian Law Teachers Association* 1; David Barker, 'Post-World War II Icons of Australian Legal Education: Professors David Derham, Hal Wootten, Dennis Pearce and Tom Cain' (2017) 11 *Journal of the Australasian Law Teachers Association* 1.

[2] I regretfully note that Michael passed away on 13 April 2019. See 'Obituary: Emeritus Professor Michael Coper AO, FAAL', *ANU College of Law* (Web Page, 16 April 2019) <https://law.anu.edu.au/news-and-events/news/obituary-emeritus-professor-michael-coper-ao-faal>.

[3] David Barker, 'An Avalanche of Law Schools: 1989 to 2013' (Paper presented at the Australasian Law Teachers Association Conference, Legal History Interest Group, Canberra, 1 October 2013) 153.

These academics have also had to assert leadership within both the legal education and the wider legal communities, while at the same time maintaining their personal credentials with respect to research, teaching and leadership. Nevertheless, only in the long term, through ongoing historical analysis of supporting evidence of the evolution and evaluation of the formal sources of legal education, will we become certain that the latest nominated four academics deserve to be included among the eight other outstanding legal educators.

II COPER

Coper graduated from the University of Sydney in 1970 and subsequently taught at the Department of Law at the University of Rajasthan in Jaipur, India as a Myer Foundation Asian and Pacific Fellow.[4] An account of his year in India was published in the *Jaipur Law Journal*.[5] He became a teaching fellow and then lecturer at the University of New South Wales ('UNSW') Law School. During this time he also completed a PhD on s 92 of the *Australian Constitution*, which was later published as *Freedom of Interstate Trade under the Australian Constitution*.[6] In 1978, Coper received a Fulbright Senior Scholarship to study in the United States at the University of Virginia.

Coper's tenure at UNSW in the 1970s marked a visionary period of the Law School, particularly for its reputation of embodying modern law school teaching methods, which, combined with other teaching reforms such as interactive methods of teaching and continuous class assessment, created an atmosphere of social consciousness.

In 1988, Coper left UNSW to take up an appointment as an Inter-State Commissioner in Canberra, also serving as a member of the Committee of the Constitutional Commission. James Stellios, editor of Coper's *Festschrift*, describes his appointment as a lawyer member of the Commission:

> He was recommended by the Commission's retiring President Justice Mervyn Everett, with whom Coper had worked closely on the Trade and National Economic Management Committee of the Constitutional Commission in the mid-1980s. Gough Whitlam, whose baby the Inter-State Commission was in its second appearance in the 20th century and who launched Coper's book *Encounters with the Australian Constitution* in 1987, may also have been instrumental … According to Michael, it was an exhilarating period in his life.[7]

Coper similarly recalls:

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[4] 'Our People: ANU College of Law, Michael Coper', *Australian National University* (Web Page, 2019) <http://law.anu.edu.au/staff/Michael-coper>.
[5] Michael Coper, 'Freedom of Trade in India and Australia: Introductory Thoughts on the Nature of Judicial Choice' (1970) 10 *Jaipur Law Journal* 1.
[6] Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (Butterworths, 1983).
[7] James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education; Essays in Honour of Michael Coper* (Federation Press, 2018) 18.

> I felt at that time that despite having had some success in advocating legal change through my academic writing and other channels, my experience at the Inter-State Commission brought me closer than I had previously been to having a direct input into government policy.[8]

On the demise of the Inter-State Commission in 1991, Coper moved to Sly and Weigall (later Deacons Graham & James) as Director of Government Advising, where he was primarily involved in commercial and constitutional work, some of which entailed collaboration with the Federal Attorney-General's Department. He was then appointed to the ANU College of Law in 1995 as the Robert Garran Professor of Constitutional Law, succeeding Leslie Zines.

ANU's Faculty of Law had been established within the School of General Studies in 1960. Some commentators have regarded the Law School as the last of the traditional law schools, while others have regarded it as the beginning of the 'Second Wave'. In reality, it was a bridge between two worlds.[9] Within three years of joining ANU, Coper had become Dean of the Faculty of Law, a position he held until the end of 2012. He was ANU's longest serving Law Dean.[10]

Coper's contribution to Australian legal education may be usefully reviewed in three areas: his contribution to legal scholarship, particularly within the area of research and publications; his role within the ANU Law School; and the contribution of his leadership to the wider legal education community.

A *Contribution to Legal Scholarship*

Coper's first major work, which brought him to the attention of constitutional lawyers, was *Freedom of Interstate Trade under the Australian Constitution.*[11] This book was based on his award-winning PhD thesis and deals, in particular, with s 92 of the *Australian Constitution*. Sir Anthony Mason described the work as a 'splendid book', adding that 'it will do much for the progressive evolution of the law in this country'.[12] *Encounters with the Australian Constitution* secured Coper's reputation as an expert in Australian constitutional law. Williams observed, 'when the work first appeared in 1987, it turned judicial and academic heads'.[13] Furthermore, Starke commented, 'not only is the author's text in itself a tour de force, but the production and form, in conjunction with the accompanying copious photographs, drawings and illustrations are of superb quality'.[14]

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[8] Ibid.
[9] David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 62.
[10] Ibid 63.
[11] Coper, *Freedom of Interstate Trade* (n 6).
[12] Sir Anthony Mason, 'Book Review' (1983) 6 *University of New South Wales Law Journal* 234.
[13] John Williams, 'Encounters with Michael Coper's Career and the Search for New Ways Forward' in James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education; Essays in Honour of Michael Coper* (Federation Press, 2018) 21.
[14] JG Starke, 'Book Review' (1988) 62 *Australian Law Journal* 100.

The next of his major books was the *Oxford Companion to the High Court of Australia*, co-edited with Tony Blackshield and George Williams,[15] which Irving described as 'stand[ing] among his greatest contributions'.[16] Furthermore, 'all understood from the start that Coper was its originator and its driving force. Certainly, it would not have appeared without him.'[17]

Coper wrote or edited another seven books, together with 21 book chapters, 30 journal articles and numerous shorter notes and comments and unpublished papers, many representing conference presentations, both national and international. These outputs illustrate the important ongoing contribution he has made to legal literature.

B *Role at ANU*

Coper commented on his role as a legal educationalist, particularly during his long period as Dean of the ANU Faculty of Law, later renamed the ANU College of Law, in the following terms:

> I derive enormous satisfaction from leading a law school that conducts important and socially useful research; imparts the results of that research to some of the best and brightest students in Australia; and engages with the community in a wide range of what we call 'outreach' activities …[18]

He added:

> The highest standards of teaching and research, and the production of lawyers of the highest competence, are important goals in their own right, but are also necessary pre-conditions to the effectiveness of agitation for law reform and social justice.[19]

He has also stated that:

> I enjoyed very much being Dean — perhaps even [though] … it does come at a cost, both at a personal level and in terms of the impact on one's capacity to continue to develop as a genuine scholar … One can do much good as a dean; but it is less tangible, less adapted to general dissemination, less well remembered, and, in the end, less valued and less enduring, than one's contribution to scholarship and the world of ideas.[20]

C *Legal Community*

When considering Coper's influence as a leader within the legal educational community, it is relevant to reflect on his role as Chair of the Council of Australian Law Deans ('CALD') during

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[15] Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).
[16] Helen Irving, 'Through the Lens of an Encyclopedia' in James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education; Essays in Honour of Michael Coper* (Federation Press, 2018) 147.
[17] Ibid.
[18] Michael Coper, 'Dean's Welcome', *ANU College of Law* (Web Page, February 2010) <https://web.archive.org/web/20120119085552/http://law.anu.edu.au/deansMessage.asp>.
[19] Ibid.
[20] Stellios (n 7) 193.

the period 2005–08, when he was also Chair of the Standards Committee. He explained the purpose of the CALD standards project as providing for the enhancement of 'the quality of Australian law schools in all of their diverse endeavours, and to do so by assisting all Australian law schools to strive for and to reach a clearly articulated set of standards'.[21]

The outcome was that the standards themselves were incorporated in a unanimous resolution adopted by CALD at its first meeting on 4 March 2008 at the UNSW Conference Centre at Coogee Sands, hence the resolution was titled the 'Coogee Sands Resolution'.[22] This resolution was both a notable triumph for CALD and also for Coper as its Chair. It ensured that not only was the agreement inclusive of all Australian law schools, but it confirmed that by taking the initiative in this way, it forestalled any outside official body or institution from imposing any unacceptable or draconian forms of standards on the law schools. This decision was probably the greatest triumph of Coper's legal education career.[23]

III WEISBROT

Despite being highly influential as an Australian legal educator, Weisbrot was born and educated in the United States. He studied Politics and Communications at Queens College, City University of New York, before undertaking his Juris Doctor Law Degree at the University of California Los Angeles. He subsequently qualified as a lawyer by passing the California Bar Examination. Before coming to Australia he had worked at both the Congress of Micronesia as a lawyer and the University of Papua New Guinea as a law academic. He was one of the overseas lawyers who caught the enthusiasm of the innovative approach to legal education adopted by the UNSW Law School, and he joined the staff there in 1979. He has recalled how it was a unique time to be involved in Australian legal education and what a rewarding experience being a member of the UNSW Law School proved to be.[24] During his time at UNSW, he took leave of absence to work at the New South Wales Law Reform Commission for four years, an experience that was to stand him in good stead when he was subsequently appointed to the Australian Law Reform Commission ('ALRC').

After UNSW, Weisbrot moved to the University of Sydney Law School, where he served as Dean until 1997. This was a crucial time for the Law School as it was during this period that he initiated changes to its structure that enabled it to regain some of the prestige it had ceded to UNSW. He also progressed plans for the Law School to move to the main university campus. He was subsequently appointed a Pro-Vice-Chancellor of the university, during which time he restructured the university's faculty system, introducing a college system whereby the 18 university faculties were divided into three colleges. Law was incorporated into a college that included Arts, the Conservatorium of Music, Sydney College of Fine Arts, Education, the

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[21] Michael Coper, Council of Australian Law Deans, *A Brief History of the CALD Standards Project* (Report, 9 March 2008) <https://cald.asn.au/wp-content/uploads/2017/11/CALDStandardsforAustralianLawSchoolsProjectBrief_History1.pdf>.
[22] Barker, *A History of Australian Legal Education* (n 9) 150.
[23] Ibid.
[24] Interview with David Weisbrot, Chair of the Australian Press Council (Sydney, 8 November 2013).

Graduate School of Business and the Faculty of Economics and Commerce. However, most commentators on legal education would probably agree that the most momentous time for change in Australian legal education was brought about by the appointment of Weisbrot as President of the ALRC in July 1999.

At the time of his appointment, the ALRC was at the final stage of completing its report *Managing Justice* ('ALRC 89'), which represented 'the culmination of a major four year inquiry, which commenced with terms of reference directing the Commission to consider "the need for a simpler, cheaper and more accessible legal system"'.[25] The launch of this report on 17 January 2000 was preceded by *Review of the Federal Civil Justice System* ('DP 62') published in August 1999.[26] At this stage, DP 62 indicates legal education was only contemplated as comprising a minor part of the review, headed 'Education, training and accountability'.[27] This part constituted a mere 36 pages of DP 62, with legal education forming 17 pages. Within these 17 pages, there was little reference to modern contemporary Australian legal education. Much of this section included reports on legal education in the United Kingdom and North America, together with comment on dispute resolution, practical legal education and continuing legal education. Weisbrot's appointment as ALRC President explains the different in focus of DP 62 and ALRC 89. Despite the short period between his appointment and the publication of ALRC 89, there was a dramatic change in ALRC 89's objectives — in particular, a widening of these objectives relating to the influence of all aspects of legal education. Under the heading of 'Education, training and accountability', ALRC 89 included not only education for the legal profession, but education and professional development for judges, judicial officers and tribunal members.

In measuring the effect and success of ALRC 89, without gainsaying the work of the Commissioners, there can be no doubt that Weisbrot's tenure as President had a major impact on its lasting effect on the development of Australian legal education from the time of its publication onwards.

This article is not about the ALRC 89, but it is relevant to Weisbrot's influence on the more challenging goal for legal education set in the report, as compared to that identified in DP 62. While the latter stated the 'requirement of higher educational qualifications is classically one of the defining features of the profession', the former set a more challenging goal of engaging with 'theory and practice in relation to the nature, shape, siting, funding and regulation of professional education [being] contingent and dynamic, and thus open to contest and controversy'.

While focusing on the academic stage of legal education, ALRC 89 also broke new ground by its willingness to undertake a comparative study of legal education in other jurisdictions,

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[25] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC Report No 89, 2000) 7.
[26] Australian Law Reform Commission, 'Review of the Federal Civil Justice System' (Discussion Paper No 62, 1999).
[27] Ibid 40.

particularly the United States' MacCrate Report, which emphasised the importance of 'professional legal skills'. ALRC 89 recognised that development of 'skills which will be needed in any subsequent legal practice' was an 'emerging trend in [Australian legal education]'. It acknowledged the current difference between Australian legal education and that of North America, stating 'MacCrate would orient legal education around what lawyers need to be able to do, while the Australian position is still anchored around outmoded notions of what lawyers need to know.'

Weisbrot's other major influence on the ALRC's recommendations was Recommendation 6, which sought the establishment of an Australian Academy of Law, to 'serve as a means of involving all members of the legal profession — students, practitioners, academic and judges — in promoting high standards of learning and conduct and appropriate collegiality across the profession'.

As an outcome from ALRC 89, while he was still President, Weisbrot convened a small group of leading law academics and led the discussion and negotiation whereby the Australian Academy of Law came into existence in 2007, and, for a short period, he acted as its temporary inaugural President. The fact that the Academy is currently recognised as a vibrant institution with approximately 380 selected members owes much to the earlier foresight of the ALRC, and of Weisbrot in particular.

IV CROUCHER

Croucher originally studied at the ANU Faculty of Law, transferring in 1974, after her first year, to the School of Law, University of Sydney, where she was awarded both a BA and an LLB. In 1994, she graduated with a PhD in legal history from UNSW.

Croucher has been involved in legal education for 25 years, originally in 1982 as a lecturer at Macquarie University Law School, moving two years later in 1984 to the UNSW Law School, and then to the University of Sydney Law School in 1990, where she was Head, Department of Law, Acting Dean and then Interim Dean in 1997–98.[28] She returned to Macquarie University Law School in 1999, where she was Dean of Law until 2007.[29] Croucher's role as Dean was credited with leading the Macquarie Law School back to some form of normality in the relationships between its various academic staff members.[30] This followed the Pearce Committee's findings in March 1987 that the Macquarie Law School 'should be closed, phased or divided due to irreconcilable differences'.[31] Croucher took up this challenge as Dean.

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[28] Rosalind Croucher, 'Rosalind Frances Croucher', *Australian Women Lawyers as Active Citizens* (Web Page, 14 November 2016) <http://www.womenaustralia.info/lawyers/biogs/AWE5643b.htm>.
[29] 'President — Rosalind Croucher', *Australian Human Rights Commission* (Web Page, 28 July 2017) <https://www.humanrights.gov.au/about/commissioners/president-rosalind-croucher>.
[30] Barker, *A History of Australian Legal Education* (n 9) 83.
[31] Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (AGPS, 1987).

Her firm but communicative personality stood her in good stead. Gradually the Law School returned to its focus on good relationships between the staff and the students, which had very much been its hallmark during the early days of the deanships of Professors Nygh and Peden. Examples of this change are illustrated by the Law School establishing major law journals. The *Macquarie Law Journal,* an initiative of students and staff, was launched in 2001 and joined by a further series of specialist journals: the *Australian Journal of Legal History*, the *Macquarie Journal of International and Comparative Environmental Law* and the *Macquarie Journal of Business Law*. In 2000 the Law School hosted its inaugural prize-giving ceremony, which, in addition to the normal prizes donated by law firms and professional bodies, included Croucher presenting special Dean's Awards to recognise service by students within the law school community. These initiatives had not been considered important by the Law School in the 20 or so years preceding her joining. Another of her initiatives was establishing the Trevor Martin Moot Court in 2002.

Croucher's approach to the challenges of legal education, particularly at the Macquarie Law School, are well documented in *The First 30 Years of the Macquarie Law School*, which she jointly edited with Jennifer Shedden. In an afterword, she states:

> The aim of Macquarie Law is that one may meet the other [teaching and learning] and that our students will rise to the challenge of the prodding of their teachers and, in time, if not immediately, appreciate the value of deep learning. For our goal is not to educate for the moment, with quick grabs of law as it might be at the time of one examination or another but to educate for a lifetime, with an understanding of the dynamics of the 'whys', 'wherefores', and 'hows' of the law that equips our graduates to be able to respond to any issue at the time it is raised. Law is not a static thing, but a living creature. Understanding how it moves, changes, reconfigures itself, is an essential element in continuing to be true to the law.[32]

Besides being recognised as an outstanding teacher, Croucher has also co-published with Prue Vines a major text on succession law — *Succession: Families, Property and Death*, now in its fourth edition. She has also edited seven books, including *Families and Estates: A Comparative Study* and *Law and Religion: God, the State and the Common Law* (co-edited with Peter Radan and Denise Meyerson), and written 20 book chapters. In 2007 she was appointed as Foundation Fellow of the Australian Academy of Law, serving on its Board of Directors until 2018, during which time she was also Chair of its Projects Committee. In this capacity, she was proactive in ensuring that the Academy developed a country-wide series of activities that fully embraced the membership. She was also CALD Chair, 2002–03.

In 2006, Croucher was appointed to the ALRC and was its President between 2009 and 2017. During this time as a Commissioner, she led a number of significant inquiries. Other law-related honours and awards that she has received include Honorary Fellowship of the Australian College of Law Medicine (2004) and Honorary Life Membership of the Women Lawyers Association of New South Wales (2013), besides being the winner in 2014 of the

[32] Rosalind Croucher and Jennifer Shedden, *Retro 30: Thirty Years of Macquarie Law School* (Macquarie University, 2005) 254.

Australian Women Lawyers Award in recognition of her 'outstanding contribution to the legal profession' in supporting and advancing women in the legal profession. In the same year she was also named in the *Australian Financial Review* and Westpac awards as one of Australia's '100 Women of Influence', due to the effect of her contributions to public policy.[33]

She is currently the President of the Australian Human Rights Commission, having been appointed in 2017. In 2015 Croucher was appointed a Member of the Order of Australia for 'significant service to the law as an academic, to legal reform and education, to professional development and to the arts'.

V ROPER

Roper's legal academic career has been significantly different from those of the other three scholars discussed in this article, although he briefly held a chair at the University of Newcastle Law School. In fact, much of his background is different from that of a conventional academic lawyer, although his studies commenced in a traditional manner when he enrolled at the University of Sydney, where he studied for an LLB/BA during the period 1962 to 1967. After graduation, he completed articles before being admitted to practice as a solicitor in New South Wales in 1968. After a period of practice both in England and New South Wales, he attended Trinity College, University of Melbourne to study for a degree in Theology, which he completed in 1975. Having decided not to undertake ordination within the Anglican Church, he first worked with the Law Foundation of Australia and then moved to the Law Council of Australia where he was employed by the Hon Robert Nicholson, the first full-time Secretary-General. In some ways this was a portent as to the future direction of his involvement in administration with legal organisations.

The opportunity arose for Roper to become involved with legal education administration in the form of practical legal training when he became the Executive Director of the Leo Cussen Institute in Melbourne from 1972 to 1982. He subsequently become Director of the College of Law, Sydney from 1982 to 1988. He then moved to Stephen Jacques, a large Sydney law firm, and was responsible for the continuing legal education of their solicitors for a four-year period, until he was appointed to the newly established Centre for Legal Education ('CLE') in February 1992.[34] The CLE had been established under the auspices of the Law Foundation of New South Wales as an outcome of a Colloquium on Legal Education conducted by the Foundation in June 1990, which had had as it major goals:

> To examine the problems and challenges, within the existing education process, that relate to the transforming of law students into legal practitioners; to examine the range of programs, models and possibilities for providing ways of transforming law students into legal practitioners; and to produce, if possible, some consensus on solutions and ways forward.[35]

[33] 'President — Rosalind Croucher' (n 29).
[34] 'Christopher Roper' in Crown Content, *Who's Who 2015* (2015) 1082.
[35] Centre for Legal Education, *The Centre for Legal Education: The First Three Years 1995* (1995) 3.

The Board of Governors of the Law Foundation intended the CLE to be a permanent organisation to carry forward the outcomes of the Colloquium on Legal Education. It was proposed that the overall aim of the CLE would be to further legal education and improve its outcomes. It was seen at that time as taking up the objectives of the Law Foundation and dealing with them in an outgoing, permanent and professional manner.

I have previously described Roper's appointment as Director of the CLE as proving to be an 'inspired choice'[36] and, certainly to any outside observer, this is borne out by the CLE's achievements and outcomes from its foundation in 1992 to its closure as an independent organisation in 2000. The importance of the CLE was that it was the first Australian institution to become seriously focused on research into legal education and, in this respect, it became the precursor of other research institutions in this area of study. During its most active period, when it continued to be generously funded by the Law Foundation of New South Wales, it had a major influence on the legal community's reaction to, and views on, contemporary legal education. Roper wrote two of its most significant publications during this time — *Senior Solicitors and Their Participation in Continuing Legal Education*[37] and *Foundations for Continuing Legal Education*.[38] A further monograph, which incorporated a wide-ranging literature review on this topic, was *A Study of the Continuing Legal Education Needs of Beginning Solicitors,*[39] authored by John Nelson.

The most important aspect of these early publications was that they were in an area of legal education that had never been explored in the interests of legal research. The CLE later published a document titled *The First Seven Years* that chronicled a notable list of its achievements, which were mainly attributable to Roper's role as the Director.[40] Among these accomplishments were a review of practical legal training in New South Wales, assistance to the New South Wales Law Society in developing a policy on legal education, and reviewing their Accredited Specialists' Scheme.

However, perhaps the most significant achievement of the CLE were two major research projects, the first a national law students' career intentions and career destinations study of Australian law graduates, and the second a study of the socio-demographic characteristics of first-year law students. Although both of these studies were conducted more than two decades ago, their results are still currently quoted, as no other researcher or institution has been able to gather the resources or funding to conduct similar projects.

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[36] David Barker, 'Silver Jubilee Milestone 1992–2017: A Contribution to Australian Law Teaching the Coming-of-Age of the Centre for Legal Education and the Legal Education Digest' (2017) 10 *Journal of the Association of Law Teachers* 8, 9.
[37] Christopher Roper, *Senior Solicitors and Their Participation in Continuing Legal Education* (Centre for Legal Education, 1993).
[38] Christopher Roper, *Foundations for Continuing Legal Education* (Centre for Legal Education, 1999).
[39] John Nelson, *A Study of the Continuing Legal Education Needs of Beginning Solicitors* (Centre for Legal Education, 1993).
[40] Centre for Legal Education, *The Centre for Legal Education: The First Seven Years 1999* (1999).

Another significant achievement of the CLE was the development of an impressive portfolio of legal publications, which incorporated the *Legal Education Digest*, the *Australasian Legal Education Yearbook*, a wide variety of legal monographs, two major reports relating to the introduction of the *Uniform Admission Rules* and *The Lawyers Admission Handbook*, the *Lawasia Directory of Law Courses* and *The Australasian Professional Legal Education Directory*.[41]

The CLE was also responsible for organising a New South Wales Legal Education Conference, which met on a six-monthly basis, having as its primary purpose an exchange of information and a focus on matters of current concern relating to legal education in New South Wales. This brought together representatives of legal professional bodies responsible for legal education, delegates from the appropriate government departments, Law Deans and Heads of practical legal training courses, providers of continuing legal education and representatives from the Australian Law Students' Association.[42]

In 2000, the CLE moved to the University of Newcastle, following a review by the Law Foundation of New South Wales that concluded it could longer financially support it. Roper continued as head, with the designation of Professor. However, it soon became evident that the CLE would struggle to effectively function away from Sydney. Roper therefore resigned at the end of 2001.[43] Although the CLE continued to function, it eventually merged with Bond University Law School's Centre for Professional Legal Education in 2017.[44]

Roper became Director of the College of Law Alliance 2001–05 and Director of the St James Institute 2007–10, and was appointed in 2009 as the Secretary of the Judicial Conference of Australia.[45] He was also appointed to Adjunct Professorships with the City University of Hong Kong in 2009 and the Western Sydney University in 2014.[46] However, holding these administrative posts did not end his connections with legal education. In 2007, concerned that another organisation, such as the Law Council of Australia, or a government body would step in, CALD resolved to take the initiative and establish a set of national standards for Australian law schools. (In 1994, the Law Council of Australia had unsuccessfully attempted to establish a National Appraisal and Standards Committee to accredit law schools.) The outcome was that CALD established a Standing Committee on Standards and Accreditation ('the Standards Committee'), which sought Roper's assistance in drafting *Standards for Australian Law Schools*.[47]

Michael Coper wrote a brief history of the standards project in 2008 when Chair of the Standards Committee.[48] This history records that CALD approved the standards as set out in

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[41] Barker, 'Silver Jubilee Milestone 1992–2017' (n 36) 10.
[42] Ibid 11.
[43] Ibid 12.
[44] Ibid 15.
[45] 'Christopher Roper' (n 34).
[46] Ibid.
[47] Barker, *A History of Australian Legal Education* (n 9) 162.
[48] Coper, *A Brief History of the CALD Standards Project* (n 21).

the Standards Report by unanimous resolution as the Coogee Sands Resolution.[49] Roper was instrumental to the ongoing success of the standards due to his concise drafting of the Standards Report.

VI REVIEW AND CONCLUSION

Law teaching has been described as 'a great and noble occupation':[50] the four law academics discussed in this article all exemplify that description. Although most of their early experience was at the time of the 'Second Wave' law schools, their most meaningful influence has been during the most recent expansion of Australian law schools — the 'Third Wave' law schools or 'Avalanche of Law Schools'[51] — in the period 1989 to 2015 onwards. This period has been marked by a dramatic change in law teaching, legal research, legal education and the legal profession, apart from the effect of the Dawkins reforms whereby the binary divide between the former universities and colleges of advanced education was abolished.[52] While three of the four academics nominated were also involved at some time in their early careers with the influential and innovative experience of working at the UNSW Law School, Roper followed an entirely different career path of being the principal participant in the introduction, post-Second World War, of practical legal training. What makes the careers of all these law academics stand out is their wide involvement in teaching and research, incorporating leadership in their roles as Deans with regard to Coper, Weisbrot and Croucher, who, in 2007, were all appointed Foundation Fellows of the Australian Academy of Law. Coper (2005–07) and Croucher (2002) were also elected chairs of CALD.

The four would also feature in any literature review of the development of Australian legal education since 1989. What distinguishes them from their peers is an exceptional ability to bridge the gap between legal education and the legal community.

[49] Barker, *A History of Australian Legal Education* (n 9) 163.
[50] Fiona Cownie and Ray Cocks, *A Great and Noble Occupation: The History of the Society of Legal Scholars* (Hart Publishing, 2009).
[51] Barker, 'An Avalanche of Law Schools' (n 3).
[52] Barker, *A History of Australian Legal Education* (n 9) 100.

ADOPTING THEORETICAL AND METHODOLOGICAL LENSES TO SEE A FORM OF POST-TRUTH LEGAL RESEARCH AS A COLLECTION OF MULTIFOCAL LAW NARRATIVES

*Emma Babbage**

ABSTRACT

The primary purpose of this paper is to invite the reader to wear theoretical and methodological lenses in order to see post-truth legal research in the form of a collection of multifocal law narratives. This paper will exemplify how wearing lenses of postmodernism and narrative jurisprudence enables legal researchers to undertake a combination of doctrinal and non-doctrinal methods to interpret the meaning of statutory provisions in a contemporary context. The vision represented through a collection of images invites legal researchers to reimagine a collective engagement in the post-truth world through seeing what a form of legal research could look like.

* PhD Candidate (under the supervision of Associate Professor Jennifer Nielsen and Professor William MacNeil) and Casual Academic, School of Law and Justice, Southern Cross University, Australia.

I INTRODUCTION

The primary purpose of this paper is to invite the reader to wear theoretical and methodological lenses in order to see post-truth legal research in the form of a collection of multifocal law narratives.[1] In this paper, I am broadly conceptualising a narrative as anything that is narrated,[2] which implies a narrator telling a story.[3] I am defining a post-truth world or space as one that includes multiple truths without the need for any one truth to win over another and assert a hegemonic position as Truth. Within postmodernism, 'Truth' with a capital 'T' as emblematic of 'the' hegemonic truth is replaced with plural truths and possibilities.[4] This paper will exemplify how wearing lenses of postmodernism and narrative jurisprudence enables legal researchers to undertake a combination of doctrinal and non-doctrinal methods to produce a collection of multiperspectival law narratives. In so exemplifying, this paper articulates tenets of my doctoral research (hereinafter 'the research') as post-truth legal research. The purpose of the research is not to assert one answer to the research question akin to a winning argument in a court of law, but to explore that question, and open a dialogue about it.[5] The post-truth legal researcher may indeed 'look at law as a dialogue between subjects themselves',[6] as 'knowledge of law, and legal reality, is produced by legal subjects'[7] narrating law. Although legal subjects need not be legal practitioners, they are, of course, practitioners of everyday life.[8] This paper suggests that doctrinal methods may be complemented by non-doctrinal methods in post-truth legal research that seeks to interpret the meaning of statutory provisions in a contemporary context, particularly where that meaning has not (yet) been subject to judicial interpretation.

Since a picture defies the broad definition of narrative, I would like to suspend the reader's disbelief to show her a self-made collection of images throughout this paper to demonstrate the theoretical and methodological stance of treating law as narrative knowledge. The vision represented through these images invites legal researchers to reimagine a collective engagement in the post-truth world through seeing what a form of post-truth legal research could look like. The text of this paper forms my narration of these images, but the reader's seeing of these images enables her to take a vantage point from outside the narrative form being represented in order to arrive at her own interpretations and appreciation of the theoretical and methodological frames underpinning it.

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[1] The genesis for exploring what legal research could look like in a post-truth world stems from the theme of the Australasian Law Academics Association Conference in July 2019, where I presented a version of this paper: '"Real" Laws in the Post-Truth World: 2019 Australasian Law Academics Association Conference', *School of Law and Justice at SCU* (Web Page) <https://sljresearch.net.au/alaa2019>.
[2] M Fludernik, *An Introduction to Narratology* (Routledge, 2006), cited in M Amerian and L Jofi, 'Key Concepts and Basic Notes on Narratology and Narrative' (2015) 4(10) *Scientific Journal of Review* 182, 183.
[3] Ibid 187.
[4] Marett Leiboff and Mark Thomas, *Legal Theories: In Principle* (Lawbook Co, 2004) 230.
[5] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2018) 117.
[6] Ibid.
[7] Ibid 118.
[8] James A Holstein and Jaber F Gubrium, 'Active Interviewing' in Jaber F Gubrium and James A Holstein (eds), *Postmodern Interviewing* (SAGE Publications, 2013) 67, 73.

Before viewing the collection of images, it is important to unpack the lenses through which to view a form of post-truth legal research as a collection of multifocal law narratives. I am constructing these lenses through the theoretical and methodological design of the research. Kiley extends the metaphor of lenses to the 'critical aperture' of 'narrativity' in articulating the purpose of his paper, '[t]o attempt a focal fit between multiple literary and legal theoretical lenses'.[9] The purpose of this paper is indeed to 'attempt a focal fit' between postmodernism and narrative jurisprudence as lenses for the post-truth legal researcher and her reader to de-centre any claims to singular legal truth in making space for plural legal truths and possibilities. In the postmodern tradition of Lyotard, all kinds of knowledge are produced and told as narratives.[10] Narratives are further distinguished by type, be they grand or micro narratives.[11] Law may be understood to purport a grand narrative, particularly via the application of the 'rule of law'. Dicey's articulation of 'the rule of law' indeed holds that the law applies equally within a jurisdiction, and that no one is above the law.[12] Grand narratives are perhaps surreal abstractions, offering dreamlike beginnings, middles and endings for equal application. On the other hand, Lyotard suggests that micro narratives are small stories told by individuals that hold truth(s) in specific localities.[13] Put simply, scholars of narrative jurisprudence conceive of law as narrative.[14] Olson implores that '[n]arration plays a central role in legal discourse and permits law to be communicated, adjudicative acts to be justified, and their principles to be explained'.[15] Moreover, the beauty of narrative jurisprudence lies in the reach of its methodological arm to extend the arena of law beyond the bounds of the legal system, but to the narrations of law that circulate around it by individuals who need not play roles as parties to a case.[16] The perspective imbued in narrative jurisprudence is '[t]o see law and narrative as mutually interdependent', which 'opens the door to considering aesthetics, poetics, and other aspects of form as essential characteristics of sound legal decision-making'.[17] Sources of law stories are limitless, whether they be, say, derived from written legal doctrine, oral stories, biographies or poems — so long as they are *about* law.[18] In sum, a postmodern approach views knowledge *as* narrative,[19] and narrative jurisprudence views law *as* narrative.[20] Accordingly, postmodern legal research may enmesh forms of grand and micro law narratives.

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[9] Dean Kiley, 'Real Stories: True Narratology, False Narrative and a Trial' (1996) 12 *Australian Journal of Law and Society* 37, 38.
[10] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, tr Geoff Bennington and Brian Massumi (University of Minnesota Press, 1984).
[11] Ibid.
[12] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959), cited in Elizabeth Ellis, *Principles and Practice of Australian Law* (Lawbook Co, 3rd ed, 2010) [1.50].
[13] Lyotard (n 10).
[14] David O Friedrichs, 'Narrative Jurisprudence and Other Heresies: Legal Education at the Margin' (1990) 40 *Journal of Legal Education* 3, 17–18.
[15] Greta Olson, 'Narration and Narrative in Legal Discourse', *The Living Handbook of Narratology* (Web Page, 31 May 2014) <http://www.lhn.uni-hamburg.de/node/113.html>.
[16] Friedrichs (n 14) 18.
[17] Robin Wharton and Derek Miller, 'New Directions in Law and Narrative' (2019) 15(2) *Law, Culture and the Humanities* 294, 299.
[18] Friedrichs (n 14) 18.
[19] Lyotard (n 10).
[20] Friedrichs (n 14) 17–18.

A philosophical frame of law espoused by contemporary legal theorist Margaret Davies supports the combination of these theoretical and methodological lenses. Davies articulates a philosophical view of law as being plural and materialised by individuals in specific circumstances.[21] The ontology of law is plural, according to Davies, which, in essence, connotes 'a way of thinking which acknowledges diversity, and does not try to reduce its theoretical object to a system or a unity'.[22] Far from being statically accessible or known, law does not exist as written legal rules, but rather comes to life through plural interpretations, followings, uses, or lack of following or use by individuals in any given circumstance.[23] Furthermore, Davies also proposes that the epistemology of law is material, as law is made material or mobilised by individuals.[24] Davies points to the shortcomings of an exclusive doctrinal analysis, asserting that 'analytical legal theory has sometimes failed to see law as thoroughly enmeshed in social life and therefore it has failed to see the need for multidimensional theoretical approaches'.[25] A further problem in exclusively undertaking a doctrinal analysis in legal research is to be 'blind to the extra-judicial or extra-legislative content that "pours in" to the law via literary and other narrative forms of cultural production'.[26] One solution to the problems of the myopia of exclusively undertaking doctrinal legal methods is to concurrently undertake non-doctrinal methods. Davies indeed argues that '[m]ultiperspectival legal theory' can be inspired by moving away from the 'internal and expert perspective' and towards 'the knowledges',[27] beyond the 'four corners'[28] of that perspective. While formal law as mediated by doctrinal methods contained by legal rules obscures or renders individual legal subjects 'almost invisible',[29] non-doctrinal methods have the potential to reveal and render visible real individuals as research participants. Davies' writing is instructive:

> [R]ather than ask how a reified and singular 'law' sees subjects, we need to be able to see the diversity — the radical and constitutive difference — of socially situated subjects and their relationships as the starting point for law.[30]

I contend that complementing a doctrinal analysis of law with non-doctrinal methods enables both the legal researcher and her reader to see plural law narratives and to think about how this plurality can germinate new ideas about what law means or includes.[31] Producing a legal research piece as a narrative in the genre of a collection of short stories,[32] comprising both a grand law narrative and micro law narratives, is perhaps 'far more interesting'[33] than proffering

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[21] Davies (n 5).
[22] Ibid 10.
[23] Ibid 53.
[24] Ibid 55.
[25] Ibid 128.
[26] Wharton and Miller (n 17) 302.
[27] Davies (n 5) 128.
[28] Wharton and Miller (n 17) 303.
[29] Davies (n 5) 116.
[30] Ibid 118.
[31] Ibid.
[32] Amerian and Jofi (n 2) 190.
[33] Davies (n 5) 118.

a singular approximation as to how the law in question is most likely to be answered in a court of law. The interplay or tension between the grand law narrative and the micro law narratives provides a fertile post-truth space within which the legal researcher and her reader may interpret 'a much more expansive definition of legality and a more nuanced analysis of everyday narratives of law'.[34] To foreshadow the effect of the research, 'a variety of normative lenses other than the state law itself' provide ways of refracting the state law,[35] and so seeing through those lenses potentially materialises that law in (un)intended ways. Equipped with the rationale for wearing these theoretical and methodological lenses, I hereby unveil the collection.

II VIEWING 'THE COLLECTION'

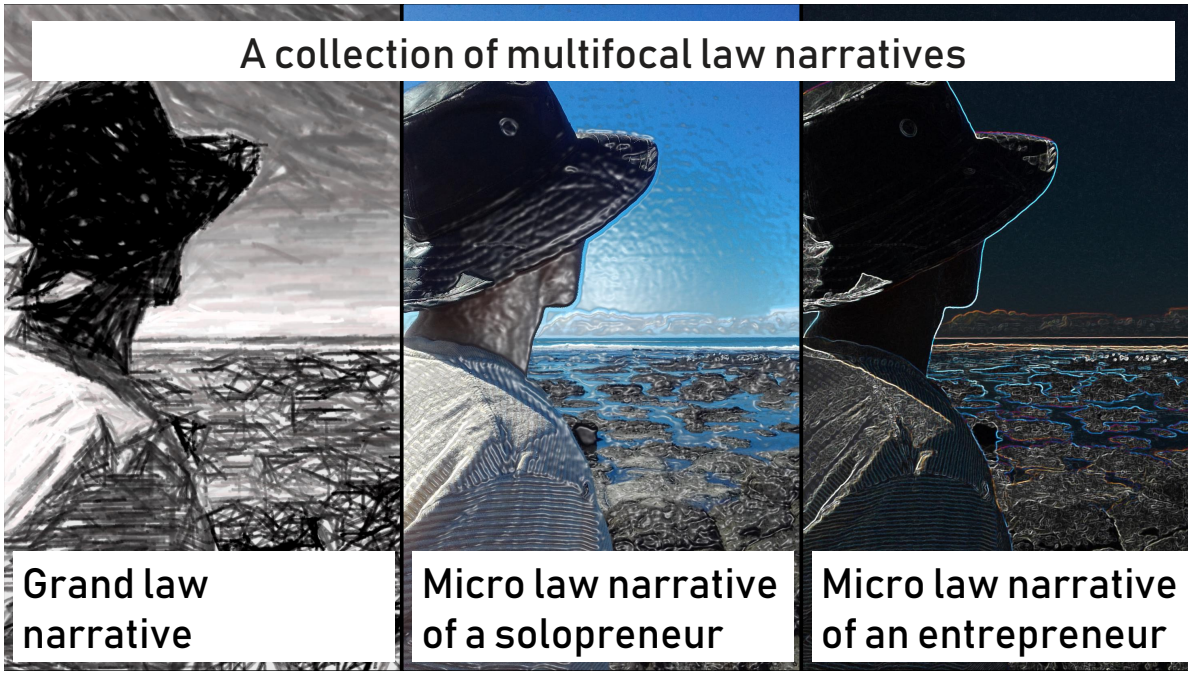

Image 1: 'The Collection'

The setting of these images is Flat Rock at low tide, the unofficial most easterly point of the Australian mainland, which is located in the Northern Rivers region in the far north-east corner of New South Wales. This region is known as a 'lifestylepreneur' region, with rates of entrepreneurship twice to three times the national average.[36] I am situating the research in this region because of this prevalence of entrepreneurship, and the theoretical impetus to elicit micro law narratives from a locale of study. The research question guiding the research is: does the reach of either or both of the self-duties under ss 19 and 28 of the *Work Health and Safety*

[34] Ibid 121.
[35] Ibid.
[36] Jasmine Burke, 'Northern Rivers an Entrepreneurial Hotspot', *The Northern Star* (online, 22 August 2017) <https://www.northernstar.com.au/news/northern-rivers-an-entrepreneurial-hotspot/3214861>.

Act 2011 (NSW) extend to touch the wellbeing of people who work for themselves in small business in the Northern Rivers, why or why not, and if so, how?

The research objectives are three-fold: (1) to undertake doctrinal methods in applying legal rules of statutory interpretation and the doctrine of precedent to arrive at a doctrinal analysis of the most likely position a court would take in relation to the research question; (2) to undertake experiential methods in conducting active interviews with 30 people who work for themselves in small business in the Northern Rivers to elicit interpretations as to whether work health and safety means or includes wellbeing, why or why not, and if so, how; and (3) to undertake narratological methods of: (a) crafting a grand law narrative in presenting the results of the doctrinal methods; (b) crafting micro law narratives in presenting the results of the experiential methods; and (c) analysing those grand and micro law narratives. Methods of narrative analysis include thematic analysis. An important caveat is that, while thematic analysis enables the researcher to synthesise themes, the variations among and between these themes are of equal importance in the postmodern paradigm. This is in accordance with Fontana's notion that the value of postmodernism lies in turning our attention to fragments, 'seeking to understand them in their own right rather than to gloss over differences and patch them together into paradigmatic wholes'.[37] The resultant production and interpretation of a collection of multifocal law narratives thus materialises law as plural narrative knowledge.

Having viewed the collection of images from afar, it is important to take closer vantage points in order to see the nuances of how the theoretical and methodological frames produce the form of each image as representative of the form of law narratives at play in the research.

[37] Andrea Fontana, 'Postmodern Trends in Interviewing' in Jaber F Gubrium and James A Holstein (eds), *Postmodern Interviewing* (SAGE Publications, 2013) 51, 52.

Image 2: 'A Grand Law Narrative'

The black and white sketch purports to be 'A Grand Law Narrative', and is produced by traditional doctrinal methods of statutory interpretation and case analysis. In returning to Lyotard's postmodern tradition, grand narratives are perhaps surreal abstractions, offering dreamlike narratives with intended storylines for equal application in a jurisdiction. A law is a written reflection of Parliament's intention, and perhaps at best is a hope, a sketch for the behaviour of a jurisdiction.[38] The result of following the legal rules of statutory interpretation will invariably be to produce a grand narrative of what the interpreter interprets as the most likely meaning of a law, which purports to apply universally within a jurisdiction in accordance with the rule of law. This enables the legal researcher to apply a doctrinal lens to her work to ensure that her reading of law does not misread or misinterpret that law in deviating or venturing too far from Parliament's intention.

A reading of the intrinsic material in the *Work Health and Safety Act 2011* (NSW) ('the Act') purports a grand law narrative of the New South Wales Parliament's intention in enacting the Act. The purpose of implementing traditional legal methods of statutory interpretation is, according to the golden rule as subsumed in the various interpretation Acts across Australian jurisdictions, to ascertain Parliament's intention.[39] Section 3 sets out the object of the Act, of which s 3(1)(a) is particularly instructive for the research:

> (1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by—

[38] Andrei Marmor, *Interpretation and Legal Theory* (Hart Publishing, 2nd ed, 2005) 139.
[39] For example, *Interpretation Act 1987* (NSW) s 33.

> (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant …[40]

The inclusion of welfare in the phrase 'health, safety and welfare' in s 3(1)(a) of the Act[41] provides an inroads for an examination of Parliament's intention in respect to the creation of the self-duties under the Act, and the scope of those duties.

Section 19(1) of the Act sets out the content of the 'primary duty of care':

> (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of—
>
> (a) workers engaged, or caused to be engaged by the person, and
> (b) workers whose activities in carrying out work are influenced or directed by the person,
>
> while the workers are at work in the business or undertaking.[42]

Pertinently for the research, the note in s 19 stipulates that a 'self-employed person is also a person conducting a business or undertaking for the purposes of this section'.[43]

In addition, a self-employed person is likely to satisfy the definition of worker in s 7.[44] Johnstone and Tooma provide clarity that a person conducting a business or undertaking 'who is a natural person can, at the same time, be a worker'.[45] Accordingly, it is possible for a natural person who is a self-employed person to be both a person conducting a business or undertaking and a worker under the Act, attracting the primary duty of care and the duties of workers.

Section 28 sets out the duties of workers. Section 28(a) is particularly instructive for the research:

> While at work, a worker must—
> (a) take reasonable care for his or her own health and safety …[46]

Accordingly, the intrinsic material of the Act writes a grand law narrative in which a self-employed person owes herself two self-duties in respect to her health and safety at work as per ss 19(1)[47] and 28(a).[48] However, this narration is silent as to whether the scope of any or both of these duties extends to reach her wellbeing at work. Under the definitions section, 'health' means physical and psychological health.[49] However, the Act does not define 'safety' or

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[40] *Work Health and Safety Act 2011* (NSW) s 3(1)(a) ('*WHS Act*').
[41] Ibid.
[42] Ibid s 19(1).
[43] Ibid s 19.
[44] Ibid s 7.
[45] Richard Johnstone and Michael Tooma, *Work Health and Safety Regulation in Australia* (Federation Press, 2012) 58.
[46] *WHS Act* (n 40) s 28(a).
[47] Ibid s 19(1).
[48] Ibid s 28(a).
[49] Ibid s 4.

'welfare'. Furthermore, what physical and psychological health means or includes is, arguably, ambiguous. The ambiguity created in an overlay of ss 19(1)[50] and 28(a),[51] with the object enshrined in s 3(1)(a),[52] provides space for interpretation in asking what the expressions 'health and safety'[53] and 'health, safety and welfare'[54] mean or include in the contemporary context.

At first reading, wellbeing is excluded from the narrative as written by the intrinsic material in the Act.

A cursory search reveals that the question of whether or not 'work health and safety', or 'work health, safety and welfare', means or includes work wellbeing has not (yet) been judicially determined in the jurisdiction of New South Wales in respect of ss 19 or 28.[55] The practical limitations of this question in respect to self-employed persons is highlighted by the fact that the prosecutor is unlikely to prosecute for breaches of a self-duty in respect to wellbeing if it is unclear in the first instance as to whether or not the scope of that duty extends to wellbeing.

However, some recent cases illustrate judicial consideration of the effect of s 19 in respect to wellbeing, notwithstanding Parliament's intention. In *Margaritte Joanne Colefax v Secretary, Department of Education (No. 3)*,[56] the Respondent made an argument in respect to the intention of 'their policies and procedures and codes of practice', asserting that they 'are just "guidelines", and can therefore be ignored and set aside or varied'.[57] However, the New South Wales Industrial Relations Commission noted that employees of the Respondent 'rely on' the Respondent's 'policies and procedures and codes of practice … to protect their health, safety, wellbeing, recovery, rehabilitation, and return from injuries, illnesses and disabilities'.[58] Accordingly, the Commission contemplated that the effect of the Respondent's documents includes 'health, safety, [and] wellbeing'.[59] This reasoning provides a judicially contemplated inroads within which to explore the effect of the work health and safety legislative scheme[60] in respect to individuals, notwithstanding the intentions of the drafters of that scheme and resultant documents.

The facts reported in the Supreme Court of New South Wales in *Duffin v Mount Arthur Coal Pty Ltd*[61] also provide an interesting judicially considered inroads within which to consider a

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[50] Ibid s 19(1).
[51] Ibid s 28(a).
[52] Ibid s 3(1)(a).
[53] Ibid ss 19(1), 28(a).
[54] Ibid s 3(1)(a).
[55] '4 documents found for ("whasa2011218 s19" AND wellbeing)', *AustLII* (Search Results, 4 May 2020); '103 documents found for ("whasa2011218 s19" AND well-being)', *AustLII* (Search Results, 4 May 2020); '0 documents found for ("whasa2011218 s19" AND wellbeing)', *AustLII* (Search Results, 4 May 2020); '7 documents found for ("whasa2011218 s28" AND well-being)', *AustLII* (Search Results, 4 May 2020).
[56] [2019] NSWIRComm 1000 (21 January 2019).
[57] Ibid [15].
[58] Ibid.
[59] Ibid.
[60] Ibid [13].
[61] [2020] NSWSC 229 (16 March 2020).

duty holder's interpretation of his legislative duty. I will let the following extract from the case speak for itself:

> Jock …: I want you to change your medical certificate to say that you can't work in the pit anymore because I have a duty of care for your well-being and safety.
>
> Plaintiff: What the fuck's this about Jock?[62]

The central rationale for undertaking a combination of doctrinal and non-doctrinal research methods is that this combination enables legal researchers to produce a collection of law narratives that engage not only in a Parliament's intention in making statute law, but in interpretations of legal subjects who materialise — or do not materialise — a statutory provision in their daily lives. The experiences of research participants as storied via non-doctrinal methods provide a way for the legal researcher to consider not only the purpose of law as intended by Parliament, but the possible effects of law as materialised by legal subjects, which may include uses of law (un)intended by Parliament, or warnings against that use.

Internationally recognised work health and safety expert Michael Tooma provides commentary for duty holders to contemplate how to comply with work health and safety duties in respect to mental health in the contemporary context. Tooma cites the World Health Organization's definition of mental health, which imbues a metonym of mental health as a 'state of well-being'.[63] Cloaked in Tooma's language, it is possible to conceive of compliance with work health and safety law as encompassing a 'systematic'[64] and 'holistic … approach to mental health'.[65] In commenting on how duty holders can implement such an approach, Tooma implores:

> If we are to tackle mental health problems, we must embrace an organisation's role in promoting well-being programmes seeking to build worker mental health resilience through a focus on nutrition, exercise, sleep and mindfulness.[66]

According to Tooma, these 'are complementary initiatives' to those that are designed to reduce stress, and accordingly are 'mitigation strategies you adopt to reduce … the exposure to the work related chronic stress' and 'build resilience to the adverse impact of stress'.[67] With Tooma's commentary, it appears that promoting wellbeing has entered the arena of work health and safety law as a method of managing risks to mental health in the contemporary context.

Nonetheless, it remains important to consider whether, why or why not, and if so, how, some legal subjects are adopting any such reading in their interpretations and (in)actions. Under the rules of statutory interpretation, the statutory interpreter may consider extrinsic material to

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[62] Ibid [143].
[63] World Health Organization, *Investing in Mental Health* (2013) 7, cited in Michael Tooma, *Michael Tooma on Mental Health* (Wolters Kluwer, 2020) [1-030].
[64] Ibid [1-060].
[65] Ibid [4-060].
[66] Ibid.
[67] Ibid.

determine the meaning of a provision that is ambiguous or obscure.[68] Although the list of extrinsic material included in s 34(2) of the *Interpretation Act 1987* (NSW) is not exhaustive, it establishes a formality that is unlikely to include the interpretations of legal subjects in a contemporary context. Hutchinson implores:

> [L]egal research currently has an opportunity to be liberated from the chains of its previous narrow doctrinal framework. This constitutes a blossoming of the legal research environment and a move away from a constrained and outdated paradigm.[69]

Unshackled from the chains of a grand narrative of law espoused by statute, the post-truth legal researcher may adopt methodologies that enable legal subjects to become legal narrators in sharing the stage of interpretation.

III ENVISIONING 'NON-DOCTRINAL METHODS'

Inviting legal subjects to become narrative subjects of reading — and writing — law narratives enables the legal research to traverse multifocal perspectives. According to Wharton and Miller:

> Notions of legal subjectivity underlie depictions of the subject in narrative, whether that narrative subject acts within commonly adapted legal bounds placed on individual agency, or whether that subject transgresses or transcends such limits.[70]

Accordingly, none of the perspectives advanced by a collection of legal subjects and a resultant collection of micro law narratives need take a winning or grand stage as limited by the legal bounds of a court of law. This approach is particularly useful in the research that explores the subject matter of wellbeing, which eludes a single accepted definition in the scholarly literature. Dodge and her co-authors conducted a review of definitions of 'wellbeing' and proposed a definition for 'universal application'.[71] This definition is analogous to a seesaw, in which wellbeing occurs at a set point or balance between, on the one side, psychological, social and physical resources, and, on the other, psychological, social and physical challenges.[72] However, this definition reads as a grand narrative, which other definitions may nonetheless displace. Schulte and his co-authors also conducted a review of definitions of 'wellbeing', but concluded that 'true' wellbeing requires 'autonomy'.[73] This conclusion reads as an opening for micro narratives of wellbeing as told by individuals in specific situations.

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[68] *Interpretation Act 1987* (NSW) s 34.
[69] Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melbourne University Law Review* 1065, 1087.
[70] Wharton and Miller (n 17) 298.
[71] Rachel Dodge et al, 'The Challenge of Defining Wellbeing' (2012) 2(3) *International Journal of Wellbeing* 222, 230.
[72] Ibid.
[73] Paul A Schulte et al, 'Considerations for Incorporating "Well-Being" in Public Policy for Workers and Workplaces' (2015) 105(8) *American Journal of Public Health* 31, 41.

Equipped with these multifocal lenses, we can see that this collection houses at least two more images.

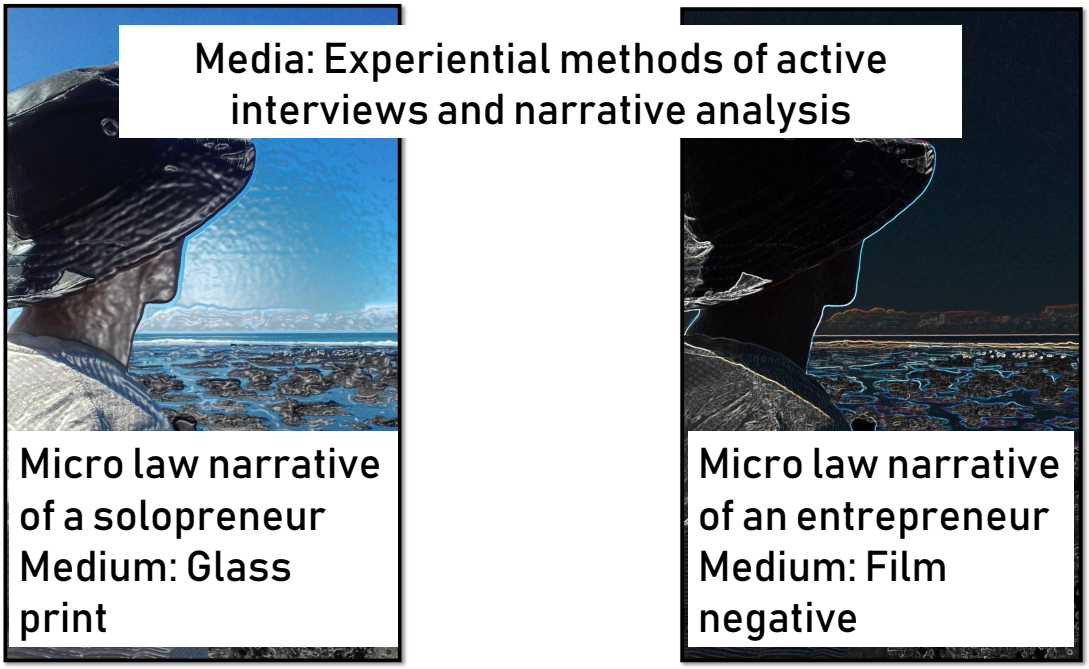

Image 3: 'Experiential Methods'

Micro narratives are perhaps realist specifications, with individualised storylines that applied — or could apply — to individuals in specific situations. 'Micro law narrative of a solopreneur' is a glass print, representing the transparency of the reality of the solopreneur who follows, or even uses, the primary duty of care to ensure his own wellbeing at and through his chosen work. In contrast, 'Micro law narrative of an entrepreneur' is a film negative, representing the situation of lack: of the entrepreneur not following, let alone using, the duty for his own wellbeing.

Who narrates law is a question left open for those who tell law narratives. Legal researchers are invariably legal narrators; and the narrators from whom they choose to elicit legal narrative knowledge invariably shape the perspective and content of the narratives they reproduce in their research. If a legal researcher confines the purview of her research piece to a doctrinal analysis, for example, her resultant legal narrative will be constituted by the narratives told by parliaments and courts inside the official law books, but will be necessarily penned by her, through the lens of her interpretation(s) of those books. If a legal researcher expands the purview of her research piece to non-doctrinal methods, she effectively opens the door for her resultant legal narrative to be constituted by a multitude of narrators, including living legal subjects. The inclusion of the perspectives of legal subjects in legal research allows the legal researcher to work beyond the 'four corners'[74] of the law books, and, in so doing, to bring a three-dimensionality to her research piece that would otherwise be marginalised. This three-

[74] Wharton and Miller (n 17) 303.

dimensional view operates as a post-truth space within which to break the fourth wall, in borrowing from the Tom Stoppard variety of drama, and invite and take seriously the perspectives of those who follow or use — or do not follow or use — a particular law in their daily lives. Following law implies compliance with the existence of a legal obligation; whereas using law implies adoption of law for a purpose beyond which it was intended.

The purpose of the experiential study is to elicit micro law narratives from research participants in a locale of study. I am producing the micro law narratives represented by these images by conducting active interviews with a number of research participants who satisfy the recruitment criteria of being a self-employed person. The research participants and I are necessarily active in making meaning about the dialogue.[75] I am crafting a micro law narrative from the written transcript of each audio-recorded interview in the words of each participant. Seidman advocates that qualitative interview researchers can craft profiles or vignettes as an engaging way of presenting their interview data that enables interpretations to be made about this data by readers.[76]

Having viewed each image in the collection more closely, it is important to understand how the research objectives interlace with the production of each image. The purpose of crafting and interpreting micro narratives is to enlarge the arena of legal sources to include the voices of individuals who would otherwise be marginalised or excluded from the legal system. This is especially important when exploring not only the mandatory reach of a duty in accordance with Parliament's intention, and whether people are following that duty, but perhaps the voluntary use of that duty, in accordance with an individual's intention that surpasses Parliament's intention. If a self-employed person wants to ensure her own wellbeing at her work, and/or take reasonable care for her own wellbeing at work, she could use one or both of her self-duties under ss 19 and/or 28 for those purposes.

Experiential legal research can play a theoretical role in disentangling the legal rules as to how to interpret law from the meanings of law in a contemporary context. This is particularly important for legal research that is underpinned by theoretical understandings of law that do not rest on the formal application of legal reading rules, but on the real (dis)application of law in everyday life. Opening legal research up to include non-doctrinal methods opens a post-truth space for legal researchers to elicit and engage in perspectives of law from legal subjects with multiperspectival vantage points that may break the fourth wall, so to speak, of the law. Eliciting the perspectives of legal subjects as legal narrators enables the production of a legal research piece as a multifocal law narrative that need not assert any single winning argument in a court of law.

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[75] Holstein and Gubrium (n 8) 73.
[76] Irving Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (Teachers College Press, 3rd ed, 2006) 121–2.

IV THE INTERPLAY

Equipped with theoretical and methodological lenses, each reader ultimately sees the interplay between the grand law narrative and micro law narratives from her own perspective. The goal of narrating law and as such producing legal research as a form of law narrative via multiperspectival narration transcends the goal of doctrinal legal research to argue the most likely conclusion for a court to reach. In surpassing a quest for the most likely answer or one legal truth, post-truth legal research borrows its purpose and effect from the literary world. Perhaps ironically, '[a] major point of literature is to wake one's conscious and stir one's sense of justice'.[77] I say ironically because of the purported purpose of law to achieve justice. Perhaps one way of the legal researcher working towards justice is to leave the task of ascertaining the meaning(s) of the law narrative she produces to her reader. The form of legal research as a multiperspectival law narrative provides an opening for the post-truth legal researcher, her participant narrators of law and her readers to 'engage in dialogue with each other in the context of established conventions or texts'[78] that underpin the grand law narrative. Legal research in the form of a multiperspectival law narrative positions each reader in the place of literary and legal interpreter, actively materialising her own narration(s) of law from invariably plural perspectives. This goal is particularly pertinent given the subject matter of wellbeing attracting the above-mentioned reflexive definition of 'autonomy'.[79]

[77] Thomas Morawetz, *Literature and the Law* (Wolters Kluwer, 2007) xxii cited in Greta Olson, 'Law is not Turgid and Literature not soft and Fleshy: Gendering and Heteronormativity in Law and Literature Scholarship' (2012) 36(1) *Australian Feminist Law Journal* 65, 77.
[78] Davies (n 5) 117–18.
[79] Schulte et al (n 73) 41.

V 'A PASTICHE'

Image 4: 'A Pastiche'

This paper has transparently articulated how a combined theoretical and methodological frame enables me to produce legal research in the form of a collection of a grand law narrative and micro law narratives, generating a fertile post-truth space for interpretation between them. Although this paper is limited in illustrating one form of post-truth legal research through one research project, it contributes to the knowledge base of 'a new research world', which '[t]oday's lawyers are moving into', 'in which it is necessary to know, use and be able to critique a whole variety of methodologies in addition to the known doctrinal methodology'.[80] Further legal research that contemplates and articulates its form as post-truth legal research is needed to enhance and diversify this knowledge base. With no singular, fixed understanding of law in any given circumstance, the post-truth legal researcher and her reader might envision legal scholarship as a pastiche: collections of grand law narratives and micro law narratives that operate alongside each other and, in so doing, de-centre any one claim to a winning legal truth.

The benefits of producing a pastiche may nonetheless permeate the formal bounds of the legal system. While law narratives 'are not mere ornamentation of judicial process', they are 'perhaps as influential in shaping the judicial process as the doctrine of *stare decisis* or the rules of evidence'.[81] Producing legal research in a narrative form

[80] Hutchinson (n 69) 1084.
[81] Wharton and Miller (n 17) 299.

> could also foster greater mindfulness and clarity in legislative and judicial decision-making by creating a broader awareness of how deeply legal narratives draw upon and how profoundly they influence the creation of a collective socio-cultural identity.[82]

Moreover, from a vantage point outside the legal rules of statutory interpretation, the legal researcher and her reader can appreciate — and play active roles in interpreting — a plurality of law narratives without the need for any one narrative to 'win'. Kiley writes: 'Perhaps answers don't fit the game. Perhaps the stakes are too divergent. That's why we have literature.'[83]

The reader's wearing of the theoretical and methodological lenses through which to see the form of the research echoes my adoption of theoretical and methodological frames through which to produce the research. In wearing these lenses, the reader is privy to a post-truth space through an overlay of or interplay between a grand law narrative and micro law narratives that engage in the research question. This demonstrates a 'performative view of law [that] sees imagined law and its material performance as co-emergent, constantly in dialogue'.[84] The beauty is that, like art, producing legal research as multifocal law narratives is 'finally, subjective'.[85] This subjectivity invites multiple interpretations,[86] which allow multiperspectival law narratives to continue to be read — and written — well beyond the post-truth legal researcher's last word.

[82] Ibid 304.
[83] Kiley (n 9) 45.
[84] Davies (n 5) 143.
[85] Friedrichs (n 14) 18.
[86] Leiboff and Thomas (n 4) 235.

FAIR USE, FAIR DEALING, OR A HYBRID? COPYRIGHT, EDUCATION AND INNOVATION IN THE ASIA PACIFIC

*Susan Corbett**

ABSTRACT

Although there is much debate in the academy about the specific features that support innovation, most commentators agree that an educated populace is essential. Yet education is heavily reliant on copyright works. This article identifies deficiencies in the permitted exceptions for educational users in the copyright laws of selected developing countries in the Asia Pacific region. It is argued that the United States' fair use provision is also inadequate for educational users and needs to be supplemented by more specific provisions. Some countries in the region have already emulated the United States' approach and introduced a hybrid fair use/fair dealing regime for education into their own copyright laws. Such an approach is recommended but, as the article cautions, without further steps, such as access to collective licensing bodies and open-source textbooks, the developing countries in the Asia Pacific will not be equipped to reap the economic benefits of innovation.

* Associate Professor in Commercial Law, Wellington School of Business and Government, Victoria University of Wellington, New Zealand.

I INTRODUCTION

> *[W]estern intellectual property legislation is predicated upon a highly developed, literate and bureaucratic society with a strong State to administer and enforce law. These are not characteristics of many South Pacific countries.*[1]

Copyright tends to be overlooked in the innovation paradigm because innovation is generally held to be stimulated by technological and biochemical advances, which are protected by the patent system. Yet education and access to information are essential tools for nations striving to achieve economic success through innovation,[2] and these tools are regulated by copyright law.[3]

As Olwan reminds us, innovation is not necessarily confined to developed countries and nor is it necessarily true that 'both developed and developing countries have innovative capabilities'.[4] Moreover, factors such as foreign investment, technology transfer, market and trade liberalisation policies and expenditure on research and development influence innovative activity.[5] Nevertheless, education, particularly at the tertiary level, also plays a crucial part in 21st century innovation.[6] Whereas in earlier times simple mechanical inventions might have been described as innovations, today's successful innovations tend to be more technically complex.[7] Basic numeracy and literacy skills are rarely sufficient to innovate in a way that increases economic performance; instead competence in more advanced areas of education, such as biochemistry, genetics, information and communication technologies, intellectual property and data logistics, is essential.[8] The activity of building upon knowledge of advanced areas to develop a new idea can result in an economically viable innovation. In short, an educated community provides the foundation for an innovative economy.[9]

This article considers how the copyright provisions for education in selected developing countries in the Asia Pacific region might be improved. It warns, however, that such improvements are unlikely to be sufficient to address the innovative potential of those countries and notes that other

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[1] Miranda Forsythe, 'Intellectual Property Laws in the South Pacific: Friend or Foe?' (2003) 7(1) *Journal of South Pacific Law* 1.
[2] On the development of the concept of innovation, see Julian Meyrick, 'Exactly What Is Innovative about the Word "Innovation"?', *The Conversation* (Web Page, 3 May 2016) <https://theconversation.com/exactly-what-is-innovative-about-the-word-innovation-58720>.
[3] Rami M Olwan, *Intellectual Property and Development: Theory and Practice* (Springer, 2013) 17.
[4] Ibid 120.
[5] Ibid 121–36.
[6] Ruth L Okediji, 'The International Copyright System: Limitations, Exceptions and Public Interest Consideration for Developing Countries' (Issue Paper No 15, International Centre for Trade and Sustainable Development, March 2006) 2.
[7] '[T]he type of R&D done in developed countries is sophisticated when compared to that conducted in developing countries, which can be described as imitative and preliminary': see Olwan (n 3) 133.
[8] William J Baumol, 'Education for Innovation: Entrepreneurial Breakthroughs vs. Corporate Incremental Improvements' (Working Paper No 10578, National Bureau of Economic Research, June 2004) 23.
[9] See discussion in UNESCO Office Bangkok and Regional Bureau for Education in Asia and the Pacific, *The Asia and Pacific Regional Bureau's Education Support Strategy 2014–2021: Learning for Peace and Sustainable Development* (Report, 2014) 7–9, 15 <https://unesdoc.unesco.org/ark:/48223/pf0000231083>.

areas must be urgently addressed. These areas include provision of local copyright collective licensing organisations and the need for more locally focused educational materials.

The following part discusses the relevance of copyright law to education more generally and explains why an exclusive reliance upon permitted exceptions for education in copyright law is unsatisfactory, while the United States' fair use provision (often touted as advantageous to fair dealing) is similarly unsatisfactory for all educational requirements and is supplemented with more specific provisions. Moreover, the use of collective licensing bodies as a practical solution to inadequate educational provisions is rarely available in developing countries. Part III describes, as exemplars, the specific provisions for educational institutions and students in the national copyright laws of three countries in the Asia Pacific region: Samoa, Fiji and China. Each of these countries is classified by the World Bank as a developing country.[10] (Although China is rapidly developing an innovative economy in its industrial regions, there are many rural areas that remain primitive and contribute to the country's ongoing classification as 'developing'.)

Part IV discusses Singapore and Korea, two countries of the region that have introduced a hybrid fair use/fair dealing paradigm into their copyright legislation, as well as the Philippines, which has also very recently introduced a hybrid regime. Given the different political, cultural, economic and social environments of the countries within the Asia Pacific region, as well as the diverse approaches taken when drafting their domestic copyright laws, regional harmonisation of the provisions for educational users may be impractical. Nevertheless, the article concludes that the potential improvements to the education systems in the Philippines, Singapore and Korea may encourage other countries in the region to move to a hybrid fair use/fair dealing paradigm in their own copyright legislation.

II THE ROLE OF COPYRIGHT IN EDUCATION

Copyright law is pervasive in its influence throughout education systems worldwide. Analogue teaching materials and textbooks as well as computer software, music recordings, films, broadcasts and ebooks are protected by copyright for many years.[11] International treaties and agreements, including the *Berne Convention for the Protection of Literary and Artistic Works* ('*Berne Convention*') [12] and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('*TRIPs*')[13] set out the minimum standards for national copyright laws. All Member States are bound to comply with the well-known 'three-step test' when providing user exceptions in their copyright laws. The three-step test first appears in the *Berne Convention*[14] and is reiterated (with

[10] For analysis of the meaning of 'developing countries', see Olwan (n 3) 23–25.
[11] For example, the term of copyright protection for literary works in New Zealand is the life of the author plus 50 years. The equivalent term in Australia is the author's life plus 70 years.
[12] *Berne Convention for the Protection of Literary and Artistic Works*, as revised on 24 July 1971 and amended on 28 September 1979, opened for signature 9 September 1886, 828 UNTS 221 (entered into force 4 December 1887) ('*Berne Convention*').
[13] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPs*'). In practice there are very few nation states that are not members of the *Berne Convention* and *TRIPs*.
[14] *Berne Convention* (n 12) art 9(2).

minor changes in wording) in *TRIPs*.[15] The test has hitherto been considered to be 'an obstacle to the adoption of open-ended flexible provisions at the national level'.[16] This somewhat oppressive description is based largely on the interpretation of the three-step test adopted by World Trade Organization panels in international trade disputes.[17] More recently, however, scholars have argued that the test was drafted with the intention that it serve 'as a flexible balancing tool offering national policy makers sufficient breathing space to satisfy economic, social and cultural needs'.[18] Geiger and his co-authors provide examples of the tacit acknowledgement of flexibility in the application of the three-step test in recent changes to the copyright laws of Singapore, Israel, Malaysia, Canada and Korea.[19] More recent examples include South Africa and the Philippines. Each of these countries has now either expanded the scope of their fair dealing exceptions for education, or taken the bolder step of including a combination of fair use and fair dealing exceptions in their national copyright laws.[20] This latter step, now taken by three countries of the Asia Pacific region, could provide a useful example for others in the region and is discussed further in Part IV.

The drawbacks of an exclusive regime of prescriptive permitted acts for education in copyright laws are well traversed in the literature.[21] For example, typical permitted acts for education are contained in s 44(3) of the Copyright *Act 1994* (NZ), which allows an educational institution to copy no more than the greater of 3% or three pages of a work, but the same part may not be copied by the same educational institution within 14 days (s 44(6)). Clearly such a provision is impractical for many educational institutions and has resulted in all New Zealand universities and most schools paying for licences from copyright collective management bodies to expand their uses of copyright works.

By contrast, educational institutions in the United States are able to rely to a limited extent upon a seemingly more flexible 'fair use' provision for making copies of copyright works for classroom use.[22] Section 107 of the *Copyright Act 1976* states that

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[15] *TRIPs* (n 13) art 9. The three-step test also appears in other more recent international copyright treaties, which are not yet as widely signed up to as the *Berne Convention* and *TRIPs*.
[16] Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (Research Paper No 2013-04, American University Washington College of Law, Program on Information Justice and Intellectual Property, December 2013) 3. See also Susan Isiko Ŝtrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Martinus Nijhoff Publishers, 2012) 79.
[17] The first such dispute was *United States – Section 110(5) of US Copyright Act*, WTO DOC WT/DS160/R, 26 January 1999. For discussion, see Susy Frankel, *Intellectual Property in New Zealand* (LexisNexis New Zealand, 2nd ed, 2011) 40–41.
[18] Geiger, Gervais and Senftleben (n 16) 3.
[19] Ibid 42.
[20] Ibid.
[21] Alexandra Sims, 'The Case for Fair Use in New Zealand' (2016) 24 *International Journal of Law and Information Technology* 176.
[22] 17 USC § 107 (1976).

> the fair use of a copyrighted work, including such use by reproduction in copies … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[23]

However fair use is not without its pitfalls — in the main this is because only a court can rule definitively whether a particular use is fair or not fair. Section 107 continues:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Moreover, the precise quantity of a work that may be used or copied for the purpose of education under the umbrella of fair use is not clear. The United States Copyright Office has provided guidance on fair use, but qualifies its advice with the warning that it 'cannot give legal advice or offer opinions on what is permitted or prohibited'.[24] Teaching staff are provided with a plethora of unofficial recommended practices,[25] including how to make their own prior evaluation on the fairness of a proposed use, but the uncertainty inherent in this process has led most United States educational institutions to pay copyright collective licensing management fees.

The fair use provision has been supplemented by the *Technology, Education and Copyright Harmonization Act of 2002*, which permits teachers and students of accredited, non-profit educational institutions to transmit performances and displays of copyright works as part of a course if certain conditions are met. If these conditions are not or cannot be met, in order to be lawful, a use would arguably have to qualify under another exception, such as fair use.[26] Moreover, teachers and educational institutions in the United States are safeguarded to some extent from the vagaries of fair use by another statutory provision that protects them from being ordered to pay statutory damages should a court find that their use of copyright material was infringing. The proviso to this section is that the teacher or institution satisfies the court that they had used the copyright material believing, on reasonable grounds, that what they were doing constituted fair use.[27]

Although national copyright laws provide certain permitted exceptions for educational uses, clearly, in most countries, these exceptions are limited in scope and provide little practical help. Therefore, most educational institutions in developed countries pay substantial fees to copyright

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[23] Ibid.
[24] United States Copyright Office, 'Reproduction of Copyrighted Works by Educators and Librarians' (Circular No 21, August 2014) 21.
[25] See Kenneth D Crews, *Copyright, Fair Use and the Challenge for Universities: Promoting the Progress of Higher Education* (University of Chicago Press, 1993); Kenneth D Crews, *Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions* (American Library Association, 2nd ed, 2006).
[26] For analysis, see Kenneth D Crews, 'Copyright and Distance Education: Making Sense of the TEACH Act' (2003) 35(6) *Change* 34.
[27] 17 USC § 504(c)(2) (1976).

collective licensing organisations in order to provide sufficient materials to their students. This solution is, however, not available in many developing countries in which there are no established copyright collective licensing bodies.

The Appendix to the *Berne Convention* allows developing countries to grant compulsory licences for the bulk reproduction and translation of copyright works for educational purposes. However, the complicated procedural requirements set out in the Appendix are expensive and impractical.[28] In addition, the Appendix has no provision that would permit educational institutions to provide digital versions of works to students. Consequently, there has been very limited uptake of the compulsory licence regime by any of the developing countries.[29] In her examination of 'special legal regimes for access to education', Ŝtrba concludes that the procedural requirements and the limited scope of the Appendix reflects a deliberate policy adopted by the developed countries to discourage uptake of the compulsory licensing regime and to protect the economic interests of their authors and publishing industries.[30]

III EDUCATIONAL PROVISIONS IN THE COPYRIGHT LAWS OF DEVELOPING COUNTRIES IN THE ASIA PACIFIC REGION

Before considering how the perceived problems for educational institutions in the Asia Pacific could be addressed, this part describes the current permitted uses for education in the domestic copyright laws of three developing countries in the region: Samoa, Fiji and China. All three are classified by the World Bank as developing countries.[31] However, it would be wrong to assume that they have identical needs. To be sure, each is a copyright user, but only Samoa and Fiji are net importers of copyright educational materials; China has many local publishers.[32] While Chinese universities continue to import foreign educational materials for many disciplines, in 2018 China instigated a strict policy of allowing only 'state-approved' locally published textbooks and other course materials to be used in its schools, requiring local publishers to remove any foreign content.[33]

Nevertheless, in the three countries, foreign books and international academic databases are expensive and sometimes physically unobtainable or inaccessible. Copyright exceptions for education are therefore crucial.

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[28] *Berne Convention* (n 12) Appendix.
[29] See Margaret Chon, 'Intellectual Property "from Below": Copyright and Capability for Education' (2007) 40 *University of California Davis Law Review* 803, 829; Okediji (n 6) 32.
[30] Ŝtrba (n 16) 89–109.
[31] For analysis of the meaning of 'developing countries', see Olwan (n 3) 23–25.
[32] 'The Book Publishing Industry in the Chinese Mainland', *Encyclopedia.com* (Web Page, 28 March 2020) <https://www.encyclopedia.com/books/international-magazines/book-publishing-industry-chinese-mainland>.
[33] Zou Shuo, 'Schools Told to Use Approved Textbooks', *ChinaDaily* (online, 20 September 2018) <https://www.chinadailyhk.com/articles/45/85/38/1537418279569.html>.

A *Samoa*

From 19 December 1972 to 31 August 1998, Samoa did not provide statutory copyright protection.[34] Copyright in Samoa is now regulated by the *Copyright Act 1998* (Samoa), which has retrospective effect.[35] Compared with the copyright statutes of developed countries in the Asia Pacific region, such as New Zealand and Australia, the Samoan legislation is brief and to the point, containing only 35 sections.[36] The term of protection is life of the author plus 75 years. Moral rights have the same term of protection as copyright.[37] There is generous provision in s 8 for 'private reproduction for personal purposes':

> A physical person may reproduce a single copy of a published work provided it is exclusively for his or her own personal purposes[38] … provided the reproduction does not conflict with a normal exploitation of the work or otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright.[39]

Section 10 regulates reproduction for teaching, permitting

> [t]he reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, provided that reproduction is compatible with fair practice and does not exceed the extent justified by the purpose.[40]

Section 10(1)(b) permits the reproduction, for face-to-face teaching in not-for-profit educational institutions,[41] of published articles, other short works or short extracts of works, to the extent justified by the purpose.[42] However, reproduction must be isolated — occurring, if repeated, on separate and unrelated occasions.[43] Moreover, if there is a collective licence available (that is, offered by a collective administration organisation of which the educational institution is or should be aware) under which such reproduction can be made, then the permitted exception in s 10(1)(b) may not be utilised.[44] So far as is practicable, the name of the author and the source of a work that has been reproduced must be indicated on all reproductions made under s 10(1).[45]

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[34] In *Fauolo v Gray* [1997] WSSC 1; CP 364 1995 (5 August 1997) the court refused to recognise common law copyright claims.
[35] *Copyright Act 1998* (Samoa) s 1(3); see discussion in *Galumalemana v Timani Samau & Sons Truck Services Ltd* [2006] WSCA 6 (26 April 2006) [10], per Ellis, Gallen and Salmon JJ sitting in the Court of Appeal at Samoa.
[36] Interestingly, the *Copyright Act 1998* (Samoa) s 29 explicitly protects 'expressions of folklore' (defined broadly in s 2 to include 'all manner of indigenous cultural works') and provides that the use of folklore can be authorised by an authority determined by the Minister of Justice with payment for such authorisation 'to be used for the purposes of cultural development'.
[37] Ibid s 16.
[38] Ibid s 8(1). Sections 8(2)(a)–(c) provide that works of architecture, databases and computer programs are excluded from s 8(1).
[39] Ibid s 8(2)(d). This subsection reiterates the matters set out in the three-step test in *TRIPs* (n 13) art 13.
[40] *Copyright Act 1998* (Samoa) s 10(1)(a).
[41] '[T]he activities of [the educational institutions] do not serve direct or indirect commercial gain': ibid s 10(1)(b).
[42] Ibid.
[43] Ibid s 10(1)(b)(i).
[44] Ibid s 10(1)(b)(ii).
[45] Ibid s 10(2).

The provision in s 8 for the personal use of copyright works appears generous, but in practice it is likely to be rarely used, since it requires the user to assess whether or not their proposed use satisfies the three-step test in the *Berne Convention*:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.[46]

As reiterated and reformulated in *TRIPs*:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.[47]

For Samoan educational institutions, s 10 is also limited in scope and usefulness. Section 10 does not apply to distance education institutions, does not permit (in any practical sense) the making of multiple copies for course books, and contains undefined phrases such as 'the extent justified by the purpose'[48] and 'compatible with fair practice',[49] which provide uncertainty instead of clarity. Samoa currently does not appear to have any copyright collective management organisations.

B *Fiji*

The *Copyright Act 1999* (Fiji) is roughly based on New Zealand copyright legislation, but its educational permitted exceptions are tightly ring-fenced in favour of copyright owners. For example, the provision that allows an individual to make a single copy of any copyright work for research or private study, which also appears in the *Copyright Act 1994* (NZ),[50] is subject under Fijian law to the proviso that the exception does not apply 'if there is a collective licence available under which the copying can be done'.[51] Computer programs are also excluded from the permitted exception for research or private study provision in the Fijian *Copyright Act*.[52]

An identical proviso and exception applies to the permitted exception for copying by schools and other educational establishments for their students and staff.[53] Arguably, it is more acceptable for these bodies to be required to take out a licence, although in a small country the issue of potential anti-competitiveness of any collective licensing body must be taken into consideration. Moreover, at the time of writing there appears to be only one established copyright collective licensing body operating in Fiji: the Fiji Performing Rights Association.

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[46] *Berne Convention* (n 12) art 9(2).
[47] *TRIPs* (n 13) art 13.
[48] *Copyright Act 1998* (Samoa) ss 10(1)(a)–(b).
[49] Ibid s 10(1)(a).
[50] *Copyright Act 1994* (NZ) s 43(1).
[51] *Copyright Act 1999* (Fiji) s 42(1).
[52] Ibid s 42(8).
[53] Ibid ss 43(1), 43(4), 44(1), 44(7).

C *China*

The *Copyright Law of the People's Republic of China* ('PRC Copyright Law') was promulgated in 1990 and revised in 2001 and 2010. A third amendment was proposed by the State Council in 2012, and three drafts of that amendment have since been released to the public for comment. A 'finalised' set of draft amendments was released on 6 June 2014.[54] However, as yet, there is no final revised form. The proposed amendments do not appear to change the permitted exceptions for education and libraries, apart from providing 'a mechanism for the collective management of copyright' and the 'extension of competence of copyright collective management associations'.[55] If passed into law, these provisions will amend art 8 of the PRC Copyright Law, which currently permits the copyright owners themselves to appoint a collective copyright administration organisation.

'Limitations on Rights' are set out in art 22 and are brief and somewhat ill-defined (but due to their lack of definition possibly rather generous) provisions for education and libraries. Article 22 requires that the name of the author and the title of the work be indicated and 'the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced'.[56] If the foregoing requirements are satisfied, a published copyright work may be translated or reproduced 'in a small quantity of copies' for use by teachers in classroom teaching, 'provided that the translation or the reproductions are not published for distribution'.[57] In order to encourage the compilation and publication of textbooks for the nine-year compulsory education or state education planning, unless an author has stated that his works are prohibited from such use, fragments of works, short written works or musical works, a single work of fine art, or photographic works that have been published may be compiled in textbooks, 'with remuneration paid, the name of the author and the title of the work indicated, and without prejudice to the other rights enjoyed by the copyright owners according to this Law'.[58]

China is both more advanced and more liberal in its provisions for education than the other countries discussed in this article. The Regulations on the Protection of the Right to Network

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[54] See 'PRC Copyright Law (Revision Draft for Solicitation of Comments', *China Law Translate* (Web Page, 6 July 2014) <https://www.chinalawtranslate.com/en/prc-copyright-law-revision-draft-for-solicitation-of-comments>.

[55] *Copyright Law of the People's Republic of China* (Revision Draft, Submission Version, 18 June 2014) ch 5 s II.

[56] Ibid art 22. Article 22 also provides that each of the limitations on the rights of authors is also applicable to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.

[57] Ibid art 22(6).

[58] Ibid art 23. This article is also applicable to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.

Dissemination of Information ('the PRC Regulations')[59] provide educational institutions with generous additional exceptions to copyright for works distributed on the internet. The purpose of the PRC Regulations is stated in art 1:

> [F]or the purposes of protecting the right of dissemination via information network of copyright owners, performers and sound and visual recording makers as well as encouraging the production and dissemination of the works that are beneficial to the construction of socialist spiritual and material civilization.[60]

The PRC Regulations provide eight very specific permitted exceptions for users, including '[p]rovision of a published work, in a small amount, to a small number of teachers or scientific researchers for classroom teaching or scientific research',[61] and for '[t]ranslation, into a minority nationality language, of a published work created in the Chinese Han language by a Chinese citizen, legal person, or any other organization and provision thereof to the minority nationalities inside China'.[62] Importantly, the PRC Regulations also provide for distance education, allowing distance education institutions to provide students with 'segments of published works or short written works, musical works, fine art works in the form of a single-piece, or photographic works that have been published' without permission from the copyright owner, provided that remuneration is paid to the copyright owner.[63]

Fair dealing provisions for education tend to either allow very limited uses of copyright works or provide vague guidelines that, in practice, are unworkable by educational institutions. Furthermore, drawing from the United States' experience, an isolated fair use provision is not sufficient for educational needs; the United States has introduced additional statutory provisions for distance teaching and also provides specific exceptions in regard to potential damages payable for copyright infringement by an educational user. This can be described as a hybrid regime and is an approach emulated by the Philippines, Singapore and Korea.

IV HYBRID REGIMES: FAIR USE AND FAIR DEALING FOR EDUCATION

The copyright statutes of the three countries described in this part — the Philippines, Singapore and Korea — also include statutory licensing provisions that permit educational institutions to make multiple copies of articles or books or to communicate them to students, with remuneration to the copyright owner to be agreed or alternatively to be determined by a copyright tribunal.[64]

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[59] *Regulation on Protection of the Right to Network Dissemination of Information* (People's Republic of China) State Council, Order No 468, 18 May 2006 (as amended by the Decision of the State Council on Amending the Regulation on Protection of the Right to Network Dissemination of Information, 30 January 2013). For an English translation, see HFG Law & Intellectual Property, *Regulations on the Protection of Right of Dissemination via Information Network (2013)* (2014) <https://www.hfgip.com/sites/default/files/law/regulations_on_the_protection_of_right_of_dissemination_via_information_network_2013_english.pdf>.

[60] Ibid art 1.

[61] Ibid art 6(3).

[62] Ibid art 6(5).

[63] Ibid art 8.

[64] *Copyright Act 1987* (Singapore) s 52.

The Philippines has introduced a United States-style fair use provision into s 185.1 of its intellectual property code — 'fair use of a copyrighted work for criticism, comment, news reporting, teaching including limited number of copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright'. In determining whether a specific use is fair, the code requires consideration of the same four factors as are required by the United States fair use provision. The uncertainties surrounding fair use as discussed previously do not appear to have been addressed in the Philippines' provision.

Similar United States-style fair use provisions, albeit sometimes described as 'fair dealing' provisions,[65] have been introduced into Singapore's and South Korea's copyright statutes. These open-ended provisions operate alongside more specific provisions that permit certain educational uses, such as copying by non-reprographic means and things done for the purpose of examinations.

The *Copyright Act 1987* (Singapore) includes an open-ended provision, similar to the United States' fair use provision, that permits 'fair dealing with a copyright literary, dramatic, musical, or artistic work or with an adaptation of any one of these for any purpose'.[66] The fair dealing provision includes a fifth factor, in addition to the four factors required in the United States fair use provision, requiring the courts to have regard to 'the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price'.[67] In a current review of the Singapore Act, however, it has been proposed that this fifth factor should be removed due to its lack of clarity in a digital era and the possibility that it implies there is always an obligation to seek a licence before relying on the exception.[68] The *Singapore Copyright Review Report* has also proposed changing the term 'fair dealing' to 'fair use' to reflect its similarities to the United States' open-ended provision.[69]

Jong explains that a general clause on fair use, art 35*ter*, was inserted into the *Copyright Act of Korea* in 2011:

> In determining whether a use falls under this paragraph, the following factors shall be considered under the Act:
>
> – Purposes and characters of use, such as for-profit or non-profit;
> – Types and uses of works, etc.;
> – Proportions of used parts in the entire works, etc. and their importance;
> – Impact of the use of works, etc. on the current market or value or potential market or value of such works, etc.[70]

[65] Ibid s 35(1).
[66] Ibid s 35.
[67] Ibid s 35(2)(e).
[68] 'Proposal 6: Strengthening the General "Fair Use" Exception', in Singapore Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (Report, 17 January 2019) 25, 26.
[69] Ibid 28.
[70] Sang Jo Jong, 'Fair Use in Korea' (Conference Paper, Australian Digital Alliance Copyright Forum, 24 February 2017) <http://infojustice.org/archives/37819>.

Although, as Jong reports, there have been several cases where the new fair use clause justified legitimate uses, he also notes that another question remains to be addressed by Korea: '[H]ow to minimize uncertainty and unpredictability under the fair use doctrine'.[71]

It appears that the introduction of a hybrid regime to national copyright laws has some benefits but has also introduced additional uncertainty. Educational institutions are not confident of the legal boundaries of fair use, or indeed of some of their permitted exceptions. For instance, despite their own hybrid regime and the useful clause limiting damages payable by educational institutions, educational institutions in the United States continue to subscribe to collective copyright licensing bodies to ensure they are legally protected when providing educational materials to their students. Similarly, fair dealing provisions for education tend to either allow very limited uses of copyright works or provide guidelines that, in practice, are unworkable for educational institutions. Therefore, educational institutions in fair dealing countries also subscribe to collective copyright licensing bodies, rather than rely upon the uncertainties of fair dealing.[72]

V CONCLUSION

A well-informed, educated and skilled citizenry is indispensable to the development process.[73]

The Asia Pacific region comprises many developing nations that are excluded from the economic advantages of innovation. Without increased concessions for education in the copyright laws of the region, many countries and territories will continue to be disadvantaged. The introduction of hybrid fair use/fair dealing provisions for education by some Asia Pacific nations is a step in the right direction. However, there are other contributing factors to the problems of developing countries. These include the lack of copyright collective licensing organisations in many developing countries and the need for suitable educational materials appropriately focused on the specific domestic market, resulting in an over-dependence on expensive international educational materials. With improved copyright exceptions for education, the provision of licensing organisations and access to suitable educational materials, developing countries in the Asia Pacific could, eventually, be equipped to reap the economic benefits of innovation.

[71] Ibid.
[72] For analysis of the failures of fair use and fair dealing provisions to resolve the issue of permissible quantitative copying limits for educational users, see Muhammad Masum Billah and Saleh Albarashdi, 'Fair or Free Use of Copyrighted Materials in Education and Research and the Limit of Such Use' (2018) 17 *Chicago-Kent Journal of Intellectual Property* 422.
[73] Okediji (n 6).

DOES LAW NEED A THEORY OF TRUTH? A LOOK AT THE EPISTEMOLOGY OF THE NEW HAVEN SCHOOL OF JURISPRUDENCE

*Tomas Fitzgerald**

ABSTRACT

Law and truth have a complicated relationship. Epistemologists' attempts to resolve this complication by articulating a coherent theory of truth have only exacerbated the issue. But is a theory of truth necessary for jurisprudence? If 'we are all pragmatists now',[†] might we not be better off rejecting standard accounts of epistemology altogether? This paper will outline how the pragmatist rejection of epistemology resolves the challenge of Gettier problems. It will trace the influence of the early pragmatists on American Legal Realism; particularly Holmes, Llewellyn and Frank. It will then suggest, following Lasswell and McDougal, that the American Legal Realists crucially misread Dewey, and that the New Haven School of Jurisprudence corrects this misconception. Properly understood as a radically pragmatist project, the New Haven School of Jurisprudence offers an account of legal theory that avoids standard epistemological controversies and still offers a coherent and effective approach to jurisprudential enquiry.

* Senior Lecturer, School of Law, University of Notre Dame Australia.

† John D Arras, 'Freestanding Pragmatism in Law and Bioethics' (2001) 22(2) *Theoretical Medicine and Bioethics* 69, quoting Richard Rorty.

I INTRODUCTION

Standard accounts of epistemology proceed on the basis that knowledge is the possession of a justified true belief ('JTB').[1] One significant and persistent challenge to JTB theories of knowledge are Gettier problems: cases in which a subject holds a justified true belief that does not seem to be knowledge.[2] Standard accounts of epistemology deal with Gettier cases by nuanced restatements of their particular account of truth. Broadly, such accounts are usually foundationalist[3] or non-foundationalist.[4]

A third solution to Gettier problems exists. One might reject standard accounts of epistemology altogether. In fact, James,[5] Dewey[6] and Rorty[7] — indeed all philosophical pragmatists — take this approach. Pragmatism has been unpopular in legal theory. The historical links between James and Dewey's pragmatism and the perennially controversial American Legal Realists have compounded this unpopularity.[8]

Despite this, there is much to recommend the pragmatist position to legal theorists. It offers unique and pragmatic, in the vernacular sense, solutions to the problems of legal theory. Moreover, there is a fully articulated and *radically* pragmatist system of legal theory ready-made, though frequently overlooked: Lasswell and McDougal's New Haven School of Jurisprudence.[9]

This article will outline how the pragmatist rejection of epistemology resolves the challenge of Gettier problems. It will trace the influence of the early pragmatists on American Legal Realism, particularly Holmes, Llewellyn and Frank. It will then suggest, following Lasswell and McDougal, that the American Legal Realists crucially misread Dewey, and that the New Haven School of Jurisprudence corrects this misconception.[10] It will then demonstrate how, properly understood as a *radically* pragmatist project, the New Haven School of Jurisprudence offers an account of legal theory that avoids the epistemological controversy in jurisprudence.

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[1] Matthias Steup and Ram Neta, 'Epistemology' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University, Summer 2020 ed, 2020) <https://plato.stanford.edu/archives/sum2020/entries/epistemology>.
[2] Edmund Gettier, 'Is Justified True Belief Knowledge?' (1963) 23(6) *Analysis* 121.
[3] As with doxastic or epistemic basicality: see Steup and Neta (n 1).
[4] As in coherentist accounts of epistemology.
[5] William James, 'Pragmatism's Conception of Truth' (1907) 4(6) *The Journal of Philosophy, Psychology and Scientific Methods* 141.
[6] John Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (Capricorn, 1960).
[7] Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press, 2009).
[8] Harold D Lasswell and Myres S McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven Press/Kluwer Law, 1992) vol 1, 130, 250, 255 ('*JfaFS*').
[9] Ibid 324 and, in particular, 217–18 n 21. But note the considerable academic controversy about its central claims: see, in particular, Hengameh Saberi, 'Love It or Hate It, but for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity' (2012) 35 *Boston College International and Comparative Law Review* 59.
[10] *JfaFS* (n 8) 265 n 197.

II EPISTEMOLOGY, GENERALLY

Epistemology is the study of knowledge. A sub-discipline of philosophy, it seeks to understand the nature of claims we make about knowledge. The possibility of knowledge is often taken for granted. So, too, is the possibility of truth; some propositions are true, others false. We assume it is possible, though often difficult, to distinguish between truth and falsehood. Epistemology, at its core, examines the processes by which we might determine how we know something — including how we might know whether a proposition is true or false. Additionally, epistemology is concerned to interrogate the conceptual framework by which we understand knowledge.

Consider the question of knowledge from the context of a law student. Suppose, in an exam, we ask a first-year student to identify which decision of the High Court of Australia established the common law principle that Native Title survived the Crown's acquisition of radical title. The student's answer — *Mabo v Queensland (No2)* ('*Mabo*')[11] — is correct. Can we infer that the student who has given that answer possesses certain 'knowledge' about the *Mabo* case?

Traditional approaches to epistemology posit that knowledge is, roughly, a justified true belief, or JTB.[12] Suppose our student, panicking as the exam clock ticks down, gave the answer because, having recently watched *The Castle*, they recalled the *Mabo* case was used by fictional lawyer Dennis Denuto as a catch-all authority for 'the vibe' that restrictions on federal government's powers over property are possible. The student had no particular belief that the *Mabo* case stood for any specific or concrete legal proposition. Their answer was, in essence a lucky — albeit vaguely informed — guess. A traditional epistemologist would contend that, despite giving a correct answer, the student did not possess knowledge, relevantly speaking. The answer given was true, but the justification of the answer was suspect and, arguably, the student lacked any relevant specific belief about the answer given. The student no more possesses knowledge about the state of the law than someone who answered the question by throwing a dart at an array of cases and happened to land on the *Mabo* case. Steup summarises the position as follows: '[W]e arrive at a tripartite analysis of knowledge as JTB: S knows that p if and only if p is true and S is justified in believing that p.'[13]

The conception of knowledge as the possession of a JTB is compelling. Yet, it is incomplete. Gettier's 1963 paper 'Is Justified True Belief Knowledge?' identified key shortcomings in the JTB account of knowledge, with examples that have since come to be known as Gettier cases.[14] In those cases, a person holds a true belief, and is justified in holding that belief, but their justification is in some way unsatisfactory or unreliable.

To take a slight variation on the example Gettier gives, suppose our law student is interviewing for a clerkship. So, too, is Ms Jones, another excellent candidate for the clerkship, who recently

[11] (1992) 175 CLR 1.
[12] Steup and Neta (n 1).
[13] Ibid.
[14] Gettier (n 2).

completed an internship at UNCITRAL in Vienna. Ms Jones still wears her UN pin on her lapel with pride. Our student has good reason to believe that Ms Jones will get the clerkship — specifically, they overheard the firm's HR manager tell another lawyer at the firm that Ms Jones was chosen for the position. Our student, who in a bout of nerves has forgotten Ms Jones' name, forms the belief that 'the person with the UN pin will get the clerkship'. As it happens, our student is in fact the successful applicant. While reaching into their suit pocket to retrieve a pen with which to sign the contract, their hand brushes against a UN pin, which had been given to them by a relative who visited Vienna as a tourist, which they had quite forgotten was there.

In this hypothetical, our student was in possession of a true belief: 'the person with the UN pin will get the clerkship'. That belief was, at least in a sense, justified. However, despite this, intuitively, they do not appear to possess knowledge. One might complain that this scenario is highly contrived. It is, and other more plausible scenarios might well be described. Yet the broad principle remains; there appear to be situations in which JTB is not sufficient to ground a claim that someone possesses knowledge.

This example largely mirrors Gettier's 'the person who gets the job has 10 coins in their pocket' hypothetical, spelled out in 'Is Justified True Belief Knowledge'. Controversy as to how best we might characterise the state of our student's knowledge is, therefore, largely coterminous with objections to Gettier's original scenario. Such objections posit, infra, that the scenario equivocates between testimony (overhearing that Ms Jones will get the job) and experience (having the visual perception 'that is a UN pin'); that the statement about which our student holds a belief ('the person with the UN pin will get the clerkship') is not genuinely equivalent to the ultimately 'true' proposition (our student, who is in possession of a UN pin they have forgotten about, was selected for the clerkship); and that the extent to which our student's belief is 'justified' is open to attack. Repeating the long history of philosophical discourse on Gettier cases is, the reader will be relieved to know, well beyond the scope of this article. It suffices at this point to identify that, at the very least Gettier cases give us good reasons for supposing that our intuition that knowledge is explicable as JTB is controversial, and that resolving that controversy will require further precision about what constitutes having a good justification for supposed knowledge.

A *Epistemologies: Foundational and Coherentist*

If we accept the premise that Gettier cases challenge the JTB theory of knowledge, then solving that problem requires identifying how we might systematically distinguish between actual knowledge and mere luck.

A common focus of this debate is the notion of justification. By developing a more rigorous notion of when a belief is justified, we might well do away with Gettier problems. Hence, epistemologists are concerned with what constitutes having a justification for a particular belief. Here, we can divide theories of epistemology into two broad kinds: foundationalist and non-foundationalist (usually coherentist).

Foundationalists contend that beliefs are justified by virtue of their dependence upon other beliefs. Our set of beliefs is, therefore, akin to a building: one belief rests on other, underlying beliefs. The foundationalist account of justification posits that a belief is justified where it may be inferred from another, more basic belief. Applying this analogy, a person is justified in believing their watch to be accurate if they have set it from a source known to be accurate and have good reason for supposing that the watch's mechanism is keeping good time.

Broadly speaking, faced with Gettier cases a foundationalist seeks to shore up the notion of knowledge by reference to such a picture of justification. Beliefs are only good justifications, and therefore reliable as predictors of knowledge, to the extent that they can be properly inferred from other, more basic beliefs. What follows from this is that, to the extent that any of our more basic or foundational beliefs are called into question, the assault on those foundations will flow through to all our subsequent beliefs that rely upon them. If the radio clock at the station by which I set my watch is incorrect, then that error will infect the entire chain of beliefs that rest upon it.

A difficulty arises with foundationalist accounts of epistemology. If all beliefs depend for their justification upon more basic beliefs, how do we avoid the problem of infinite regression?

Foundationalist responses to this problem differ. Steup identifies a number of different approaches, among them doxastic and epistemic basicality and variations thereon, that attempt to answer this question.[15] However, one might also avoid the problem of infinite regression by rejecting a foundationalist account of justification altogether. Coherentists do just that.

A coherentist picture of justification is non-foundational in that it does not view beliefs as constructed upon — and therefore dependent upon — more basic, foundational claims. Rather than a building, coherentists urge the metaphor of a 'web of belief'; each of our beliefs is justified on the basis of its relation to other beliefs that we hold. For a coherentist, checking our watch gives rise to a belief about the time. The justification of that belief is not a series of prior, more basic beliefs. Rather, we might justify our belief about the time being correct by reference to other matters in our broader web of belief. For example, we might justify a belief that our watch keeps time correctly by noting that reliance on that watch allowed us to show up to a meeting on time, arrive at a station before the train did and otherwise coordinate time-sensitive activities with other people. Lawyers will recognise this style of inference as akin to circumstantial evidence. No one piece is itself determinative, but on the whole the confluence of events can be taken as good reason for supposing a particular conclusion. Or as Pollock CB puts it:

> It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence — there may be a combination of circumstances, no one of which would raise a

[15] Steup and Neta (n 1).

> reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.[16]

While this might sound reassuring, this passage contains a sting in the tail; 'as much certainty as human affairs can require or admit' leaves coherentists open to the charge that they have not given an account of knowledge at all. While foundationalists might struggle to find a basic claim that guarantees knowledge, coherentists struggle to find *sufficient* reasons. An accused might be convicted on the basis of circumstantial evidence, while we admit that we might never *know* what really happened.

The extent to which either of these accounts resolve the Gettier problem remains hotly debated, as does the question of which account is the preferable one. Yet insofar as both posit that knowledge is a characteristic of a thing whose status might be ascertained, they share a common premise. Hence, both theses share a common weakness: they must account for the gap (or the potential gap) between the messy world of our reason and experience and the possession of something we call knowledge, which might be had by various methods. Both standard accounts of epistemology wrestle with that gap, still. Yet, another path remains open. Coherentism and foundationalism address themselves to the question of how we might justify whether our beliefs are true. This engages with the J and B of the JTB account of knowledge. An alternative route is to tackle the concept of knowledge directly. That is, what work does a theory of knowledge even do? Is such a theory even necessary?

B *The Pragmatist Rejection of Epistemology*

Since its inception, pragmatism has been centrally concerned with epistemology. In 1907, pragmatist William James delivered a series of public lectures entitled 'Pragmatism: A New Name for Some Old Ways of Thinking'.[17] The sixth of those lectures concerns 'Pragmatism's Conception of Truth'.[18] It outlines James' characterisation of Dewey and Schiller's work in epistemology, whom James contends 'have given the only tenable account of this subject'.[19]

The pragmatist method, outlined by James in the first of his lectures, distills philosophical problems down to their practical consequences. James notes, 'whenever a dispute is serious, we ought to be able to show some practical difference that must follow from one side or the other's being right'.[20] Expanding on this theme in the lecture 'What Pragmatism Means', James contends:

> It is astonishing to see how many philosophical disputes collapse into insignificance the moment you subject them to this simple test of tracing a concrete consequence. There can BE no difference any-where that doesn't MAKE a difference elsewhere — no difference in abstract truth that doesn't express itself in a difference in concrete fact and in conduct consequent upon that fact, imposed on somebody, somehow, somewhere and somewhen. The whole function of philosophy ought to be to find out what

[16] *R v Exall* (1866) 4 F & F 922, 929.
[17] William James, *Pragmatism* (Courier Corporation, 1995).
[18] James, 'Pragmatism's Conception of Truth' (n 5).
[19] Ibid.
[20] James, *Pragmatism* (n 17) 2.

> definite difference it will make to you and me, at definite instants of our life, if this world-formula or that world-formula be the true one.[21]

A pragmatist, therefore, investigates philosophical problems by first determining what, if any, practical consequences turn on the dispute. By application of this method a pragmatist hopes to segregate genuine philosophical disputes from supposed ones — the illusory philosophical problems that Wittgenstein contended 'arise when language goes on holiday'.[22]

James turns this methodology to the central problem of epistemology: 'True ideas are those that we can assimilate, validate, corroborate and verify. False ideas are those that we cannot.' For James, it is inescapable that any actual process of assimilation, validation, corroboration or verification must be engaged in by an actual person. That person is engaged in that enquiry because it has real-world consequences. It follows that any process of verification is not — and cannot be — separate from the question of its consequences. Hence: '[T]he truth of an idea is not a stagnant property inherent in it. Truth happens to an idea.'[23] It happens because — and only because — we are engaged in a process of enquiry.

Indeed, James identifies this as the central pragmatist project:

> Pragmatism, on the other hand, asks its usual questions. 'Grant an idea or belief to be true,' it says, 'what concrete difference will its being true make in any one's actual life? How will the truth be realized? What experiences will be different from those which would obtain if the belief were false? What, in short, is the truth's cash-value in experiential terms?'[24]

Thus, James' approach to epistemology does not merely tackle the narrow question of justification; his critique is far more radical. James' account asserts that truth itself is the process of verification, not a status obtained once verification is complete. Truth is not a property an object or idea may possess. Truth is the means, not the end. It follows that, as a process, not a category, truth is not 'objective' in any relevant sense. Such a categorisation denies truth an ontological status. Further, truth, on James' account, is relative. It is the mechanism by which one fact 'relates' to others.

These views are contentious. They were in James' time. One might reasonably recoil at the suggestion that truth is coterminous with *mere* 'usefulness'. Particularly if we ask: useful to whom? It seems plainly objectionable to call any account of facts that happens to serve a useful purpose — no matter how nefarious — 'truth'. James notes: 'A favorite formula for describing Mr. Schiller's doctrines and mine is that we are persons who think that by saying whatever you find it pleasant to say and calling it truth you fulfill every pragmatic requirement.'[25] This issue remains contentious today — indeed perhaps more so than in James' time, beset as we are by accusations of 'fake news'.

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[21] Ibid 25.
[22] Ludwig Wittgenstein, *Philosophical Investigations* (Wiley-Blackwell, 4th ed, 2009) 23.
[23] James, *Pragmatism* (n 17) 25.
[24] James, 'Pragmatism's Conception of Truth' (n 5) 142.
[25] Ibid 154.

James does not discuss truth's ontological status as such, though he touches on the point: 'When Berkeley had explained what people meant by matter people thought that he denied matter's existence. When Messrs. Schiller and Dewey now explain what people mean by truth, they are accused of denying its existence.'[26] That is, James contends that Berkeley is merely pointing out that there is an explanatory gap between our experience of matter and our idea of matter. Such a claim does not, contrary to the manner in which it is characterised by Berkeley's critics, deny that matter exists. But James does not settle the question as regards truth. It was left to later pragmatists to discuss truth's ontological status explicitly.

C *Richard Rorty's Neo-Pragmatism*

Rorty acknowledges that his seminal work, *Philosophy and the Mirror of Nature*, owes a debt to James,[27] though both Rorty and James identify the central idea as Dewey's. Unlike James, who avoids the question of the ontological status of truth, Rorty is open about where pragmatism's criticism of standard accounts of epistemology ultimately ends. Pragmatism's approach to truth is not simply an alternative coherentist epistemology, addressed to the narrow question of how we should best understand when a belief is justified. Rather, it implies a wholesale rejection of the possibility of epistemology, classically conceived. It is a radical critique, in the sense that it is a roots-and-all objection to epistemology per se, rather than an objection to any particular part of a standard account of epistemology.

Rorty specifically contends that this more radical critique is implied in James' work, noting that the 'occasional protests against … the pretensions of a theory of knowledge' found 'in, for example, Nietzsche and William James went largely unheard'.[28]

Setting out the project of *Philosophy and the Mirror of Nature*, Rorty notes, 'the aim of this book us to undermine the reader's confidence in … "knowledge" as something about which there ought to be a "theory" and which has "foundations"'.[29] Rorty contends that, properly understood, the work of Sellars and Quine lays the foundation for a 'revolutionary' approach to truth, which conceives of

> truth as, in James's phrase, 'what it is better for us to believe', rather than as 'the accurate representation of reality'. Or to put the point less provocatively, they show us that the notion of 'accurate representation' is simply an automatic and empty compliment which we pay to those beliefs which are successful in helping us do what we want to do.[30]

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[26] Ibid.
[27] Rorty (n 7) 4. Some scholars, like Saberi, distinguish between pragmatism and neo-pragmatism. It is not clear on what basis this distinction is drawn. Certainly, neo-pragmatism deals explicitly with the thornier implications for epistemology that earlier pragmatists were willing to pass over. But there appears to be no 'break' in the internal logic of pragmatism that warrants treating the epistemological positions of Dewey and Rorty differently. The better view — the one advanced by Rorty himself — is that his work merely brought to light the extent to which Dewey and James in particular had given an account that collapsed much of traditional epistemology.
[28] Ibid.
[29] Ibid 7.
[30] Ibid 10.

Rorty's work bells the cat. The key distinction between the pragmatist account of epistemology on the one hand and the coherentist on the other is that the latter still insists that knowledge is ascertainable to the extent that our coherent beliefs mirror or copy an external reality — one that exists prior to the inquiries that gave rise to those beliefs. Pragmatism collapses that distinction. It contends that there is no work to be done by the concept of knowledge aside from the process of verification, so discards it as a vestigial relic of a bygone platonic era. The abstraction from the act of verification to the concept of knowledge is dispensed with entirely.

In doing away with this abstraction, the pragmatist rejection of standard accounts of epistemology similarly does away with Gettier problems. The problem of knowledge only arises if you grant knowledge some special or separate ontological status aside from the mechanisms by which you make enquiry. For a pragmatist, the thing to do is to describe the way in which drawing inferences from the matters before you — recollections of cases or claims about pins — might go well or badly in practice. The idea that the knowledge that might be claimed by the student is somehow suspect *aside from the method of enquiry* simply does not enter into it. It is a mere linguistic confusion, on which nothing practical turns at all.

III EPISTEMOLOGY AND LAW

For lawyers — far more so than other disciplines — this is a particularly interesting point. The law has, by nature of its practical work, had to engage squarely with the question of knowledge. Unlike philosophy, it has not had the luxury of kicking tricky questions about the underlying theory of knowledge into the long grass indefinitely. Since legal disputes must be ultimately determined in a timely fashion, the law has had to develop strategies for solving contested claims about knowledge in a practical manner.

The law of evidence and trial procedure is the most obvious example of these pragmatic — in both the vernacular and philosophical sense — solutions. One excellent example is the High Court's treatment of circumstantial evidence in *Plomp v R*,[31] recently affirmed in *The Queen v Baden-Clay*.[32]

Indeed, law's approach to questions of knowledge has been so successful that the language of legal procedure has come to be applied outside its legal context. Take the notion of the 'burden of proof', a quintessentially technical question of the law of evidence that establishes which party carries the requirement to prove a certain claim to a particular standard. On the face of it, this is a discussion of interest only to the particular sub-section of lawyers, law academics and judges who consider the trial and appeal process.

Yet, the popular application of the notion of the 'burden of proof' is very broad indeed. We are likely to find assertions about the relevant burden of proof — who carries it and the standard to which it must be discharged — in all manner of extra-legal disputes. Even in ordinary

[31] (1963) 110 CLR 234.
[32] (2016) 258 CLR 308.

conversation, reference to burdens of proof are not uncommon.[33] Yet, displaced from its legal context, the 'burden of proof' is a clumsy beast. Situations that are not constrained by the demand for timeliness incumbent on the judicial process seem to have little reason to apply the notion at all. Its usefulness is a product of the thorough temporalisation of the law; the reality that since justice delayed is justice denied, processes must be adapted to meet that demand. What is served, for example, by physicists who offer competing explanations of how the four fundamental forces might be unified arguing about which of them must discharge the burden of proof?

The demands of temporalisation have pressed law into a thoroughly pragmatist approach to epistemology. So much so that the broader notion of a concept of truth (or a systematic epistemology) is largely absent from standard accounts of legal theory. This is one reason Arras has remarked — in the context of bioethics and the law — that 'we are all pragmatists now'.[34] Hence, even accepting that pragmatism's rejection of standard accounts of epistemology remains controversial in philosophy more broadly, it is worth considering this analysis carefully in jurisprudence.

Having discussed the broader pragmatists' rejection of epistemology and its relationship to jurisprudence, it falls to consider how the New Haven School of Jurisprudence adopts a pragmatist approach to/rejection of epistemology in this context.

IV THE NEW HAVEN SCHOOL OF JURISPRUDENCE

The New Haven School of Jurisprudence (hereafter 'NHSJ') has been described as 'the most visible, but ultimately the least influential, midtwentieth century project of disciplinary renewal' in international jurisprudence.[35] Its progenitors, Harold Lasswell and Myres McDougal, began a scholarly collaboration in 1935, and in 1943 published 'Legal Education and Public Policy',[36] 'one of the most quoted and cited law review articles ever published in the United States'.[37] After publication of that paper, the NHSJ project 'lived a life of celebrity scholarship — attracting some and repelling many others — in which fiery rebuttals trumped meaningful engagements'.[38]

Since then, a curious disjunction had arisen in the scholarship. On the one hand, the *Oxford Handbook of the Theory of International Law*, published in 2016, contains a chapter dissecting

[33] Alvin I Goldman, 'Argumentation and Social Epistemology' (1994) 91(1) *The Journal of Philosophy* 27.
[34] John D Arras, 'Freestanding Pragmatism in Law and Bioethics' (2001) 22(2) *Theoretical Medicine and Bioethics* 69, quoting Richard Rorty.
[35] Saberi (n 9) 62. For an excellent short introduction to the NHSJ, see W Michael Reisman, 'The View from the New Haven School of International Law' (1992) 86 *American Society of International Law Proceedings* 118.
[36] Harold D Lasswell and Myres S McDougal, 'Legal Education and Public Policy — Professional Training in the Public Interest' (1943) 52(2) *Yale Law Journal* 203.
[37] W Michael Reisman, 'Myres S. McDougal: Architect of a Jurisprudence for a Free Society' (1996) 66 *Mississippi Law Journal* 15.
[38] Saberi (n 9) 60.

the 'mainstream discipline's rejection of [the NHSJ]'.[39] At about the same time, *Jurisprudence for a Free Society* ('*JfaFS*'), the seminal NHSJ text, was being published in a Chinese language translation. Indeed, it is one of the first Western texts on jurisprudence to be so translated — leapfrogging such stalwarts of the Western jurisprudential canon as *Natural Law and Natural Rights*,[40] *The Concept of Law*,[41] *Pure Theory of Law*[42] and *Law's Empire*.[43] Presently, there is a striking disparity between the shared view from Europe and the UK — that the NHSJ is a failed project[44] — and the view from Asia, where NHSJ scholarship finds fertile ground.[45]

The disjunction arises, in part, because critics of the NHSJ have mischaracterised its central epistemological claim. The NHSJ's most vocal critics — principally Saberi and Freeman — contend that it proceeds on the basis of an incoherent foundational claim about law; that its account of human dignity is 'foundationalist antifoundationalism'.[46] Yet the NHSJ's critics have persistently failed to address, or have mischaracterised the nature of, the pragmatist epistemology that lies at the heart of the theory.

A *Is the NHSJ a Pragmatist Project?*

That Lasswell and McDougal conceived of their approach to jurisprudence as pragmatist is evident in their work. Despite this, the claim remains contentious. Some, such as Gould, squarely identify the NHSJ as a pragmatist project.[47] Dunn agrees with this characterisation, but notes that Lasswell and McDougal's treatment of the matter was sparing.[48] Nevertheless, what little Lasswell and McDougal did write on the matter was direct. Lasswell notes, 'the policy sciences are a contemporary adaptation of the general approach to public policy that was

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[39] Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016).
[40] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011).
[41] HLA Hart, *The Concept of Law* (Clarendon Law, 2nd ed, 1997).
[42] Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange, 2005).
[43] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).
[44] Most notably, Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 8th ed, 2008); Orford and Hoffmann (n 39).
[45] See, for example 沈伟, '后金融危机时代的国际经济治理体系与二十国集团——以国际经济法-国际关系交叉为视角' (2016) 28(4) *中外法学* 1014 <http://www.oaj.pku.edu.cn/zwfx/CN/abstract/abstract62780.shtml>; Wang Chao, 'China's Preferential Trade Remedy Approaches: A New Haven School Perspective' (2013) 21 *Asia Pacific Law Review* 103; Seung Hwan Choi, 'The Applicability of International Human Rights Law to the Regulation of International Trade of Genetically Modified Organisms: A New Haven Perspective' (2014) 22 *Asia Pacific Law Review* 67; Shi Jingxia, 'Bridging the Gap between the Ideal and Reality: Services Liberalisation in the China–Japan–South Korea Free Trade Agreement' (2014) 22 *Asia Pacific Law Review* 45; John Shijian Mo, 'New Haven Solution to the Protection of Private Rights in China's FTAs' (2011) 19 *Asia Pacific Law Review* 135; Tai-Heng Cheng, 'Policy-Oriented Jurisprudence and Contemporary American Legal Education Part I: Solving Global Problems: Perspective from International Law and Policy: Preface' (2013–2014) 58 *New York Law School Law Review* 771.
[46] Saberi (n 9).
[47] Harry Gould and Nicholas Onuf, 'Pragmatism, Legal Realism and Constructivism' in Harry Bauer and Elisabetta Brighi (eds), *Pragmatism in International Relations* (Routledge, 2009) 26.
[48] William N Dunn, 'Rediscovering Pragmatism and the Policy Sciences' (2018) 4(1) *European Policy Analysis* 13, 13.

recommended by John Dewey and his colleagues in the development of American Pragmatism'.[49]

Yet contemporary critics, such as Saberi, claim that '[t]he Lasswell-McDougal policy-oriented international law does not include any direct or indirect mention of pragmatism'.[50] Plainly, however, this is incorrect. *JfaFS* makes explicit mention of pragmatism when it notes that 'the Realists, as a group, much influenced by pragmatist philosophy, were concerned with formulating and implementing policies, of relatively low level abstraction, to meet certain immediate, practical exigences'.[51] The text then continues with an extract from McDougal's 1940 article 'Fuller V. The American Legal Realists',[52] which cites the analysis undertaken by Cohen, particularly in 'The Problems of a Functional Jurisprudence'.[53] Cohen's work is equally explicit about the influence of pragmatism on American Legal Realism, noting that the 'viewpoint' he applies to law in that paper 'is something common to logical positivism, pragmatism, operationalism, and Whitehead's "method of extensive abstraction"'.[54] That footnote continues, citing the three main proponents of early pragmatism: Peirce, James and Dewey.

Indeed, indirect reference to pragmatism is frequent. Reference to the work of the early pragmatists — particularly Dewey — is made a number of times in *JfaFS*. These references usually note the influence of philosophical pragmatism on American Legal Realism, for example, James' influence on Pound,[55] and Dewey's influence on Cook[56] and Cohen.[57] More interesting, for our purposes, is the broader reference to Dewey's influence on American Legal Realism generally, as opposed to any particular proponent of that theory. The general theme of Dewey's influence abounds.[58] Specifically, *JfaFS* suggests that while American Legal Realism followed Dewey's work broadly, it deviated from his central claims in important respects. As we shall see, it is precisely this criticism of the American Legal Realists' take on Dewey that is central to understanding the error made by scholars who accuse the NHSJ of 'foundationalism'. At this stage, however, it will suffice to note that Lasswell and McDougal see pragmatism as the intellectual genesis of American Legal Realism and the NHSJ project as the intellectual successor to American Legal Realism — albeit one that corrects what the NHSJ

[49] Harold Dwight Lasswell, *A Pre-View of Policy Sciences* (Elsevier, 1971) xiii–xiv.
[50] Saberi (n 9) 90.
[51] *JfaFS* (n 8) 226.
[52] Myres S McDougal, 'Fuller V. The American Legal Realists: An Intervention' (1940) 50 *Yale Law Journal* 827.
[53] Felix S Cohen, 'The Problems of a Functional Jurisprudence' (1937–1938) 1 *Modern Law Review* 5.
[54] Ibid 8.
[55] *JfaFS* (n 8) 130.
[56] Ibid 250.
[57] Ibid 255.
[58] Ibid 59, 89, 211, 218, 265, 318–19.

takes to be the Realists' persistent misreading of Dewey's epistemology.[59] As they put it in NHSJ:

> It is the aim of the policy sciences frame to suggest theory and procedures better designed to take appropriate account of the unique complexities and difficulties that attend authoritative decision. It rejects the deterministic teleologies of the natural law, historical and positivist frames and builds upon the conception of the American Legal Realists that the final, culminating commitment in decision is inescapably an expression of choice.[60]

Evidently, Lasswell and McDougal take American Legal Realism, and consequently pragmatism, to be the intellectual progenitors of the NHSJ. On that basis, and commensurate with the positions they set out in *JfaFS*, the NHSJ looks to be a thoroughly antifoundationalist account of jurisprudence. Not merely in the sense that Lasswell and McDougal take a 'pragmatic', in the vernacular sense, approach to determining legal problems. Certainly, they do, and this is at one with the pragmatist method conceived of broadly. However, their approach to jurisprudence is radically pragmatist. Consistent with both early pragmatists like James and Dewey and later pragmatists such as Rorty, they chase the implications of a pragmatist's account of epistemology through to its logical conclusion.

What follows from this is an implicit rejection of the notion that law as a thing 'out there' to be 'discovered' or even 'assessed' by reference to some objective criteria is, for McDougal, inapt. Just as pragmatism denies truth an ontological status, so too does McDougal deny such a status to law. On this view we cannot describe law as though it is a thing separate from the processes that instantiate it.

Indeed, the notion of 'law as process' is a touchstone to which consistently *JfaFS* returns. Lasswell and McDougal contend that 'the legal process is part of the process of decision which in turn is part of the social process as a whole'.[61] They argue that a workable conception of jurisprudence requires 'a clear focus upon the whole of the comprehensive and continuing process of authoritative and controlling decision'.[62] This decision-making is, for Lasswell and McDougal, an iterative mechanism by which claims about authority, control and values are made, settled, contested and reinforced. They advance a picture of law that is both deeply amorphous and self-referential. They do not attempt to identify a Kelsenian grundnorm.[63] Nor

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[59] Relevantly, this difference between the NHSJ and American Legal Realism avoids the criticisms Fuller levels at the Realists, which are well set out in McDougal (n 52). This is important to note, since one who adopted Fuller's criticisms of American Legal Realism might contend that, to the extent the NHSJ joins with the Realists in adopting a pragmatist epistemology, it is open to similar critique. Yet, precisely because of their difference with the Realists on the question of how best to read Dewey's claims about epistemology — noted above — the NHSJ do not share the kind of moral skepticism that Fuller contends is fatal to the Realists' attempts to set out a plausible account of jurisprudence. It is worth noting, however, that even despite a reading of Dewey that avoids the specific problem Fuller identifies in the Realists, McDougal nevertheless largely rejects Fuller's overarching critique of American Legal Realism.

[60] *JfaFS* (n 8) 324.

[61] Ibid 335.

[62] Ibid 191.

[63] Hans Kelsen, *Pure Theory of Law* (Berkeley, 1967).

is there any attempt to articulate foundational 'secondary rules' that bind decision-makers,[64] and thereby provide the building blocks for epistemic claims about law. No such foundationalist picture is presented. Rather, *JfaFS* contends that legal systems are inherently dynamic. That is, law is the part of the social process that simultaneously makes authoritative decisions and determines what the process is for making authoritative decisions. It both reflects social values and reinforces — sometimes even creates — social values. Specifically, Lasswell and McDougal note, 'the processes of authoritative decision in any particular community will be seen to be an integral part, in an endless sequence of causes and effects, of the whole social process of that community'.[65] Law is the process by which authoritative and controlling decisions are made in any given society — and any attempt to describe its features beyond this evaporates into platonic otherworldliness. Rather than resting on a grundnorm, secondary rules, or even an account of basic goods,[66] that process does not 'rest' on anything. It does not need to. Rules are unseated as the mechanism for decision, and in their place stand 'human beings — all human beings, to varying degrees — as deciders'.[67]

V CONCLUSION

Pragmatists reject standard accounts of epistemology by inviting us to descend the ladder of philosophical abstraction. They disavow the standard metaphor of epistemology, which posits that we might possess something called knowledge that — in some relevant sense — 'mirrors' a reality that antecedes our experience of it. Rather, they insist that this picture is thoroughly muddled, that knowledge is inseparable from the process of knowing itself. By giving up that view, pragmatism dissolves the perennial challenge of Gettier problems. Rather than attempting to draw ever-finer definitions of justification, it instead focuses our attention on better describing how and in what circumstances our processes of knowing might fall short of our intended goals.

Pragmatism's motivation is a thorough-going attempt to temporalise every aspect of philosophy. There is a direct analogy between this motivation and the reason that law must focus on processes of evidence rather than epistemology. This article suggests that this shared motive is not only of academic interest, but also suggests the possibility that pragmatism might be a fruitful area of jurisprudential enquiry.

Despite the claims of its critics, the New Haven School of Jurisprudence represents a ready-made, thoroughly pragmatist approach to legal theory. Insofar as standard accounts of jurisprudence suffer from a tendency to become mired in questions that involve competing claims about epistemology — for example, questions about how we might *know* which claims about values are correct — it is perhaps worth revisiting the long-maligned New Haven School

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[64] Hart (n 41).
[65] *JfaFS* (n 8) 25.
[66] Finnis (n 40).
[67] W Michael Reisman, 'Theory about Law: Jurisprudence for a Free Society' (1998) 108 *Yale Law Journal* 935, 937.

of Jurisprudence. We might well find that the change in perspective we gain from descending the ladder of abstraction offers valuable new insights on intractable jurisprudential disputes.

AN ANALYSIS OF THE MECHANISMS IN NEW ZEALAND LAW TO PROTECT EMPLOYEE ENTITLEMENTS IN THE EVENT OF EMPLOYER INSOLVENCY AND THEIR EFFECTIVENESS

*Trish Keeper**

ABSTRACT

In New Zealand, scarcely a week goes by without news of workers who, due to the insolvency of their employer, have lost their jobs and are owed sometimes thousands of dollars for unpaid wages, holiday pay, redundancy payments or other bonuses. The focus of this article is the mechanisms that exist in New Zealand law to ensure that such workers receive these unpaid entitlements and the effectiveness of such mechanisms. The principal mechanisms discussed are the treatment of unpaid employee entitlements as a preferential claim in the liquidation of an insolvent company and the general powers in the *Companies Act 1993* (NZ), which are generally exercised by liquidators, to bring personal actions against directors and others for misconduct on behalf of the creditors generally. The article concludes that New Zealand workers are less protected than their counterparts in comparative jurisdictions, but argues that any solution is unlikely to be found in insolvency law.

* Associate Professor in Commercial Law, Wellington School of Business and Government, Victoria University of Wellington.

I INTRODUCTION

A *Background and Overview of Article*

In New Zealand, scarcely a week goes by without news of workers who, due to the insolvency of their employer, have lost their jobs and are owed sometimes thousands of dollars for unpaid wages, holiday pay, redundancy payments or other bonuses. The focus of this article is the mechanisms that exist in New Zealand law to ensure that such workers receive any unpaid entitlements and the effectiveness of such mechanisms. It is common in cases of business failure for unsecured creditors to not receive all amounts owed to them, and the impact of non-payment on employees is particularly hard. Employer insolvency can not only create financial hardship for employees, but result in 'significant psychological and other effects from the stress of no income, and create ripple effects in the economy and the local community in which the insolvent corporation was located'.[1]

The first part of the article outlines the rationale for prioritising the payment of unpaid amounts owed to workers and how these objectives have been recognised in various international guides and conventions. It then outlines the preference mechanism in New Zealand corporate law, and this analysis concludes by explaining how preference regimes have been improved in other countries by the addition of institutional guarantees and subrogation arrangements. There are a range of other provisions in the *Companies Act 1993* (NZ) ('*Companies Act*') that may potentially impose liability on those in charge of companies who have acted improperly in relation to the failure of the company, although there are no provisions directly focused on exposing directors to personal liability for unpaid employee entitlement. The article outlines these provisions and how they are enforced. Although, as the article suggests, the low level of enforcement actions against directors and others in charge of companies mitigates such liability provisions achieving their objectives of deterrence of directorial misconduct and inattention to a company's affairs.[2] Finally, the article concludes by discussing the need for reform, and suggests that any improvements will need to be driven by the labour movement, rather than relying on insolvency law.

B *Context*

The article focuses on employees of insolvent companies that are in liquidation, although it is recognised that unincorporated businesses, such as partnerships and sole traders, also may have workers who have unpaid entitlements on the insolvency of their employer.[3] This focus on companies is for the sake of simplicity and also because limited liability companies are the

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[1] Janis Sarra, 'Widening the Insolvency Lens: The Treatment of Employee Claims' in Paul J Omar (ed), *International Insolvency Law, Themes and Perspectives* (Ashgate Publishing, 2008) 295, 295.

[2] Helen Anderson, 'Corporate Insolvency and the Protection of Lost Employee Entitlements: Issues of Enforcement' (2013) 26 *Australian Journal of Labour Law* 75, 75–76.

[3] *Insolvency Act 2006* (NZ) ss 274–76 sets out a preferential payment regime, which largely replicates that found in the *Companies Act 1993* (NZ) ('*Companies Act*') under which certain unpaid employee entitlements are paid as a second-ranking claim pursuant to s 274(2).

most common form of business structure in New Zealand. Any company incorporated under the *Companies Act* has a separate legal identity from its shareholders and its directors.[4]

Finally, as stated, this article focuses on insolvent corporate employers who are placed in liquidation, either voluntarily by a resolution of the shareholders or by the court.[5] It does not discuss companies that are placed in receivership or voluntary administration. However, receivers to the extent that they are appointed under a security agreement that covers accounts receivable and inventory of the company in receivership are subject to a requirement to pay out the proceeds from the realisation of such assets in accordance with the preferential claims regime that governs payments by a liquidator as set out in sch 7 of the *Companies Act*.[6]

In terms of voluntary administration, employees who are owed unpaid emoluments have no special rights to payment, but as creditors of the company they have a right to vote at any meeting of creditors, including the watershed meeting that decides the ultimate fate of the company.[7] Although employee contracts are not automatically terminated on the appointment of a voluntary administrator, the administrator may give notice of the termination within 14 days of appointment.[8] In practice, often employees are paid out in full, together with other smaller creditors, leaving creditors who are owed larger amounts to be part of the compromise negotiations, which ultimately result in a deed of company arrangement if the company continues into administration.

II RATIONALE AND OPTIONS FOR THE SPECIAL TREATMENT OF EMPLOYEES AS CREDITORS

A *Rationale*

When a business fails, often there will be a substantial amount owed to the employees of that business. However, employees as creditors of that business possess unique characteristics that distinguish them from other creditors. First, they will usually lose their primary or sole source of income (their job) as well as being owed money for previous services. Second, they generally fail to perceive the risk that they may not be paid until the employer is suffering significant financial distress or they lack the power to mitigate the risk of non-payment. Other unsecured creditors, at least in theory, are able to incorporate some premium into the amount they charge for goods and services supplied to the business in order to counterbalance the risk of non-payment. This is rarely possible for wage earners.[9] Also, employees are unique in that, unlike

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[4] *Companies Act* s 15.
[5] Ibid s 241(2)(a)(b).
[6] *Receivership Act 1993* (NZ) s 30.
[7] *Companies Act* ss 239AN, 239ABA.
[8] Ibid ss 239Y(1), 239Y(3). The administrator becomes personally liable for the wages and salary of any employee whose employment is not terminated, and this therefore becomes a cost of the administration, which is paid as part of the first-ranked priority claims in the event the company ends in liquidation, under *Companies Act* sch 7 cl 1(1)(b).
[9] Susan J Cantlie, 'Preferred Priority in Bankruptcy' in Jacob S Ziegel and Susan J Cantlie (eds), *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford University Press, 1994) 423.

most other creditors, they are usually dependent on a single source of income and are unable to reduce the risk of non-payment by one employer by entering into multi-employment contracts with other businesses. Another argument that has been put forward is that, 'as employees do not normally share in the profits of the enterprise, they should not share in its losses either'.[10] Furthermore, employees have conferred value on the company through their labour and loyalty — a contribution of 'time, energy and creativity over and above the current wage/labour exchange'.[11]

B *International Principles*

Many countries have recognised the need to enact some form of employee wage protection mechanism, which in the advent of employer insolvency acts to ensure that employees receive some, or all, of any unpaid wages and other related claims. However, there is no uniform approach to the form of this recognition, in practice, and there is also little uniformity among international institutions as to the best approach to be taken.

For example, the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* states:[12] 'Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors.'[13] However, the *Principles and Guidelines* more generally observe that

> proceeds available for distribution should be distributed *pari passu* to the remaining general unsecured creditors, unless there are compelling reasons to justify giving priority status to a particular class of claims. Public interests generally should not be given precedence over private rights.[14]

Similarly, the United Nations Commission of International Trade Law ('UNCITRAL') in its 2005 *Legislative Guide on Insolvency Law* also observed that there is a need to construct priority regimes narrowly, but that most nations have adopted measures to ensure the special treatment of employees. The *Guide* notes that

> insolvency laws often attribute priority rights to certain (mainly unsecured) claims, which in consequence will be paid in priority to other, unsecured and non-privileged (or less privileged) claims. These priority rights, which are often based upon social, and sometimes political, considerations, militate against the

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[10] *General Survey of the Reports Concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949: Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution)*, International Labour Organization ('ILO') Report III (Part 1B), International Labour Conference, 91st sess (2003) [299].
[11] Sarra (n 1) 297.
[12] The World Bank's *Principles for Effective Insolvency and Creditor/Debtor Regimes* were originally developed in 2001 in response to a request from the international community in the wake of the financial crisis of the late 1990s. The Principles were revised in 2005, 2011 and 2015. See World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* (World Bank Publications, 2016) <http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf>.
[13] Ibid 25, Principle C12.4.
[14] Ibid 25, Principle C12.3.

> principle of *pari passu* distribution and generally operate to the detriment of ordinary unsecured creditors by reducing the value of the assets available for distribution to them.[15]

In terms of payments to employees, the *Guide* notes that

> in a majority of States, workers' claims (including claims for wages, leave or holiday pay, allowances for other paid absence and severance pay) constitute a class of priority claims in insolvency. … The approach of providing priority for workers' claims is generally consistent with the special protection that is afforded to employees in other areas of insolvency law … as well as with the approach of international treaties on protection of workers.[16]

The International Labour Organization's ('ILO') approach is more pro-worker than that of the World Bank and UNCITRAL. The ILO in 1949 adopted the *Protection of Wages Convention* ('C 95').[17] Article 11 of C 95 provides that workers' wages due for services provided during a certain period prior to the liquidation or up to a certain amount should be treated as a privileged debt, although details of the nature of that privilege are left to the discretion of the ratifying nations. In addition, the *Protection of Workers' Claims (Employer's Insolvency) Convention* ('C 173'), which was adopted by the ILO in 1992, has the objective to strengthen the protection afforded to workers' claims by requiring ratifying countries to either protect workers claims by affording them some form of preference or privilege over other claims,[18] or by the increasingly common approach of some form of institution to guarantee workers' claims.[19] These options are discussed below.

C *Options for Protecting Workers' Claims*

1 *Privilege or Priority Payment Regimes*

The mechanism of privilege requires amounts owed to employees to receive preferential rights to payment from the assets of the insolvent enterprise before debts owed to other creditors are paid. A 2003 report tabled at the 91st session of the International Labour Conference ('the Report') observed that the preferential treatment of wage claims is by far the most widely accepted and most traditional method of protecting service-related claims in the event of the employer's bankruptcy or the judicial liquidation of an enterprise.[20] The Report noted that the preference system was first codified in the civil codes of the 19th century, beginning with the Napoleonic Code, initially to protect the wages of domestic servants. Protection was

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[15] UNCITRAL, *Legislative Guide on Insolvency Law* (Report, 2005) 270 <https://uncitral.un.org/en/texts/insolvency>.
[16] Ibid 272.
[17] ILO, *Protection of Wages Convention, 1949 (No. 95)*, opened for signature 8 June 1949, C095 (entered into force 24 September 1952) ('C 95').
[18] ILO, *Protection of Workers' Claims (Employer's Insolvency) Convention of 1992 (No. 173)*, opened for signature 3 June 1992, C173 (entered into force 8 June 1995) pt II arts 5–8 ('C 173').
[19] Ibid pt III arts 9–13.
[20] *General Survey* (n 10) [298]–[353].

progressively extended to other categories of wage earners and the preference principle soon gained recognition in both commercial and labour legislation.[21]

However, the Report noted that in most countries unpaid wages are not the only form of debt recognised by law as having a preferential or privileged right to payment. Other claims commonly include the costs of the insolvency proceedings, sums owed to the government for unpaid taxes, or compulsory insurance contributions.[22] Therefore, the relative priority, or rank, that is given to employee debts in relation to other privileged claims, is equally important. Generally, the insolvency practitioner will be required to satisfy the claims of higher-ranking creditors in full before moving to pay lower-ranked creditors.

Article 11 of C 95 provides that the length of the period or the amount of unpaid wages to be privileged is determined by the national laws of ratifying countries. C 173 partially revised C 95 by providing that the period should not be less than three months prior to the insolvency, and that privilege should extend to all holiday pay earned during the year in which the insolvency occurred and include all severance pay due to the worker upon termination of the employment.[23] It further provides that, while the amount of workers' claims may be prescribed, this amount should not fall below a socially acceptable level.[24] However, 98 countries have ratified C 95, and only 21 have done the same for C 173.[25]

Another issue is the scope of the employment-related claims. The Report noted that some countries have granted privilege to broader claims, such as holiday pay, allowances in respect of other unpaid leave and redundancy claims.[26] Also, there are differences between nations in the length of the period prior to the insolvency event for which an employee is able to claim and the total amount that any one employee may claim as a preference debt.

2 *State Guarantees*

A number of jurisdictions have established additional governmental schemes to bolster the protection for unpaid employee claims. Although there are differences between the operation of the different national schemes, essentially the schemes operate as a legislative safety net that pays out to the employee all, or some, of the unpaid amounts due to an employee in the event that there are insufficient funds left within the company to meet these claims.[27] These schemes generally operate alongside a privilege regime, allowing employees to be promptly paid their preferential claims by the scheme. The schemes are then usually subrogated to the position of

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[21] In France, the privilege granted to domestic servants was extended in 1838 to cover the claims of wage earners and apprentices for up to six months' wages. Wage claims, however, were placed in the fourth rank of privileged claims and therefore the protection was largely illusory.

[22] In the case of personal bankruptcy, the debtor's personal claims (eg, funeral or medical expenses) and the maintenance claims of the debtor's family members are often also included.

[23] C 173 (n 18) pt II art 6.

[24] Ibid art 7.

[25] 'Ratification by Convention', *International Labour Organization* (Web Page, 1996–2017) <https://www.ilo.org/dyn/normlex/en/f?p=1000:12001>.

[26] *General Survey* (n 10) [306]–[309].

[27] Janis Sarra, *Employee and Pension Claims during Company Insolvency: A Comparative Study of 62 Jurisdiction*s (Thomson Canada, 2008).

the employee if, and when, the liquidator or other administrator is able to make any preferential distributions.

3 *Other Options*

Some countries have adopted measures to protect employee entitlements by providing that unpaid amounts due to employees are paid a capped amount before other creditors, including secured creditors. Such measures, known as super priority regimes, recognise the special public policy considerations regarding employee protection. Sarra, in a 2008 comparative study of 62 jurisdictions,[28] found 40% of the countries in the study granted a capped super priority for wages and related claims over both secured and unsecured assets.[29] These included Brazil, Chile, Colombia and Mexico. She found that another 19% of the jurisdictions granted a partial priority over secured claims, usually over floating charges over personal property, but not including securities over real property.[30] As discussed below, the exception in New Zealand law for general security interests over accounts receivable and inventory from the claims of the secured creditor is an example of a partial super priority afforded to wage claims over those of a secured creditor. Sarra observed that it is arguable that ranking employee claims before that of secured creditors creates some incentives for such lenders to monitor the debtor company's conformity with its wage and other obligations to employees.[31]

III EMPLOYEE WAGE PROTECTION IN NEW ZEALAND

A *Statutory Privilege or Preference?*

Against this background, the New Zealand position can be considered. Although New Zealand has not ratified C 173, employees have for many years been assigned preferential creditor status. The current rules are contained in the *Companies Act* sch 7. If a company goes into liquidation, a liquidator (or the Official Assignee, in the event the company has no assets) will be appointed by either the High Court or by a special resolution of shareholders.[32] Section 212 of the *Companies Act* directs the liquidator to pay the preferential claims in the order of priority as set out in sch 7 before the claims of unsecured creditors. Preferential claims are paid by the liquidator primarily from the unencumbered assets of the insolvent company. Secured creditors are free to realise their respective secured collateral,[33] without regard for the claims by preferential creditors, with one exception. This exception applies only when the assets of the company available for payment of the preferential claims are insufficient to meet the full amount of the claims. In this case, the preferential debts have priority over the claims of any

[28] Ibid.
[29] Ibid 15–16.
[30] Ibid.
[31] Ibid 9.
[32] *Companies Act* s 241(2)(a), (2)(c). Note a liquidator under s 241(2)(b) can also be appointed by a board of directors on the occurrence of an event specified by the constitution of the company.
[33] Ibid s 248(2), which provides that the commencement of the liquidation of a company does not affect the rights of a secured creditor, subject to s 305 of the Act.

person under a security interest to the extent that the security interest is over all, or any part, of the company's accounts receivable and inventory or any part of either of them.[34]

Employee claims are not the first-ranked preferential debts, as a liquidator is required to pay all the claims set out in sch 7 cl 1 before making any distribution to employees. The first-ranked debts include all the costs related to the administration of the liquidation, including costs of any previous administration, costs of any creditor who applied to liquidate the company or spent funds protecting the assets of the company. At this level, any employee who continued to work for the company during the liquidation or was engaged by the liquidator would be paid any wages due to that employee as a cost of the liquidation.[35]

After all the first-level debts are paid, a liquidator, providing there are funds available, will pay all employee claims. If there are insufficient funds available, the claims are paid on a *pari passu* basis. Employees may include claims for unpaid wages and salaries,[36] untransferred payroll donations, holiday pay, redundancy, reimbursement for lost wages, claims in respect of outstanding deductions for certain employee obligations and employee KiwiSaver obligations.[37] Unpaid wages and salary are restricted to services rendered to the insolvent employer during the four months preceding the commencement of the formal insolvency.[38]

There is, however, a maximum amount that each employee is entitled to claim, an amount that is adjusted for inflation every three years.[39] At the time of writing, this amount is NZD23,960. An employee who is owed more than this cap is entitled to claim as an unsecured creditor for the balance. However, as unpaid amounts owed to the Crown for goods and services tax, income tax (PAYE), residents' withholding tax and non-residents' withholding tax are also preferential creditors, albeit ranking after employee claims, non-preferential unsecured creditors' claims often receive very little or nothing. The final restriction is that an 'employee' is given a restrictive definition for the purposes of sch 7. Any person who is or was at any time during the 12 months before the commencement of the liquidation a director or a nominee or relative of a director of the company is excluded from being an employee for the purposes of sch 7.[40]

B *Comparison with the United Kingdom and Australia*

There is no government institutional guarantee or insurance system in New Zealand. This can be compared to the position in a number of other comparable jurisdictions. For example, in the United Kingdom, the *Insolvency Act 1986* (UK) sch 6 lists wages and salaries of employees

[34] Ibid sch 7 cl 2(1)(b). The carve out does not include if the security interest is a perfected purchase money security interest or other specific forms of security interests.
[35] Ibid sch 7 cl 1(1)(a), as an expense properly incurred by the liquidator in carrying out the duties and exercising the powers of the liquidator.
[36] This is specifically provided to include unpaid wages and salary, whether or not earned wholly or in part by way of commission and whether payable for time or for piece work.
[37] *Companies Act* sch 7 cl 1(2).
[38] Ibid sch 7 cl 1(2)(a).
[39] Ibid sch 7 cl 3(2).
[40] Ibid sch 7 cl 3(4)(b).

and earning-related social security contributions as having preferential status. Specifically, employees are entitled to claim unpaid wages and holiday pay accruing in the four months prior to a maximum of £800. However, UK employees are entitled to claim against the state National Insurance Fund ('NIF') by virtue of the *Employment Rights Act 1996* (UK).[41] This Act provides that employees are entitled to claim for unpaid wages (up to eight weeks to a maximum of £479 per week), notice pay, holiday pay, a basic compensation award for unfair dismissal, any statutory redundancy pay and certain other payments. Once the employee is paid by the NIF, the NIF is subrogated to the rights of the employee as a creditor against the employer, including any rights as a preferential creditor.

Similarly, in Australia, in terms of corporate employers, the *Corporations Act 2001* (Cth)[42] provides that unpaid wages,[43] superannuation contributions, superannuation guarantee charge, amounts due in respect of injury compensation, amounts related to a leave of absence and retrenchment payments owed to employees are preferential debts.[44] These claims may only be paid after the costs relating to the liquidation and any prior administration are paid. However, in 2000, the Australian government introduced a nationally funded scheme as a safety net for employees. The scheme was known from 2001 onwards as the General Employee Entitlements and Redundancy Scheme ('GEERS').[45] GEERS was replaced by a scheme operated under the *Fair Entitlements Guarantee Act 2012* (Cth) ('FEG') in December 2012. FEG allows for employees to claim up to 13 weeks of unpaid wages, unpaid annual leave and long service leave, up to five weeks' payment in lieu of notice, and redundancy pay of up to four weeks per full year of service. To be eligible, the employee must have lost their job due to the employer's liquidation or bankruptcy and be owed one of the entitlements received above, and the insolvency practitioner must confirm that the employee will not be paid this claim, all or in part, as a preferential creditor. As stated above, FEG pays to employees a certain level of unpaid entitlements and the government then becomes a preferential creditor entitled to receive dividend payments in the liquidation.[46]

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[41] *Employment Rights Act 1996* (UK) ss 166–70, 182–90.
[42] *Corporations Act 2001* (Cth) s 556 (1)(e)–(g) ('*Corporations Act*').
[43] Ibid s 9 defines wages in relation to a company as amounts payable to or in respect of an employee of the company (whether the employee is remunerated by salary, wages, commission or otherwise) under an industrial instrument, including amounts payable by way of allowance or reimbursement but excluding amounts payable in respect of leave of absence.
[44] Any employee who falls within the definition of excluded employee in s 556(2) of the C*orporations Act* may only claim the sum of AUD2,000 in respect of days that are classified as non-priority days. An excluded employee is a person who was a director at any time during the 12 months preceding the liquidation, an employee who is a spouse or relative of a director or former director.
[45] The scheme was initially known as the Employee Entitlements Support Scheme and provided for capped payments that guaranteed entitled employees up to 29 weeks of pay at ordinary time's rates. This consisted of a maximum of 4 weeks' unpaid wages, 4 weeks' annual leave, 12 weeks' annual service leave, 5 weeks' pay in lieu of notice and 4 weeks' redundancy payments, and applied to employees whose employment was terminated by reason of employer insolvency after 1 January 2000.
[46] Michael Murray and Jason Harris, *Keay's Insolvency, Personal and Corporate Law and Practice* (Thomson Reuters, 10th ed, 2018) [15.415] also notes that the Australian government may otherwise exercise its rights as a creditor once it has been subrogated by payment to employees.

C *Reckless Trading Actions and Other Claims*

In addition to the preference rules, the *Companies Act* contains other provisions that are available to a liquidator to swell the pot of money available to meet the claims of all creditors, including the claims of preferential creditors. The main group of provisions are the general duties that directors owe to the company, including the duty of care and the duty of good faith.[47] In addition, the duty against reckless duty and the duty to not incur unperformable obligations are also general duties owed to the company, which as general duties apply to directors at all times — although breach of these duties is likely to occur when a company is struggling financially.

The duty against reckless trading is breached if a director allowed, caused or agreed to the business of the company being operated in such a manner that it was likely to cause serious loss to the company's creditors.[48] The duty against incurring unperformable obligations imposes a duty on directors to not incur an obligation unless the director objectively believes that at the time the obligation is entered into the company will be able to perform it.[49] Although, in theory, the board can bring an action at any time against a director for breach of these duties, the reality is that it is liquidators of insolvent companies that initiate most actions before New Zealand courts for breaches. However, these general duties are not automatically breached if a company is unable to pay its creditors, including its employees. Furthermore, it is not a breach of the general duties by themselves to fail to make reasonable provision for unpaid wages, leave entitlements and severance payments in the event of insolvency. Although, clearly, if the company has been allowed to continue to trade when insolvent, effectively operating on capital supplied by its creditors, then a liquidator may wish to consider bringing an action against the directors for compensation.

The *Companies Act* was amended in 2014 by the introduction of a criminal offence in s 380(4) with respect to dishonestly incurring a debt. A person convicted of an offence under this provision is liable for a term not exceeding five years, or a fine not exceeding NZD200,000.[50] For a director to have committed an offence, not only must the company have incurred a debt, but the company must have been insolvent at the time or become insolvent because of it, and the director must have known of the company's insolvency whereby the director's failure to prevent the company incurring the debt was dishonest. To date, there have been no prosecutions under the section, which is not surprising given the very high evidential difficulties. The Registrar of Companies ('Registrar') must prove both that a director had the requisite knowledge of the company's insolvency and that the director's failure to act was dishonest.

Therefore, in New Zealand it is not a government agency but rather private sector insolvency practitioners who are largely responsible for enforcement actions against directors and other former controllers of a failed company. If a liquidator does elect to pursue directors or

[47] *Companies Act* ss 131, 137.
[48] Ibid s 135.
[49] Ibid s 136.
[50] Ibid s 373(4).

controllers for breaches of duties owed to the company, the liquidator may apply to the court for various orders. The principal remedy is set out in s 301 of the *Companies Act*, and provides that the court may order, on the application of a liquidator, creditor or shareholder, that the person in default must repay or restore the money or property of the company, or contribute such sums to the assets of the company by way of compensation as the court thinks just.[51] If the court agrees, the standard approach to quantifying the personal liability of a director, as outlined by the Court of Appeal in *Mason v Lewis*,[52] is for the court to estimate how much the debts of the company increased from the corporate governance breach date to the date the company is placed in liquidation. Once, this amount is estimated, the court considers three factors: duration, overall culpability and the connection of the debt to the decision to continue trading in establishing the actual quantum.[53] However, in a recent case, the High Court in *Mainzeal Property and Construction Ltd (in liq) v Yan*[54] took an alternative approach, starting at the total loss to creditors before applying a number of discounts in establishing the quantum.[55]

As noted above, s 301 of the *Companies Act* contemplates that actions may be brought by a creditor or shareholder, as well as the liquidator. At least in theory, an employee could instigate a claim under the provision. In the case of an application under s 301(1)(c) by a creditor, the courts may order the director to pay, transfer money or property for which the director has misapplied or become liable or accountable direct to the creditor. It should be noted, however, that under New Zealand law directors do not owe any direct duty to creditors by reason of their position as directors of the company.[56]

The vast majority of s 301 applications are initiated by liquidators and there have been a number of very large awards against directors in the past.[57] But reliance on civil claims by liquidators to bring directors to account is problematic on a number of grounds. First, it depends upon the liquidator having access to sufficient funding, either from company assets or outside funding, to initiate the action against the directors or former directors. Second, as the 2017 Insolvency Working Group observed, the current regime may deter liquidators from bringing a reckless trading claim, as there may be a mismatch between who pays the cost of making the claim and who benefits.[58] Specifically, while the costs may be met from the remaining assets of the

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[51] Ibid s 301(1)(b)(i)(ii).
[52] *Mason v Lewis* [2006] 3 NZLR 225, [109], [120].
[53] Ibid; *Lewis v Mason* (2009) 10 NZCLC 264, 545, [60]. See also *Condrens Parking Ltd (in rec and liq) Re; Jordan v O'Sullivan* CIV-2004-485-002611, 13 May 2008 [70]; *Goatlands Ltd (in liq) v Borrell* (2007) 23 NZTC 21,107, [121]–[133].
[54] *Mainzeal Property and Construction Ltd v Yan* [2019] NZHC 255.
[55] Ibid [379]–[461].
[56] *Kings Wharf Coldstore Ltd (in rec and liq) v Wilson* (2005) 2 NZCCLR 1042 [101]–[103].
[57] See, for example, *Löwer v Traveller* [2006] 3 NZLR 225 where the Court of Appeal at [91] upheld an order of NZD8.4 million against Löwer made by the High Court in *South Pacific Shipping Ltd (in liq); Traveller v Löwer* (2004) 9 NZCLC 263, 570. Also, see *Mainzeal Property and Construction Ltd v Yan* [2019] NZHC 255 [445] where an order of NZD36 million was awarded against the directors. At the time of writing, this decision is under appeal.
[58] The Insolvency Working Group was a panel of experts appointed in November 2015 by the Ministry of Business, Innovation and Employment to examine and advise on aspects of corporate insolvency law.

company, and therefore indirectly from the amounts available to distribute to the unsecured creditors, a secured creditor who has a security over all of the company's assets will obtain benefits from a successful claim. In some cases, it is the directors who hold the secured debt, thereby rendering any misfeasance action against them to be redundant.[59]

Third, it relies on the professionalism and independence of the liquidator to investigate the actions of those formerly in control of the insolvent business. Historically in New Zealand, there has been a very low bar for who can be appointed as an insolvency practitioner. This has made it relatively easy for shareholders or directors to appoint a director-friendly liquidator who may not be inclined to investigate whether the pre-liquidation activities of the directors breached any of the duties owed to the company.[60] However, in 2020, a new co-licensing regime for insolvency practitioners will come into force that will require that only licensed liquidators are appointed to be liquidators of insolvent companies. In addition to a relevant tertiary qualification, licensed practitioners must be a member of a licensing body, such as the Chartered Accountants Australia and New Zealand, and are therefore subject to the code of ethics of that body. There are also enhanced independence rules for any liquidator accepting appointment.[61]

Another provision in the *Companies Act* that may result in a liquidator having more unencumbered funds available to meet employee claims are the voidable transaction provisions in ss 292 and 293, and the provisions that may allow a liquidator to recover company property or equivalent value when there have been transactions at undervalue within certain specified time limits before the commencement of the liquidation. Also, when certain amendments to the *Companies Act*[62] come into force in 2020,[63] there will be an additional clawback regime for any transactions between the date of filing for the appointment of a liquidator and appointment.

In terms of the powers of the Registrar to act against directors, the Registrar, together with the Financial Markets Authority ('FMA'), does have a power to prohibit any person from being a director of a company, or being concerned in the management of a company. The person must have been involved in the previous five years in the management of a company that had been put into liquidation or ceased to carry on business because of its inability to pay its debts as

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[59] Insolvency Working Group, Ministry of Business, Innovation and Employment, New Zealand Government, *Review of Corporate Insolvency Law: Report No. 2 of the Insolvency Working Group, on Voidable Transactions, Ponzi Schemes and Other Corporate Insolvency Matters* (Report No 2, 15 May 2017) 47. See also Office of the Minister of Commerce and Consumer Affairs, New Zealand Government, *Insolvency Law Reform* (Cabinet Paper, 4 November 2019) [39] <https://www.mbie.govt.nz/assets/insolvency-law-reform.pdf>, which recorded Cabinet's approval to amend the *Companies Act* by restricting reckless trading recoveries to unsecured creditors.

[60] Insolvency Working Group, Ministry of Business, Innovation and Employment, New Zealand Government, *Review of Corporate Insolvency Law: Report No. 1 of the Insolvency Working Group, on Insolvency Practitioner Regulation and Voluntary Liquidations* (Report No 1, 27 July 2016) 31–35.

[61] For an outline of the new regime, see Trish Keeper, 'New Co-Licensing Regime for New Zealand's Corporate Insolvency Practitioners' (2019) 8 *Company and Securities Law Bulletin* 89.

[62] *Insolvency Practitioners Regulation (Amendments) Act 2009* (NZ) s 53 inserts new ss 296A–D into the *Companies Act*. The commencement date for these new provisions is expected to be mid-2020.

[63] For an explanation of the new voidable disposition regime, see Trish Keeper, 'New Voidable Disposition Regime and Changes to Related Party Voting Roles' (2019) 8 *Company and Securities Law Bulletin* 93, 93–94.

and when they become due.[64] This power is additional to the powers of the Registrar, amongst others, to apply to the courts to disqualify a person from being a director if they have been persistently non-compliant with the law, guilty of fraud, in breach of their duty to the company, or acting in a reckless or incompetent manner in the performance of their duties as a director.[65] There are also a range of offences under the *Companies Act* that the Registrar or the FMA may use against a malfeasant director, including prohibitions against false statements,[66] and the narrowly defined phoenix company similar name offence.[67]

IV DISCUSSION

It is unclear to what extent employees in New Zealand are not receiving part or all of their preferential claims, as this data is not published.[68] Certainly, reports in the media, especially in respect of corporate failures in the building and hospitality industry, support an assertion that the protection afforded by the existing statutory wage protection provisions is illusory. Often under the more general heading of 'wage theft', examples of corporate failures resulting in employees not receiving their full entitlements are regularly featured in the media[69] and blogs.[70]

What is clear is that whether specific employees do receive any unpaid wages and other entitlements will depend on a number of factors, including the extent of the employer's debt, to what extent that debt is secured and the amount of the first-ranking claims. Furthermore, the existence of the privilege for wage claims in itself does not guarantee debt recovery. In contrast, the statutory guarantee schemes implemented in Australia and the UK ensure that an employee's entitlements are guaranteed and employees are certain to be paid their entitlements in full (up to the specified statutory limits) even if the liquidator of the former corporate employer has no funds to distribute or if the claims as secured creditors exhaust the insolvent company's estate even before the preferential creditors are paid. In addition, employees are paid without having to wait for the liquidator to realise assets or take the other steps outlined above that may swell the total funds available to distribute to creditors.

Interestingly, in 1999 the New Zealand Law Commission recommended that some form of wage earner protection fund be considered as a means of better securing the protection of

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[64] *Companies Act* s 385.
[65] Ibid s 383.
[66] Ibid s 377 and offences under the *Crimes Act 1961* (NZ).
[67] *Companies Act* s 368A.
[68] In contrast, Helen Anderson reports that in 2011–13, according to ASIC statistics, Australian employees recovered 75% of their entitlements under the priority provisions in the *Corporations Act*. See Anderson (n 2) 76–77, fn 5.
[69] See, for example, Debrin Foxcroft, 'Staff Struggle to Get What They Are Owed from Failed Restaurant Chain Wagamama', *Stuff* (Web Page, 11 August 2019) <https://www.stuff.co.nz/business/114913504/staff-struggling-to-get-what-they-are-owed-from-failed-restaurant-chain-wagamama>; Debrin Foxcroft, 'Wage Theft Has Become a Business Model in the Hospitality Industry', *Stuff* (Web Page, 12 August 2019) <https://www.stuff.co.nz/business/opinion-analysis/114853237/wage-theft-has-become-a-business-model-in-the-hospitality-industry>.
[70] See, for example, Chloe Ann-King, 'Raise the Bar', *Millennialposse* (Blog Post, 27 March 2020) <https://millennialposse.wordpress.com>.

vulnerable employees at whom priority or privilege is directed.[71] The fund would be based on employer levies,[72] and was favoured as it would guarantee payment, reduce the amount of litigation and only require a limited amount of government funding to maintain the fund. However, the recommendation did not find favour with the Ministry of Economic Development ('MED'). In 2001, MED published a discussion document that strongly recommended against the establishment of such a fund.[73] In MED's view, it would penalise successful firms, create a moral hazard, benefit only some employees and be excessively costly.[74]

There is some merit in these criticisms, as illustrated by the fact that the Australian FEG scheme at the time of writing is being reviewed due to a high incidence of fraud and abuse. Anderson observed that there is some evidence that GEERS (and now the FEG) has acted as a disincentive to directors from providing for the payment of accrued employee entitlements, on the basis that these will be provided for by the government.[75] She continued that 'economic efficiency requires that the cost of avoiding risk should be borne by the party which can most cheaply estimate it and avoid it', and it is the employer who is the party who understands and controls the risk of loss of employee entitlements and can most cheaply make provision for them, rather than the federal government, which socialises the cost to the taxpayer. Accordingly, she concludes that Australia should enact new regulations to provide incentives for the employer, through the decisions of its directors, to take appropriate care.[76]

In the New Zealand context, amending the *Companies Act* to impose personal liability on directors for unpaid employee entitlements due to the misconduct of the directors would be problematic. First, as outlined above, the majority of enforcement actions against directors are brought by liquidators. If liquidators are to be expected to also bring actions against directors on behalf of employees, the issue would be who pays for liquidators' costs and fees in pursuing such claims. Second, for enforcement to have an impact on deterring directorial misconduct and inattention to company affairs, then criminal sanctions are likely to be necessary. Only a government agency potentially would have the resources to pursue directors for what often may be comparatively insignificant amounts of money compared to the total debt owed by an insolvent corporate employer. Prosecution by a government agency would rely on liquidators advising the agency of unpaid entitlements, although the exact amount of the underpayment may not be known until the final distribution is made. Prosecution of directors will also not ensure that employees get paid, other than by indirectly creating incentives for directors to take appropriate care.

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[71] New Zealand Law Commission, New Zealand Government, *Priority Debts in the Distribution of Insolvent Estates: An Advisory Report to the Ministry of Commerce* (NZLC SP No 2, October 1999) [88]–[89]. Unfortunately, as consideration of such a fund was not within its terms of reference, the Law Commission did not make detailed suggestions as to possible form or structure.
[72] As recommended by the Australian Law Reform Commission, Australian Government, *General Insolvency Inquiry* (ALRC Report No 45, 1988).
[73] Ministry of Economic Development, New Zealand Government, *Insolvency Law Review: Tier One Discussion Documents* (Report, January 2001).
[74] New Zealand Law Commission (n 71) [88]–[89].
[75] Anderson (n 2) 77, 95.
[76] Ibid 94–95.

The question that has to be answered before any reform is considered is what is the objective of that reform? If it is to protect employees, then some form of government fund would be the solution. If it is to punish miscreant directors, then some form of government enforcement would be required. Although, it should be noted that the New Zealand government has shown little interest in increasing the protection afforded to employee entitlements under the current preferential arrangements in the *Companies Act*. In fact, the only imminent change to the regime is the announcement by the Minister of Commerce and Consumer Affairs on 4 November 2019 that Cabinet has approved changes to the existing employee payment preference scheme by expanding the list of claims that an employee can claim as a preferential payment. The proposal is to amend the employee entitlements to include long serve leave and payments in lieu of notice.[77] There is no corresponding proposal to increase the level of the cap, however, which is low by international standards.

At a policy level, it is arguable that priorities based on social concerns should be addressed by laws other than the insolvency law. UNCITRAL notes that using insolvency law to satisfy social objectives that are only indirectly related to questions of debt and insolvency 'may at best afford an incomplete and inadequate remedy for the social problem, while at the same time rendering insolvency proceedings less effective'.[78] Reforms to protect employees on the insolvency of their employer are arguably best made by labour law academics and unions. Van Eck et al observed, with respect to the introduction of fair labour practices into South African insolvency law, that it was the labour movement and not the needs of insolvency practice that was the engine driving the insolvency law reform processes that have taken place in South Africa.[79] Moreover, in Australia, although the state guarantee scheme had been operating since 2000, it was taken over by FEG in 2012 as a result of the Gillard Government's promises, prior to the 2010 election, to protect workers' entitlements. Anderson suggests that the new laws were prompted by a combination of core Labor principles, encompassing the protection of workers' rights and calls from trade unions for additional protections.[80]

V CONCLUSION

In those insolvency situations where the business of the employer is not capable of rescue, either through some form of arrangement or compromise with creditors or hiving off the viable parts to another entity, most countries have recognised the necessity of some form of preferential treatment for unpaid employees over other unsecured creditors.[81] As employees are often unable or ill-prepared to protect their own interests, and employers and other creditors are unlikely to put first the interests of employees, the public interest demands some form of government intervention to provide a degree of protection for employees on the insolvency of

[77] Cabinet Minute, New Zealand Government, 'Insolvency Law Reform' (CAB-19-MIN-0491.01, 23 September 2019) 2.
[78] UNCITRAL (n 15) 271.
[79] Stefan Van Eck et al, 'Fair Labour Practices in South African Insolvency Law' (2004) 121 *South African Law Journal* 902, 906.
[80] Anderson (n 2) 86.
[81] See Andrew Keay et al, 'Preferential Debts in Corporate Insolvency: A Comparative Study' (2001) 10 *International Insolvency Review* 167; Cantlie (n 9) 412.

their employer. Although it is difficult to establish the effectiveness of the preferential regime for unpaid entitlements in New Zealand law, there are also difficulties with imposing new obligations on liquidators. Any new measures to protect employees may be best undertaken as part of wider move to ensure that workers in New Zealand receive fair wages and protections.

BELONGING, BEING, BECOMING: EXPLORING THE VALUE OF A STATEMENT OF LAW STUDENT IDEALS

Karina Murray and Trish Mundy†*

ABSTRACT

In 2017, the School of Law at the University of Wollongong commenced an educational 'experiment' designed to send an important symbolic message to students that their career as a legal professional starts from the day they begin their law studies. It invited first-year students to commit to core values, attitudes and practices that are seen as important to developing a positive legal professional identity. In 2018, as part of the evaluation and review process, the original 'Pledge' was redesigned as the 'Statement of Law Student Ideals'. This article reports on the learnings gained through adopting the Statement of Law Student Ideals, and reflects on its impact, benefits and effects on shaping students' attitudes and understanding of their developing professional identity as future lawyers and professionals.

* Senior Lecturer, Academic Program Director, School of Law, University of Wollongong.
† Professor, Dean, School of Law, University of Wollongong. The authors acknowledge the contribution of the other members of the Statement of Law Student Ideals research team: John Littrich (Senior Lecturer) and Kate Tubridy (Lecturer), School of Law, University of Wollongong.

I INTRODUCTION

Positive professional identity development and law student wellbeing have been key concerns among legal educators for the last decade or more.[1] Since 2002, the School of Law at the University of Wollongong ('UOW') has been refining its first-year programme to provide a more integrated curriculum and evidence-based transition pedagogy for first-year law students as a means of attending to critical law student transition and wellbeing issues.[2] In 2017, the authors, with the other members of the research team within the School of Law, embarked on an 'experiment' that was designed to engage students in thinking more purposefully about their professional and ethical identity as commencing law students. It did this through the introduction of a Law Student Pledge ('Pledge') for the incoming first-year cohort of 2017. It invited these students to commit to core values, attitudes and practices that are seen as important to developing a positive professional and ethical identity and meeting the standards expected of them as future lawyers.

This article outlines the exploration and redevelopment of the Pledge into the current Statement of Law Student Ideals ('Statement'), introduced to incoming first-year law students for the first time in 2018. The Statement was redesigned with a more explicit focus on wellbeing, social justice values and connection to, and respect for, others. It sought to reflect the values of UOW Law and the expectations of beginning professionals embarking on the study of law. Reflecting the team's ongoing commitment to collaborative practice, student feedback, evaluation and refinement of our work, the authors seek to share our practice and learnings arising from this later work with the aim of strengthening opportunities in the law curriculum that may enhance students' capacity to reflect on positive professional identity development and their own wellbeing.

In doing so, this paper has adapted Wilcock's 'occupational dimensions' framework as a helpful lens through which to understand the student feedback about the Statement and its introduction across the first-year programme.[3] The authors suggest that a Belonging, Being and Becoming ('3B') framework offers a useful vehicle to enhance positive professional identity and wellbeing in the context of a broader transition and wellbeing strategy. In particular, it finds that the Statement fosters:

- Belonging — an enhanced sense of belonging and connection to peers, law school and law studies.

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[1] See, for example, Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing Our Thinking: Empirical Thinking on Law Student Well-Being, Thinking Styles and the Law School Curriculum' (2011) *Legal Education Review* 71; Rachael Field, James Duffy and Anna Huggins, *Lawyering and Positive Professional Identities* (LexisNexis Butterworths, 2014); John Littrich and Karina Murray, *Lawyers in Australia* (Federation Press, 4th ed, 2019) ch 2.

[2] See Cassandra Sharp et al, 'Taking Hints from Hogwarts: UOW's First Year Law Immersion Program' (2013) 6(1) *Journal of the Australasian Law Teachers Association* 127.

[3] Ann A Wilcock, 'Reflections on Doing, Being, Becoming' (1999) 46 *Australian Occupational Therapy Journal* 1–11.

- Being — a reflective, confident law student who is more mindful of their own wellbeing.
- Becoming — a professional mindset with a commitment to social justice and the courage to question.

Part II of this paper begins by providing background context to the Statement and the School of Law's motivation for introducing it. It describes the development of the Statement and its purposeful integration within the law curriculum, including the structured engagement of students with the Statement throughout their first year. Part III outlines the reflective process undertaken to refine and improve the usefulness of the Statement. It first details the research methodology and processes associated with gaining student feedback via surveys and focus groups. It goes on to outline an analytical '3B framework', based on an adaptation of Wilcock's 'occupational dimensions' model. The final part offers an analysis of the feedback through the lens of the 3Bs — Belonging, Being and Becoming — to assess the effectiveness of the Statement for developing a positive professional identity for law students.

II BACKGROUND AND MOTIVATION FOR MAKING A STATEMENT

In 2017, in considering ways to inculcate a developing positive professional identity in law students, the research team decided to explore the use of a Law Student Pledge, something that was quite uncommon in Australia yet extensively used internationally.[4] Oaths, or pledges, have important functions in the legal profession: being used as a regulatory mechanism; setting aspirations for a profession; and providing ethical guidance.[5] A combination of these three functions was behind the conception of the initial UOW Pledge. Introduced as part of Orientation activities, the Pledge was symbolic and aspirational in nature, designed to 'induct' students into the idea that their professional identity development begins at law school. Students were invited to sign the Pledge in their first weeks of law school and reinforcement of the Pledge occurred within the curriculum at key points throughout their first year, with particular linkage made to the legal ethics and professional responsibility subject studied in second semester of first year. The impact and utility of introducing the Pledge was subsequently evaluated and our learnings have been shared elsewhere.[6]

The key learnings the research team identified from the 2017 Pledge pilot were that, while it was seen to have an overall positive message, the purpose and aims of introducing the Pledge were not sufficiently articulated. This left students with an overemphasis on the regulatory aspects of an oath. Some students were concerned that signing the Pledge could lead to its specific enforcement against them, while others felt it was largely aimed to address plagiarism

[4] See, for example, AD Kehner and MA Robinson, 'Mission: Impossible? Mission: Accomplished? Or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools' (2012) 38 *University of Dayton Law Review* 57; Nicola Booth-Perry, 'Enforcement of Law Schools' Non-Academic Honour Codes: A Necessary Step towards Professionalism?' (2011) 89 *Nebraska Law Review* 634.
[5] CR Andrews, 'The Lawyer's Oath: Both Ancient and Modern' (2009) 22 *Georgetown Journal of Legal Ethics* 3.
[6] Trish Mundy et al, 'The Role of the Law Student Pledge in Shaping Positive Professional and Ethical Identities: A Case Study from Australia (2020) *International Journal of the Legal Profession* (forthcoming).

and academic misconduct. Some staff involved in the implementation of the Pledge identified that, while there was inherent value in raising the important ethical issues outlined in the Pledge, they felt it needed greater integration into the curriculum to have real effect on students. Further, a number of students commented unfavourably on the 'American' feel of a pledge. There was also some pushback against a perceived assumption that students felt was inherent in the Pledge: that they had interest in the traditional practice of law, that is, joining the profession as a solicitor or barrister.

In reflecting upon and seeking to address the student and staff feedback, the Pledge was reimagined as the Statement of Law Student Ideals (see Figure 1). While removing the signing aspect attended to the contractual concerns raised by some students, the shift to a Statement also more clearly articulated that these ideals, derived from primary aspirations of diligence and integrity, were expected of all law students. The broad practice of law was enunciated, acknowledging the importance of a positive professional identity, irrespective of the ultimate career choices yet to be made. Additionally, in line with the original drivers behind the project, an explicit emphasis on wellbeing was incorporated. Lastly, as a core driver of the UOW School of Law, a commitment to social justice was added to the Statement.

Statement of Law Student Ideals

As a new law student, I commit to study law with diligence and integrity. I acknowledge that whether I choose to practice as a lawyer or use the knowledge and skills I gain studying law in another field, I will be expected to uphold the highest standards of personal and professional conduct and that these standards apply from the commencement of my studies. I acknowledge and commit to the UOW Student Charter and will conduct myself with the highest standards of integrity expected of a student of law, future professional and community leader. I acknowledge that commitment to the study of law is a commitment to understanding and respecting the rights of others. I will treat fellow students and academic staff with respect, and will be mindful of the importance of my mental and physical well being as I progress through my studies and beyond. I will have the courage to question and think independently with an active commitment to social justice.

Figure 1: Statement of Law Student Ideals

The Statement was introduced to students commencing their first year of law school in 2018, as part of the Orientation programme. It was then integrated into a number of seminars in the subject 'Foundations of Law' in the first semester, with a focus on successful approaches to tertiary studies and student wellbeing. It was also discussed in a 'Foundations of Law' lecture, by the Dean of Law. It was reintroduced in the second semester to students at the beginning and end of the subject 'Ethics and Professional Responsibility', with a focus on ethical behaviour and developing a positive professional identity.

III RESEARCH AND REFLECTION

This section first explains the research methodology used to evaluate the introduction of the Statement for newly commencing law students at UOW. Our key interests were to explore how students responded to the Statement in its new form and its value as a tool through which students' sense of connection to, and identity as, a law student and a future legal professional could be enhanced. The research team continued our commitment to ongoing 'collaborative review' of our work,[7] and the teaching strategies and curriculum integration associated with the introduction of the Statement. We met regularly throughout the project, engaging in mutual discussion, reflection and analysis of our professional practices at each stage of implementation.

A *Research Methodology*

This research project involved conducting an online survey and one focus group with first-year students, as well as surveying the academic teaching staff involved in using the Statement for their reflective insights. Human Research Ethics approval was obtained from UOW,[8] and the research was conducted in accordance with human research ethics guidelines.[9] There were 12 students in total who provided their feedback on the Statement; 11 completed the anonymous online survey while one attended an open focus group conducted by an external, independent facilitator. Initially, the team had planned to conduct two focus groups, as had previously been held — however, in view of the low student response rate of one, it was decided to offer students the opportunity to provide feedback via an anonymous online survey. From this online survey, a further 11 students provided formal feedback. While an external facilitator was engaged to conduct the focus group so as to ensure that students felt as 'safe' as possible to participate and were aware that no School of Law staff would be involved, thus minimising concerns about perceived or actual conflicts of interest, the small participation level in the focus group suggests that students did not necessarily feel fully comfortable to offer feedback in a focus group setting.

Participants, whether via focus group or online survey, were asked about their views on the School's introduction of the Statement; their initial response to the Statement; what they thought were the aim(s) or purpose(s) of the Statement; and whether they felt the Statement had influenced any aspects of their studies and, if so, how? Finally, students were asked if there was any particular aspect(s) of the Statement that they felt was helpful or unhelpful to them. Importantly, students were made aware that we were interested in hearing from them regardless of their views on, or support for, the Statement.

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[7] David Gosling has argued that adopting a process of collaborative review is 'the most effective, and ethical, framework to support professional learning about teaching [and] learning and related issues'. See David Gosling, 'Collaborative Peer Supported Review of Teaching' in Judyth Sachs and Mitch Parsell (eds), *Peer Review of Learning and Teaching in Higher Education: International Perspectives* (Springer, 2014) ch 2.

[8] University of Wollongong Human Ethics Approval Number: 2018/390.

[9] 'Human Ethics', *University of Wollongong Australia* (Web Page, 2020) <https://www.uow.edu.au/research-and-innovation/researcher-support/ethics/human-ethics>.

Students were recruited to participate via several email communications forwarded to all first-year law students enrolled at UOW in 2018. The email outlined the research project and invited students to contact an identified contact person, either by email or telephone, should they be interested in participating in a focus group or if they wanted information about the research. The groups were held on different days and different times to ensure that as many as possible could attend if they wished. In addition, students were referred to the anonymous online survey to complete at their convenience.

Academic teaching staff involved in the delivery of either the first session subject, 'Foundations of Law', or the second session subject, 'Ethics and Professional Responsibility', were emailed to invite them to share their perceptions on the reception and engagement of students with the Statement. They were asked to provide their personal views about the Statement, as well as their perceived views on their students' reactions to the Statement and its integration into their subject. Of the seven staff approached (not including two members of the research team that were involved in the teaching), three comprehensive responses were received (an additional response was received indicating that the staff member would like to respond at a later date, but never did).

The team were acutely aware of the power imbalance inherent in the student/teacher relationship and sought to minimise any possible concerns students may have had in coming forward to participate. First, the team ensured that the focus groups were conducted only after release of all assessment results and final grades. Second, the contact person for the research was a member of the team who was not teaching any first-year subjects in the second semester. This meant they had no formal role in the teaching and assessment of the student cohort. Third, it was agreed that this person would not share information about the identity of students who participated in the study with the rest of the research team. Finally, the team engaged an external, independent person to conduct the focus groups and to do so in such a way as to ensure that student contributions were de-identified and kept anonymous from the researchers. Even with these efforts, it is possible that students were concerned that the academic members of the research team may have contact with these first-year students over the coming years through both teaching and/or future employment opportunities.

While we hoped that more students would participate and despite our recruitment attempts, interest was much less than expected. This affects the sample size — however, we believe these student views, combined with the academic teaching staff responses, can offer us insight into the use and utility of adopting the Statement.

B *An Analytical Framework: The 3Bs*

This section describes the analytical 3B framework adopted for this research, namely, the conceptual tools of Belonging, Being and Becoming through which to understand and explore law students' experiences of the Statement. The framework has been adapted from the work of Ann Wilcock and the 'occupational dimensions' model of Doing, Being, Becoming and

Belonging,[10] as well as the more recent *Belonging, Being & Becoming: The Early Years Learning Framework for Australia*, developed in the context of early childhood learning as a key phase in developmental transition.[11]

Wilcock views occupation as a synthesis of Doing, Being, Becoming and Belonging,[12] and sees these as integral to occupational health and wellness.[13] While people have similar needs, Wilcock considers that 'health and well-being depend on all people having the chance to develop their [unique] potential' and that 'rules and structures … must encourage and enable occupation that has meaning and value to individuals and communities'.[14] Many scholars have since applied and adapted these concepts,[15] with variations in the dimensions utilised and a growing prevalence across the professional literature and discourse.[16] For example, Molineux has written on the professional identity of occupational therapists;[17] Ennals et al have explored the shifting occupational identity of academics transitioning from professional roles into the academy;[18] and Skott has considered the professional identity of mathematics teachers.[19] The framework has also been adopted as a means of understanding the emotional process of being and becoming a student transitioning into university.[20]

What do these dimensions mean? 'Doing' is said to refer to one's occupational performance[21] and the various roles one enacts.[22] Doing is the social mechanism that facilitates personal and societal growth and development,[23] and 'creates and shapes the societies in which we live, for good or bad'.[24] 'Being' is described as the 'contemplation and enjoyment of one's inner life' — the call to self-discovery and self-reflection as a requirement to understand and sustain one's roles.[25] Hitch et al refer to Being as the 'sense of who someone is as an occupational and human

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[10] Wilcock (n 3). Note that 'Belonging' was later included in Ann Wilcock, *An Occupational Perspective of Health* (SLACK Incorporated, 2nd ed, July 2006).
[11] Department of Education and Training, Australian Government, *Belonging, Being & Becoming: The Early Years Learning Framework for Australia* (Council of Australian Governments, 2009) <https://docs.education.gov.au/system/files/doc/other/belonging_being_and_becoming_the_early_years_learning_framework_for_australia_0.pdf>.
[12] Wilcock, 'Reflections on Doing, Being, Becoming' (n 3) 3.
[13] Ibid 2.
[14] Ibid 6.
[15] Danielle Hitch, Geneviève Pépin and Karen Stagnitti, 'In the Footsteps of Wilcock, Part One: The Evolution of Doing, Being, Becoming, and Belonging' (2014) 28(3) *Occupational Therapy in Health Care* 231.
[16] Ibid 231.
[17] M Molineux, 'Standing Firm on Shifting Sands' (2011) 58(1) *New Zealand Journal of Occupational Therapy* 21.
[18] Priscilla Ennals et al, 'Shifting Occupational Identity: Doing, Being, Becoming and Belonging in the Academy' (2016) 35(3) *Higher Education and Research & Development* 433.
[19] Jeppe Skott, 'Changing Experiences of Being, Becoming, and Belonging: Teachers' Professional Identity Revisited' (2018) 51(3) *International Journal on Mathematics Education* 469.
[20] Hazel Christie et al, 'A Real Rollercoaster of Confidence and Emotions: Learning to Be a University Student' (2008) 33(5) *Studies in Higher Education* 567.
[21] Louise Pang, 'Framework of Doing-Being-Becoming', *OT Theory* (Web Page, October 2019) <https://ottheory.com/therapy-model/framework-doing-being-becoming>.
[22] Ennals et al (n 18) 440.
[23] Wilcock, 'Reflections on Doing, Being, Becoming' (n 3) 4.
[24] Ibid.
[25] Ibid.

being' and encompassing of the meanings a person gives to their life and experiences, including their unique physical, mental and social capacities and capabilities.[26] 'Becoming' speaks to the process of life and the potential for transformation and self-actualisation.[27] Hitch et al see Becoming as a process of change and development: a 'dynamic and emergent perspective on identity'[28] that is guided by one's own particular goals and aspirations.[29] To achieve wellbeing, says Wilcock, 'people must be enabled towards what they … want to become'.[30] 'Belonging' refers to 'a sense of connectedness to other people, places, cultures, communities, and times', and is the context within which occupations happen.[31] Belonging, at its core, is relational and includes connections to people, places and groups. For a useful summary of current understandings of Doing, Being, Becoming and Belonging, see Hitch et al.[32]

Belonging, Being & Becoming: The Early Years Learning Framework for Australia, developed in 2009, aims to 'extend and enrich children's learning from birth to five years and through the transition to school'.[33] It recognises that the characteristics of Belonging, Being and Becoming are fundamental to children's lives,[34] and it offers a curriculum and pedagogical framework to direct and support the professional practice of early childhood educators. The framework understands Belonging as 'knowing where and with whom you belong'; it is relational in that it 'acknowledges children's interdependence with others and the basis of relationships in defining identity … and crucial to a sense of belonging'.[35] Being sees childhood as a time 'to be, to seek and make meaning of the world', knowing oneself, building and maintaining relationships, and engaging with the joys and complexities of life. Becoming reflects childhood as a time of rapid change and growth.[36]

We suggest that this 3B framework, while developed in the context of early childhood learning, can be usefully understood in its broader setting and relevance to transition and identity development. After all, transitions occur at many points in life, and transition to university has, as we have already canvassed,[37] long been acknowledged as a critical time of transition, full of opportunity and demanding similar curriculum and pedagogical responses. This framework, in synergy with the four 'occupational dimensions' identified within the professional literature that connect to wellbeing and identity development in the occupational context, offers a highly useful analytical model with which to understand the experiences and impacts of the Statement

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[26] Hitch, Pépin and Stagnitti (n 15).
[27] Wilcock, 'Reflections on Doing, Being, Becoming' (n 3) 5.
[28] Hitch, Pépin and Stagnitti (n 15) 241.
[29] Ibid.
[30] Wilcock, 'Reflections on Doing, Being, Becoming' (n 3) 5.
[31] Hitch, Pépin and Stagnitti (n 15) 242.
[32] Ibid.
[33] Department of Education and Training (n 11) 5.
[34] Ibid 7.
[35] Ibid 7.
[36] Ibid.
[37] Sharp et al (n 2). See also Cassandra Sharp, '"Represent a Murderer … I'd Never Do That!" How Students Use Stories to Link Ethical Development and Identity Construction' in M Robertson et al (eds), *The Ethics Project in Legal Education* (Routledge, 2011); S Kift and K Nelson, 'Beyond Curriculum Reform: Embedding the Transition Experience' in A Brew and C Asmar (eds) *Higher Education in a Changing World* (HERDSA, 2005).

on first-year law students. Through the themes of Belonging, Being and Becoming, we will explore the ways in which the Statement has enhanced students' sense of belonging to the law, their peers and the law school, enhanced the overall wellbeing of students, and enabled a sense of emerging professional identity and connection to their role as future lawyers and professionals.

IV BELONGING, BEING, BECOMING A LAW STUDENT

This section analyses the student feedback received about the Statement and discusses the overall findings of the research. Each author individually immersed themselves in the student feedback before coming together for collective reflection on our observations and, ultimately, formulating our findings and considering the analytical framework adopted. In this instance, it was considered that Wilcock's 'occupational dimensions' of Belonging, Being and Becoming was a valuable lens through which to explore the data. Interestingly, these dimensions emerged from, or were grounded in, the data itself rather than being imposed on the data. We now turn to discuss student feedback through the 3B framework.

A *Belonging*

Developing a sense of Belonging is an important aspect of any successful transition. This applies to the transition from secondary schooling to tertiary learning, or in fact non-study to tertiary studies. This transition phase provides an opportunity for the institution and its academics to set a positive direction for the new experience, particularly through the timely development of a sense of connection and belonging. In particular, it has been specifically identified that 'the potential for enthusiastic engagement in the curricula should be harnessed in the critical first days of the first weeks of the first year, thereby promoting a sense of belonging, so often missing for the contemporary learner'.[38] Students were introduced to the Statement from their first interaction with the School of Law, at Orientation. This was built upon in their first seminar in 'Foundations of Law', in their first week of law school.

1 *'As a new law student …'*

The expression of a Statement symbolically plants students in law school and in the law, situating and creating an attachment to the locus or place for their legal studies journey.[39] Students expressed a diverse range of initial responses to the Statement that indicated a developing sense of belonging. One student specifically identified that the Statement 'gives a sense of belonging to the program'. Almost all students recognised the Statement as a marker of transition and the commencement of a new stage — illustrated by such comments that featured 'the law school being the start of my career'.

[38] Kift and Nelson (n 37) 6.
[39] See, for example, Göksenin Inalhan and Edward Finch, 'Place Attachment and Sense of Belonging' (2004) 22(5/6) *Facilities* 120.

2 *'I will be expected to uphold the highest standards of personal and professional conduct'*

By making explicit the expectations of the School of Law, the Statement aims to create those relational connections necessary to a sense of belonging. The Statement aims to connect students to the expectations not only of the School of Law and UOW, but to their expectations of one another — 'I will treat fellow students and academic staff with respect'.

It reinforced their own values and motivations in choosing the study of law, typified by the following student comments in response to being asked about the usefulness of the Statement: '[s]et the tone of my studies'; '[r]einforced and reflected my values and motivation [for studying law]'; '[r]eminded me why I chose law in the first place'.

The Statement's ability to serve as a conduit to a sense of belonging is a positive indicator for student success and wellbeing. Belongingness has been identified as having 'multiple and strong effects on emotional patterns and on cognitive processes. Lack of attachments is linked to a variety of ill effects on health, adjustment, and well-being.'[40] This early intervention assists students to develop their sense of community and confidence, which supports and encourages them towards success. In this way, one student remarked that the Statement becomes a 'guideline that sits in the back of my mind' while they embark on their academic path in law school.

B *Being*

The aspect of Being is an essential element of identity, with a cohesive sense of being correlating strongly to a positive outlook and wellbeing. Beyond wellbeing, there is a growing focus on the importance of the development of an ethical professional identity, starting in the para-professional educative phase.[41]

1 *'the highest standards of personal and professional conduct'*

At its simplest, perhaps, professional identity is 'the sense of being a professional'.[42] A more fulsome definition outlines professional identity as 'the relatively stable and enduring constellation of attributes, beliefs, values, motives and experiences in terms of which people define themselves in a professional role'.[43] Tertiary studies are, therefore, an important time for the development of the sense of identity as a future professional. This identity development occurs largely through engaging in reflection and reflexive practices. Trede, Macklin and Bridges recognise 'the role of self, such as self-reflection, agency and self-authorship as being

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[40] Roy F Baumeister and Mark R Leary, 'The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation' (1995) 117(3) *Psychological Bulletin* 497, 497.
[41] See, for example, Field, Duffy and Huggins (n 1); Littrich and Murray (n 1).
[42] MJ Paterson et al, 'Clinical Reasoning and Self-Directed Learning: Key Dimensions in Professional Education and Professional Socialisation' (2002) 4(2) *Focus on Health Professional Education* 5, 6.
[43] Herminia Ibarra, 'Provisional Selves: Experimenting with Image and Identity in Professional Adaptation' (1999) 44(4) *Administrative Science Quarterly* 764, 764–5, citing Edgar Henry Schein, *Career Dynamics: Matching Individual and Organizational Needs* (Addison-Wesley, 1978).

a key part of the process of professional identity development'.[44] The Statement was designed and integrated into the curriculum as a vehicle for discussion about the opportunities that law school provides in moving into the role of future lawyer or professional. Students were engaged in a number of reflective activities concerning the Statement, relating to study and wellbeing early in the year, and then more specifically linked to the development of an ethical identity in the second semester. While one-third of respondents indicated that the Statement had little or no impact upon their sense of identity, the remaining students commented positively. By way of example, one student responded that '[t]he Law School [is] the start of my career', while another commented that '[y]es, it has encouraged me to reflect on why I chose to study law, particularly as a professional in the future'.

2 *'student of law, future professional and community leader'*

The Statement's reference to the broad career choices afforded by the study of law, as well as the forward-looking declaration of the student as a 'future professional and community leader', aims to focus students on the consideration of their career path and build a sense of control in the direction. Students identified strongly with this, providing the following comments: '[m]ade me feel proud … and [gave me] confidence that I was on the right track'; '[i]t showed … how professional identity starts in law school and the choices you make in law school can have drastic consequences on professional identity'.

3 *'… will be mindful of the importance of my mental and physical well-being'*

A key purpose behind the introduction of the Statement was to enhance student wellbeing, leading to the promotion of a positive learning experience and retention of students. The importance of this purpose has been articulated by Hall, O'Brien and Tang:

> [L]aw school is a particularly important time in the formation of students' academic and professional identities, and the impact of this process is not short term. In particular, commitment to a dominant identity can lead to the formation of cognitive schemas that regulate the long-term processing of self-related information based on that identity.[45]

Field, Duffy and Huggins have posited that '[i]f law students can see an authentic sense of who they will be as a lawyer through the law curriculum (and particularly the first-year law curriculum), they will transition better to their legal education and have a greater sense of psychological well-being'.[46] The Statement was provided at the beginning of the law school journey and explicitly referenced the importance of wellbeing. In embedding it in key points throughout the year, it was designed to become a touchstone — a prompt to work at balance

[44] Franziska Trede, Rob Macklin and Donna Bridges, 'Professional Identity Development: A Review of the Higher Education Literature' (2012) 37(3) *Studies in Higher Education* 365, 375.
[45] Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 21, 37.
[46] Rachael M Field, James Duffy and Anna Huggins, 'Supporting Transition to Law School and Student Well-being: The Role of Professional Legal Identity' (2013) 4(2) *The International Journal of the First Year in Higher Education* 15, 17.

throughout their studies and remind them of the bigger picture. This was an aspect that was positively recognised by most students, highlighted by the following comment:

> A great reminder throughout the first year of study, especially if I was getting stressed over an assessment or not understanding a subject. It reminded me of why I was studying law and that I was doing it for me and not anyone else.

Part of the reason for underlining the importance of wellbeing for students is to assist them towards their own recognition of the need for reflective practice throughout their career. Through the activities incorporated across the first year, students were afforded opportunities to reconnect with the Statement and reflect upon the important ideals within. Students responded supportively to this:

> The Statement said to ensure that you make time for outside activities or being social, not focussed 100% on study and not having a life outside of that … That was an essential part for me to read because when I took time out for myself between study, then I found I wasn't as stressed and I was sleeping better and generally feeling better within myself. Re-reading came at an essential time.

Overall, the aspect of Being was recognised as a strength of the Statement, identified through the favourable student feedback. The Statement's ability to start students on a positive path toward identity development and wellbeing marks it as a useful instrument.

C *Becoming*

Tertiary studies, particularly within the professions, have traditionally been primarily about Becoming. Historically, commencing law school was the necessary precursor to entering the legal profession: becoming a lawyer. In recent times we see law students with a broader view of the purpose behind a law degree. While it is difficult to ascertain exact figures, it has been suggested that more than one-third of law graduates today go on to careers other than a lawyer.[47] This could lead to a minor dilemma for law schools, in understanding and addressing the needs of their students. However, with a significant portion of an accredited law degree prescribed by the Priestley 11, most law schools are left with little space for addressing non-lawyer needs in the academic content of their degree. However, students, particularly in first year, are increasing wanting to 'keep their options open' and not presuppose a career as a solicitor or barrister. This message came through strongly in the previous Pledge research, discussed above. That being said, a law degree is still a professional qualification. As such, 'in becoming a professional, one starts to develop knowledge, sets of skills, ways of being and values that approach being identical to those held by other members of the profession one is part of'.[48]

[47] Littrich and Murray (n 1) 16–17.
[48] Trede, Macklin and Bridges (n 44) 380.

1 *'to practice as a lawyer or use the knowledge and skills I gain studying law in another field'*

In response to student feedback in relation to the previous Pledge and its perceived focus on entering the profession, the Statement is explicit in appreciating the options available to a law graduate. Upon reflection, this is a clear benefit in studying law and it makes sense to embrace this ambiguity in Becoming. The Statement still seeks to incorporate aspects of the ethics of the legal profession, but focuses on the broadly applicable duties and professional responsibilities, primarily 'diligence and integrity'. The students were still able to recognise the sense of becoming: '[Y]ou are joining a wider community once you study law. I feel like [the Statement] was trying to convey in that sense.'

2 *'the courage to question and think independently with an active commitment to social justice'*

Overall, the notion underpinning Becoming is aspirational. This links well with an essential element of professionalism, being 'an ethos of altruistic service'.[49] Students recognised that the Statement and its 'commitment to social justice' provided 'something to strive for'. Ultimately, some of the most encouraging responses to the Statement related to skills and qualities that will be valuable no matter what the student chooses to become: '[t]he courage to question'; '[c]onfidence — bravery to question and critique'; '[r]elevant no matter how your degree is used'.

V CONCLUSION

The Statement of Law Student Ideals is an ongoing project, but we believe it has potential to be part of supporting positive transition and wellbeing for law students and can be a vehicle for positive professional identity development and messaging around values to law students as future lawyers and professionals. The analysis suggests that there can be positive benefits to students in integrating a Statement into their first year of study, and also benefits to law schools in the process of drafting one. The authors also found usefulness in the 3B framework as a model for consideration of transition and identity. The above findings and observations have served to inform and guide the research team in our next iteration of the Statement, which was introduced to the intake of first-year law students in 2019.

[49] Geoffrey Millerson, *The Qualifying Associations: A Study in Professionalism* (Routledge and Kegan Paul, 1964) 5, cited in Ysaiah Ross, *Ethics in Law* (LexisNexis Butterworths, 6th ed, 2014) 55.

WHY NEW ZEALAND EMPLOYERS SHOULD BE SUBJECT TO MANDATORY PAY TRANSPARENCY

*Amanda Reilly**

ABSTRACT

This article argues that New Zealand employers should be subject to mandatory pay transparency as a means of addressing the gender pay gap. This would help employers to comply with their legal obligations not to discriminate against women, and it would aid in the enforcement of the law. It would also ameliorate inequality of bargaining power and encourage employers to appoint and promote based on legitimate criteria. The article also provides some recommendations to guide the design of an optimal pay transparency regime; it should be universal and accessible, with penalties and incentives around both reporting and improving performance.

* Senior Lecturer in Commercial Law, Wellington School of Business and Government, Victoria University of Wellington.

I INTRODUCTION

The gender pay gap in New Zealand stands at 9.3%, where it has stood for the past decade.[1] This tells us that there is inequality between men and women,[2] and that matters are not improving.

The gender pay gap does not tell us what is happening in individual workplaces, but there is research that shows that discrimination is a contributor to inequality between men and women.[3] This may be systemic, individual, or restricted to certain parts of an organisation. This is disappointing, considering that discrimination is prohibited by New Zealand law in the *Employment Relations Act 2000*,[4] the *Human Rights Act 1993*,[5] and the *Equal Pay Act 1972*.[6] Not only does domestic law prohibit discrimination against women, New Zealand is bound by various international instruments that make it imperative for inequality to be addressed. For example, the *Convention on the Elimination of All Forms of Discrimination against Women* art 11 states:

> Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: … (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.[7]

Pay transparency is increasingly recognised as essential for the elimination of pay gaps. The International Labour Organisation Committee of Experts has emphasised this, and the Council of Europe's European Committee of Economic and Social Rights has ruled that, as part of their positive obligation to address the gender pay gap, States must encourage/require transparency, including by publication.[8] At a national level, a number of countries have introduced legislative

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[1] 'Gender Pay Gap', *Ministry for Women* (Web Page, 2020) <https://women.govt.nz/work-skills/income/gender-pay-gap>. This is measured by median hourly earnings as of August 2019.

[2] The focus here is on inequality between men and women but it is acknowledged that transgender and non-gender conforming individuals frequently encounter discrimination and disadvantage in the workplace. This is an important issue but not one it is possible to do justice to in this article, so it will not be further addressed here.

[3] See, generally, Gail Pacheco, Chao Li and Bill Cochrane*, Empirical Evidence of the Gender Pay Gap in New Zealand* (Report commissioned by Ministry for Women, New Zealand Government, March 2017) <http://women.govt.nz/work-skills/income/gender-pay-gap/research-evidence-gap-new-zealand>.

[4] *Employment Relations Act 2000* (NZ) s 104.

[5] *Human Rights Act 1993* (NZ) s 22.

[6] *Equal Pay Act 1972* (NZ) s 2A.

[7] *Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature 18 December 1979 (entered into force 3 September 1971). *Equal Remuneration Convention*, opened for signature 29 June 1951, ILO Convention 100 (entered into force 23 May 1953) also requires Member States to promote and ensure equal remuneration for work of equal value. This is reinforced by *Discrimination (Employment and Occupation) Convention*, opened for signature 23 June 1958, ILO Convention 111 (entered into force 25 June 1958); see also *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 7(a)(i), wherein the States Parties 'recognize the right of everyone to the enjoyment of just and favourable conditions of work'.

[8] Jill Rubery and Aristea Koukiadaki, Gender, Equality and Diversity Branch, International Labour Office, *Closing the Gender Pay Gap: A Review of the Issues, Policy Mechanisms and International Evidence* (Report, 2016) 33.

requirements that require employers to report on various gender equality indicators.[9] Moreover, there is increasing evidence that pay transparency is effective at reducing pay gaps.[10]

It is recognised within New Zealand that there is a need for gender pay transparency. The Green Party introduced a Bill to Parliament providing for this in 2017 (which was withdrawn at its first reading).[11] The Human Rights Commission has been a strong and consistent advocate for pay transparency, calling repeatedly for the government to enact 'legislation enforcing a requirement that companies with more than 100 workers publicly report annually on their gender pay, bonus gaps and other EEO metrics to track progress'.[12] Most recently, the Human Rights Commission has launched an online petition demanding an independent pay transparency agency to close the gender pay gap.[13] The government itself has recognised the need for pay transparency. The Gender Pay Principles, which the government recently negotiated with the Public Service Association (the largest public sector union), include Principle 2, which explicitly states: 'Transparency and accessibility is essential to the sustainable elimination of gender pay gaps.'[14]

Yet, despite this apparent consensus, the New Zealand government does not appear to be taking any active steps toward introducing pay transparency requirements. The purpose of this article is to contribute to the argument that New Zealand should introduce mandatory universal pay transparency.

The remainder of this article begins with a review of existing law in New Zealand. This is followed by the argument that the law should change — pay transparency aids in the enforcement of the law as well as helping employers to comply with the law, and improves employee bargaining power while reducing the need for bargaining. Privacy and cost concerns are also addressed. Some principles to guide the design of pay transparency are then discussed. This all leads to the conclusion that it is time for New Zealand to be made subject to gender pay transparency.

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[9] This includes the United Kingdom, Australia, Iceland and some Canadian states.

[10] See, for example, Morten Bennedsen et al, 'Do Firms Respond to Gender Pay Gap Transparency?' (Working Paper No 25435, National Bureau for Economic Research, January 2019); Cynthia Estlund, 'Extending the Case for Workplace Transparency to Information about Pay' (2014) 4 *UC Irvine Law Review* 781, 786; Rubery and Koukiadaki (n 8) 32.

[11] Equal Pay Amendment Bill 2017 (NZ) <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_72692/equal-pay-amendment-bill>.

[12] See, for example, Human Rights Commission, *Tracking Equality at Work 2018: Summary and Recommendations* (Report, 27 June 2018) 12; Margaret Wilson, 'Pay Equality Bill' in New Zealand Human Rights Commission, *Tracking Equality at Work* (Report, June 2011) 36–38.

[13] 'End Pay Secrecy: Demand an Independent Pay Transparency Agency to Close the Gender Pay Gap', *Demand Pay Transparency, NZ Human Rights Commission* (Online Petition, 2019) <https://action.hrc.co.nz/end-pay-secrecy>.

[14] 'Gender Pay Principles', *Ministry for Women* (Web Page, 2020) Principle 2 <http://women.govt.nz/work-skills/income/gender-pay-gap/gender-pay-principles>.

II EXISTING LAW

There is no legislative requirement for pay transparency in New Zealand, even though, as mentioned above, the government itself has identified pay transparency as playing an important role in closing the gender pay gap.[15]

The government's Gender Pay Principles establish that some limited gender pay gap information must be audited and published annually. Core public service organisations must report to the State Sector Commission on their gender pay gaps and include information on the action they are taking to address them in their four-year strategic plans.[16] The State Sector Commission's annual Human Resources Capability survey publishes this information.[17]

While it could be seen as a positive step that some transparency is now required, the very limited scope of it is disappointing. The gender pay gap information is not easy to find on the State Sector Commission's website, and it is not individualised. Agencies with small numbers of employees do not have their gender pay gaps reported for reasons of confidentiality. The logic as to why reporting is confined to the core public sector is unclear when a much wider range of organisations are recipients of public funding (for example, crown entities and universities).

As far as the private sector goes, there are also no legislative requirements for transparency. NZX listing rules 3.8.1(c) and 3.8.1(d) require certain gender information — that is, a quantitative breakdown of the gender composition of directors and officers — to be included in an issuer's annual report.[18] Some leading private sector organisations have undertaken a voluntary reporting obligation, for example, the members of the Champions for Change initiative report on representation.[19] However, their goal is diversity rather than equality, and they do not report on actual wage gaps.

III ARGUMENTS FOR PAY TRANSPARENCY

There are already laws prohibiting discrimination. If inequality is to be addressed, these laws must be enforced and complied with. Pay transparency can contribute to both.

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[15] Ibid.

[16] Public service departments are defined in the *State Sector Act 1988* (NZ) s 27 as comprising the departments specified in sch 1 of the Act. As at 30 June 2018 there were 32 public service departments.

[17] 'Drill Down Data Cubes 2018', *State Services Commission* (Web Page, 13 December 2018) <https://ssc.govt.nz/resources/public-service-workforce-datadrill-down-data-cubes>. Note that '[a]gencies with small numbers of employees have not had their gender pay gaps reported due to the impact this may have on confidentiality or data quality'.

[18] 'NZX Listing Rules', *NZX* (Web Page, 1 January 2019) <https://www.nzx.com/regulation/nzx-rules-guidance/main-board-debt-market-rules>.

[19] Champions for Change, *Diversity Report 2019: Results and Analysis on the Measurement of Gender and Ethnicity at Leadership Tiers in New Zealand Businesses* (Report, October 2019) <https://www.championsforchange.nz/assets/Uploads/Diversity-Report-2019.pdf>.

A *Transparency Aids Law Enforcement*

Transparency would aid in the enforcement of the law,[20] and it is important that pay information should be available before legal action is undertaken. It is impossible otherwise to know whether or not there are grounds for legal action. Not requiring this gives employers the upper hand and creates opportunities for bad faith delay and obfuscation in the name of privacy.

At present, without pay transparency, an individual woman can suspect that she is subject to discrimination relative to a male colleague, but she cannot know. Pay transparency provides individuals and groups with the information needed to inform complaints and trigger claims.[21]

The Equal Pay Amendment Bill, which is currently at Second Reading stage in New Zealand's Parliament, will, if enacted, create a right to request information in pay equity claims, but only once the claim has been made.[22] This provision will only apply in pay equity claims that arise in a highly specific situation where a group of women, such as care workers, claim they are in a sector that has historically been female-dominated and undervalued. It would be much more useful for women in these sectors to have this information prior to raising a claim.

Pay transparency can also empower third parties like unions or state agencies, such as the Human Rights Commission, to take enforcement action where discrimination is apparent.[23] Potentially publicly available information on particularly egregious pay gaps may also generate media attention and public pressure for improvement.

B *Transparency and Employer Compliance*

Although it is important that litigation remains an option of last resort for individuals and groups, ideally employers acting in good faith would monitor their own performance and make the necessary changes. Regulators and unions have limited resources, and the cost for individual women who resort to litigation is high and success far from certain.

Moreover, enforcement through litigation is a crude mechanism for addressing gender inequality, which has multiple causes. Some inequality may be due to identifiable acts of employer discrimination, but women's socialisation and broader social forces may also play a part. Litigation as a tool implies that someone identifiable is at fault, but sometimes, as identified by Ramachandran, no one actor is necessarily to blame.[24]

No good employer intends to contravene the law, but it is easy to assume that since there is no intent to discriminate, discrimination must not be occurring. An employer as a whole may be committed to gender equality, but middle managers or supervisors may not be or may not

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[20] Estlund (n 10) 785.
[21] See, generally, ibid.
[22] Equal Pay Amendment Bill 2019 (NZ) cl 13K <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_80319/equal-pay-amendment-bill>.
[23] See, generally, Rubery and Koukiadaki (n 8) 32.
[24] Gowri Ramachandran, 'Pay Transparency' (2012) (116)4 *Pennsylvania State Law Review* 1044.

realise that they are discriminating against women. A transparency regime requiring employers to 'know and show' what is happening in their organisation leaves discrimination with no place to hide.

A process of careful scrutiny of pay disparity can help employers prevent discrimination from arising in the first place. Knowing that decisions will be subject to scrutiny and that disparities will have to be justified on non-discriminatory grounds will lead to fairer and better processes.[25] An employer who becomes aware of inequality is best placed to identify its causes and address it. It may be a rogue individual who must be dealt with, or it could be that some change, such as more family-friendly hours, is both desirable and possible.

Furthermore, as identified by Fung, Graham and Weil,[26] transparency can change internal priorities. It can empower managers who want to see change to advocate for change, and it keeps gender equality on the agenda as well as providing employers with a benchmark against which to measure their progress.

C *Improvement of Women's Bargaining Power and Reduction of the Need to Bargain*

One of the stated objectives of New Zealand's main piece of employment legislation, the *Employment Relations Act 2000* (NZ), is to acknowledge and address the inherent inequality of bargaining power in employment relationships.[27] Despite this, New Zealand's law does not recognise or address a fundamental inequality with regards to pay information. Although there are some workplaces that have collective contracts in place where pay scales may be apparent, generally employers have pay information and employees do not. Effectively, women employees (who have less power) are expected to negotiate entry salaries and pay increases and to enforce discrimination law while lacking vital information. Indeed, not only do women have less bargaining power than employers, they may have less bargaining power than men in that they could have less access to information through segregated social networks.[28]

As well as the disadvantage produced by the information deficit, there is some evidence that women have weaker negotiation skills, particularly when they are negotiating for their own interests.[29] Often women have been socialised not to value themselves as highly as men and discouraged from individualistic self-promotion, which is perceived as inappropriate and unfeminine. In fact, women who initiate negotiation are frequently penalised for this.[30] Social

[25] See, generally, Estlund (n 10) 786.
[26] Archon Fung, Mary Graham and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press, 2007) 73.
[27] *Employment Relations Act 2000* (NZ) s 3(a)(ii).
[28] Ramachandran (n 24) 1044.
[29] Ibid 1060.
[30] Hannah Riley Bowles, Linda Babcock and Lei Lai, 'Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask' (2007) 103 *Organizational Behavior and Human Decision Processes* 84.

norms that make women carry more of a burden of family responsibility may also make it harder for women to negotiate.[31]

Transparent pay information will not only empower women with information to improve their negotiation skills, it may also reduce the need to negotiate. Greater pay transparency will make pay disparities subject to greater scrutiny. Knowing this will encourage employers to set pay rates based on legitimate and justified grounds, such as proven performance. This is surely preferable to a system of unfettered managerial discretion, which may hide favouritism or discrimination and may be overly weighted towards rewarding those with the best negotiation skills rather than those who are best at their jobs.[32]

In short, improved pay transparency would not only make it easier for women to negotiate, it might reduce the need for negotiation, forcing employers to appoint and promote on other factors rather than negotiating ability.

D *Privacy and Cost Concerns*

Privacy and confidentiality concerns should not be used as a pretext for failure to implement transparency. While many New Zealanders may be inculcated with a social norm that it is bad form to discuss wages, this norm should not be allowed to pass uninterrogated. Privacy norms can shift, and sometimes it is for the greater good that they do.[33] History is replete with examples of matters that were once viewed as belonging to the private sphere where the state should not intervene — rape in marriage and corporal punishment of children are two examples of this — but those social norms have shifted and society is better for it. Confidentiality around wages is not for the benefit of employees, even if some employees on undeservedly higher salaries than their colleagues reap the benefits of it.

Employers may feel threatened by a new culture of transparency and the loss of the ability to exercise managerial prerogative unscrutinised, but employers with nothing to hide have nothing to fear. They may benefit from the cachet of being an employer who is known not to discriminate and may also serve as exemplars of best practice.[34] Decent employers should *want* to know if they have problems so that they can take steps to fix them.

Employers may worry that pay transparency could have a negative effect on morale. However, there is research that suggests that pay transparency can improve worker satisfaction by fostering perceptions of fairness.[35] The United States Department of Labour Women's Bureau succinctly makes the business case for 'open pay', stating that such policies

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[31] Ramachandran (n 24) 1060.
[32] See, generally, Estlund (n 10) 799.
[33] For discussion on changing attitudes to privacy around pay rates, see Marianne Delpo Kulow, 'Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws — A Necessary Tool for Closing the Residual Gender Wage Gap' (2013) 50 *Harvard Journal of Legislation* 385, 431.
[34] Belinda Smith, 'How Might Information Bolster Anti-Discrimination Laws to Promote More Family-Friendly Workplaces?' (2014) 56 *Journal of Industrial Relations* 547.
[35] See, for example, Estlund (n 10) 781.

> [s]top speculation about pay — workers will know they are being paid fairly[;] [m]ake it clear that top performers are rewarded, which creates an incentive to work harder[;] [s]top meritless complaints about unequal pay[; and] [i]dentify pay disparities so they can be fixed.[36]

There may also be resistance to the idea of pay transparency on the grounds of cost to employers and to the state. However, these costs must be weighed against costs of discrimination and inequality, which are currently being borne by women.

This is not to suggest that privacy and cost concerns are irrelevant, but they should not be overstated or overprivileged. They can, to an extent, be addressed in the design of the pay transparency requirements.

IV PAY TRANSPARENCY DESIGN

There is a range of options for the design of a pay transparency regime. A detailed blueprint is beyond the scope of this article, but research suggests the following guiding principles:[37]

- the information should be universal and accessible to user groups
- there should be penalties and incentives around both reporting and improving performance.

A *Universal and Accessible Information for User Groups*

It is arguable that the maximum benefits of transparency will only be achieved when complete pay transparency applies universally to all employers and employees as an accepted way of life. There is some precedent for this: in Norway, information on the pay of every single employee is publicly available to any interested party through the tax system.[38]

There are other alternatives to universal transparency that may be more palatable, at least initially. In Denmark, employers with 35 employees provide gender-divided wage statistics.[39] In Australia[40] and the United Kingdom,[41] it is only larger employers who are forced to report to an agency.

The design of the transparency regime should take into account the potential information users, and the information made available should be carefully tailored to their needs. According to Fung, Graham and Weil, transparency requirements are only effective 'when they provide …

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[36] Cited in Kulow (n 33) 429.
[37] Fung, Graham and Weil (n 26) 177–79.
[38] Lars Bevanger, 'Norway: The Country Where No Salaries Are Secret', *BBC News* (Web Page, 22 July 2017) <https://www.bbc.com/news/magazine-40669239>.
[39] Bennedsen et al (n 10).
[40] For an overview and critique of the Australian initiatives in the area, see Belinda Smith and Monica Hayes, 'Using Data to Drive Gender Equality in Employment: More Power to the People?' (2015) 28 *Australian Journal of Labour Law* 191.
[41] Employers with 250 or more staff must report in the United Kingdom. See 'Search and Compare Gender Pay Gap Data', *Gender Pay Gap Service* (Web Page) <https://gender-pay-gap.service.gov.uk>.

facts that people want … in times and places and ways that enable them to act'.[42] Such information must be presented in ways that are easily comprehensible and enable people to 'substantially improve their choices without imposing significant additional costs'.[43]

This guideline suggests that different levels of transparency could be required depending upon the purpose for which the information is needed. The general public has little need to know exactly what a given individual in an organisation earns, but this information may be relevant to that person's colleagues who are seeking pay rises or who suspect they have been discriminated against. Individuals applying for a position in the organisation could also find this information of use. In these circumstances a statutory right to request information directly from the employer could meet the need.

The general public and third parties such as unions or non-governmental organisations may have an interest in more general trends, with a view to identifying where to direct consumer and civil society pressure. These needs could be met by requiring employers over a certain size to publish a standard format statement on their website indicating the gender pay gap at an organisation level, noting any steps taken to improve it and any improvements over time.

There could also be a place for a third party agency, such as Australia's Workplace Gender Equality Agency or an expansion of the Human Rights Commission, who could be charged with receiving and processing reports from employers and reporting on selected aspects. This would potentially serve an educative function in terms of disseminating best practice and making employers aware of what is happening within their own organisations as well as allowing them to make comparisons among themselves.

The information reported to this hypothetical third party agency could also be designed to be useful to the state for purposes of enforcement, or potentially to guide procurement choices as is discussed in the next section.

B *Penalties and Incentives for Reporting and Improving Performance*

In order to realise the full potential of transparency it must be mandatory. The United Kingdom experience was that when reporting was voluntary there was very little uptake.[44] Even when it is compulsory an absence of penalties for non-reporting can lead to non-compliance, so there must be substantial penalties for not reporting or misreporting.[45]

However, there should also be rewards for compliance with reporting requirements and for improvements. There is a growing awareness that consumers care about how workers in

[42] Fung, Graham and Weil (n 26) xiv.
[43] Ibid 55.
[44] Voluntary uptake was so low initially that in 2017 reporting was made mandatory.
[45] Fung, Graham and Weil (n 26) 45 emphasise the presence of 'substantial fines or other penalties for non-reporting and misreporting' in successful transparency regimes.

individual workplaces are treated,[46] and gender equality is part of that picture. The government has the power to make sure this information is before the public's eye. The government also has the power to reward businesses who are exemplary in their reporting and practice through preferential access to government contracts.

In fact, the New Zealand government's Supplier Code of Conduct already provides the foundation for such a measure. It explicitly states that suppliers to New Zealand's government are expected to 'be transparent about their ethical policies and practices' and to 'comply with New Zealand employment standards and maintain a workplace that is free from unlawful discrimination'.[47] The next stage is surely to monitor and enforce this as well as to reward businesses who comply.

V CONCLUSION

Discrimination is unlawful and it is unjust. At present, the onus is on women to enforce their rights to non-discrimination and to negotiate their pay, and they are expected to do this without access to adequate information. Pay transparency would transfer the burden to the party with more power: the employer.

Employers are required by law not to discriminate against women; it is reasonable to require them to know and show that they are not engaging in discrimination. Good employers will want to change any discriminatory practices, bad employers should face the consequences of failure to do so. The New Zealand government is obliged to 'take all appropriate measures to eliminate discrimination against women in the field of employment'.[48] Pay transparency will facilitate monitoring, measurement, compliance and enforcement of the law, and it is accepted internationally as an essential component to furthering gender equality. It is time that gender pay transparency was introduced in New Zealand.

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[46] 'More Consumers Consider Worker Rights before Buying', *Employment New Zealand* (Web Page, 12 August 2019) <https://www.employment.govt.nz/about/news-and-updates/more-consumers-consider-worker-rights-before-buying>.

[47] 'Supplier Code of Conduct', *New Zealand Government Procurement* (Web Page) <https://www.procurement.govt.nz/broader-outcomes/supplier-code-of-conduct>.

[48] See above n 7 and accompanying text.

THE RISE OF TEACHING SPECIALIST ROLES IN THE LEGAL ACADEMY: IMPLICATIONS AND POSSIBILITIES

Aidan Ricciardo and Christina Do*[†]

ABSTRACT

The prevalence of teaching specialist academic roles has risen substantially within universities in Australia and abroad over the past decade. This paper explores the perceptions of specialist roles within law schools by presenting the perspectives of four nationally acclaimed legal academics who have received Australian Awards for University Teaching. The paper considers the potential implications that teaching specialist positions may have on the legal academy, offering approaches that law schools can implement to facilitate a successful transition for the academic staff who assume these teaching specialist roles, and ultimately the law schools that employ them. Whilst it is acknowledged some negative implications associated with teaching specialist roles are systemic within the higher education sector, it is contended that to achieve broad cultural and attitudinal change, such change must first occur locally at a school, faculty and institutional level.

[*] LLB (Hons), BA, Lecturer, University of Western Australia.
[†] LLM, LLB, BCom, GradDipLegPrac, GradCertHE, Lecturer, Curtin Law School. The authors would like to thank the legal academics who participated in the project. The authors would also like to acknowledge the work of their research assistant Jessica Border in the preparation of this paper.

I INTRODUCTION

In Australian universities the traditional permanent or fixed-term academic role involves 40 per cent teaching, 40 per cent research and scholarship, and 20 per cent service, community engagement and administration (the '40:40:20 model').[1] Though legal education in Australia was previously taught largely by legal practitioners in a part-time capacity, over the 20th century the 40:40:20 model also became the norm for legal academics.[2] However, over recent decades academic roles at many Australian universities have increasingly deviated from the traditional workload model.[3] One significant change is the increasingly casualised academic workforce,[4] but there have also been shifts in the nature of permanent and fixed-term academic work. Between 2009 and 2018, 'teaching-only' academics was the fastest-growing component of the Australian academic workforce appointed on a permanent or fixed-term basis.[5] This shift towards universities employing more teaching-only, teaching-intensive and education-focused academics — which will be referred to in this paper as 'teaching specialisation' — has also occurred internationally.[6]

There has been some exploration of the general implications of teaching specialisation within the relevant academic literature and selected government reports — some of which have also suggested ways that the less desirable implications can be mitigated or addressed.[7] Whilst the literature relating to the teaching of law has paid some attention to this shift,[8] there has not yet been a broad analysis of the potential effect of teaching specialisation within law schools.

To begin to fill this gap, this paper aims to explore the potential effect of teaching specialisation with respect to law schools and legal academics. Part II of this paper considers the trends and prevalence of teaching specialisation within Australian universities and law schools. Part III then provides some insight into the varied views of experienced legal academics on the matter of law schools moving towards specialist roles. It sets out the views of four legal academics whose teaching has been nationally recognised through the receipt of an Australian Awards for University Teaching ('AAUT') Citation for Outstanding Contribution to Student Learning ('Citation') and/or Award for Teaching Excellence ('Teaching Award'). The four AAUT law

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[1] Abel Zvamayida Nyamapfene, 'Teaching-Only Academics in a Research Intensive University: From an Undesirable to a Desirable Academic Identity' (EdD Thesis, The University of Exeter, 2018) 13–14; Andrew Norton and Ittima Cherastidtham, Grattan Institute, *Mapping Australian Higher Education 2018* (Report No 2018-11, September 2018) 36. See also Belinda Probert, Office for Learning & Teaching, 'Teaching-Focused Academic Appointments in Australian Universities: Recognition, Specialisation, or Stratification?' (Discussion Paper No 1, January 2013) 7, which notes that this 'traditional' model is a relatively recent development.

[2] See, for example, Jill Cowley, 'Recognising and Valuing Teaching Excellence in Law Schools and Teaching-Intensive Appointments' (2008) 1(1&2) *Journal of the Australasian Law Teachers Association* 275, 284.

[3] See, for example, Norton and Cherastidtham (n 1) 35–39.

[4] Ibid.

[5] Ibid.

[6] Nyamapfene (n 1) 13–14.

[7] See, for example, Norton and Cherastidtham (n 1); Probert (n 1); Sharon Flecknoe et al, 'Redefining Academic Identity in an Evolving Higher Education Landscape' (2017) 14(2) *Journal of University Teaching & Learning Practice* 2; Dawn Bennett et al, 'What Is Required to Develop Career Pathways for Teaching Academics?' (2018) 75(2) *Higher Education* 271.

[8] See, for example, Cowley (n 2).

recipients' subjective views were sought through standardised, semi-structured interviews as part of a wider project relating to effective legal teaching.[9] Part IV then explores some implications of teaching specialisation that may be unique to, or particularly felt within, law schools and the teaching of law. Finally, Part V considers how law schools should proceed if teaching specialisation trends continue.

Reflecting on the relevant literature and varied responses from the four nationally acclaimed legal academics interviewed, it is contended that specialisation within law schools could lead to a hierarchical 'multi-tiered' academic workforce, and that teaching specialist legal academics might experience serious health and wellbeing issues that differ from those relevant to their colleagues in the 40:40:20 model (referred to in this paper as 'teaching-research academics'). Consequently, the authors suggest that any further shift towards teaching specialisation within Australian law schools needs to be preceded, accompanied and followed by cultural, attitudinal and institutional change to address these issues.

II TEACHING SPECIALISATION

For the purpose of this paper, the term 'teaching specialisation' is used to refer to Australian universities moving towards academic workforces with greater proportions of permanent and fixed-term staff employed in roles that have higher teaching and education-related duties than the traditional teaching-research roles. Though the titles used to describe these academics vary between institutions,[10] there are generally three categories of teaching specialist in Australian universities: teaching-only, teaching-intensive and education-focused academics.[11] The 'teaching-only' title typically indicates that no research expectations are imposed upon the academic.[12] 'Teaching-intensive' roles involve teaching, research and service components somewhere between the teaching-only allocation and a teaching-research role. For example, a teaching-intensive academic's workload may require 60 per cent teaching, 20 per cent research and 20 per cent service. 'Education-focused' academics' workloads are not typically characterised by the heavy teaching workloads expected of teaching-only and teaching-intensive academics. Rather, education-focused roles waive the expectation of discipline-based research in favour of requiring these academics to be leaders in relation to teaching excellence, pedagogical innovation, and the scholarship of teaching and learning ('SoTL').[13] Many universities have introduced education-focused roles in an effort to raise the profile and standards of education within their institution.[14]

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[9] See Christina Do and Aidan Ricciardo, 'Meaningful Connectedness: A Foundation for Effective Legal Teaching' (2019) *Curtin Law and Taxation Review* (forthcoming).
[10] See Probert (n 1) 4, which notes: 'There are a number of different titles being used to describe these new types of appointments including the charming title of "teaching scholar" and the less charming "not research-active".'
[11] Nyamapfene (n 1) 15; Flecknoe et al (n 7) 2–3.
[12] Note that in some institutions teaching-only academics may still be expected to engage and publish in the scholarship of teaching and learning. The titles and expectations for teaching specialists differ from university to university, and any two institutions might both use the same title to refer to roles with different expectations.
[13] Nyamapfene (n 1) 15; Flecknoe et al (n 7) 2–3.
[14] Nyamapfene (n 1) 15; Flecknoe et al (n 7) 2–3.

Although universities employ significant and increasing numbers of sessional academics primarily in teaching roles,[15] the casualisation of the academic workforce is beyond the scope of this paper. However, it must be noted that to address this increasing casualisation a number of Australian universities have created teaching roles, named 'Scholarly Teaching Fellow' or similar, to perform teaching work that would otherwise have been undertaken by casual academic staff.[16] This classification can be used as a mechanism to convert casual academic staff into full-time or part-time employees.[17] In this paper, the term 'teaching specialisation' is not used to include trends towards employment of sessional teaching or Scholarly Teaching Fellow academics, though many of the issues relevant to teaching specialisation may also be relevant to these trends.[18]

A *Growth in Teaching Specialist Academic Roles in Australian Law Schools*

The report *Teaching-Focused Academic Appointments in Australian Universities: Recognition, Specialisation, or Stratification?*, prepared for and funded by the Australian Government Office for Learning & Teaching, indicates that since 2009 there has been a steady upward trend of academics taking on teaching-only appointments within the higher education sector.[19] To formally recognise teaching specialist academic roles, a number of Australian universities have incorporated provisions within their enterprise bargaining agreements ('EBAs') relating to such appointments.[20] This recognition and growth of teaching-only academic roles within Australia is largely consistent with academic appointment trends in the higher education sector internationally.[21]

At present there are 38 Australian universities that offer a Bachelor of Laws or Juris Doctor,[22] and some of these universities offer their law courses at multiple campuses across Australia or

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[15] Norton and Cherastidtham (n 1) 37–40.

[16] Universities that have created 'Scholarly Teaching Fellow' roles or similar include Charles Sturt University, University of Technology Sydney, University of Wollongong, Charles Darwin University, Griffith University, University of Queensland, James Cook University, University of the Sunshine Coast, Flinders University, University of Adelaide, University of Tasmania, Deakin University, La Trobe University, Monash University, RMIT University, Swinburne University of Technology, University of Melbourne, Victoria University, Curtin University and Edith Cowan University.

[17] For example, *Charles Sturt University Enterprise Agreement 2018–2021*, ss 30.36, 30.38 specify that a 'Scholarly Teaching Fellow' is to be 'drawn from an applicant pool of casual and fixed term employees with at least twelve (12) months' academic employment in total in Australian universities within the last three (3) years, and … has never held an ongoing position at an Australian university', and that these roles 'may be used as a conversion option for casual Academic employees'.

[18] For literature that directly considers casualisation in law schools, see, for example, Jill Cowley, 'Confronting the Reality of Casualisation in Australia: Valuing Sessional Staff in Law Schools' (2010) 10(1) *Queensland University of Technology Law and Justice Journal* 27; Mary Heath et al, 'Learning to Feel Like a Lawyer: Law Teachers, Sessional Teaching and Emotional Labour in Legal Education' (2017) 26(3) *Griffith Law Review* 430.

[19] Probert (n 1) 2.

[20] Ibid. The report indicated that, in 2012, 19 universities had drafted provisions recognising teaching specialist roles to present at the then current round of enterprise bargaining negotiations. It was predicted that more universities were likely to follow suit by the time the round of enterprise bargaining negotiations was completed.

[21] Ibid; Nyamapfene (n 1) 14.

[22] 'Australia's Law Schools', *Studying Law in Australia* (Web Page, November 2013) <https://cald.asn.au/slia/australias-law-schools>.

fully online.[23] Of these 38 universities, 23 have explicitly created teaching specialist roles with tailored avenues for career progression and promotion, and have expressly acknowledged these roles within the university's EBA (see Table 1 below). The academic workload and expectations of these teaching specialist roles are outlined in the 23 universities' respective EBAs. Although 14 of the 38 universities have not explicitly recognised teaching specialist roles in their EBAs, it does not mean that these universities have not adopted these roles. For example, the EBAs of these 14 universities all indicate that the academic workload allocations are not fixed and that academic staff and their line manager can negotiate a larger teaching allocation if desired.[24] Furthermore, some universities may have explicitly created teaching specialist academic roles, but have not formally recognised such positions in their EBA.[25] Information pertaining to academic positions and roles at Bond University was not publicly available as the university's EBA could not be located on the Fair Work Commission online database.

Table 1: Australian universities that offer a Bachelor of Laws or Juris Doctor that have explicit teaching specialist academic roles set out in their EBA

University	**Explicit teaching specialist role in EBA**	**Teaching specialist title**
Australian Catholic University[26]	Yes	Teaching-focused
Australian National University[27]	No	
Bond University	Information could not be located	
Central Queensland University[28]	Yes	Teaching Intensive and Teaching Scholar
Charles Darwin University[29]	Yes	Teaching Focused Academic
Charles Sturt University[30]	Yes	Teaching Focused
Curtin University[31]	Yes	Teaching Academic and Teaching Academic (clinical professional)

[23] 'Bachelor of Laws', *Australian Catholic University* (Web Page, 2020) <https://courses.acu.edu.au/undergraduate/bachelor_of_laws>; 'Bachelor of Laws', *Deakin University* (Web Page, 2020) <https://www.deakin.edu.au/course/bachelor-laws>; 'Bachelor of Laws (Honours)', *Griffith University* (Web Page) <https://degrees.griffith.edu.au/Program/1483>; 'Bachelor of Laws', *James Cook University* (Web Page, 2020) <https://www.jcu.edu.au/course-and-subject-handbook-2018/courses/undergraduate-courses/bachelor-of-laws>; 'Bachelor of Laws', *University of Notre Dame Australia* (Web Page, 2019) <https://www.notredame.edu.au/programs/fremantle/school-of-law/undergraduate/bachelor-of-laws>; 'School of Law, Sydney Campus', *University of Notre Dame Australia* (Web Page, 2019) <https://www.notredame.edu.au/about/schools/sydney/law>; 'Bachelor of Laws', *University of Southern Queensland* (Web Page, 2018) <https://www.usq.edu.au/study/degrees/bachelor-of-laws>.

[24] For example, *Murdoch University Enterprise Agreement 2018*, s 14.1(c).

[25] For example, *Monash University Enterprise Agreement (Academic and Professional Staff) 2014*, s 17.4. The Monash University EBA refers to a 'teaching-focused (education-focused) role' in a provision discussing the 'Scholarly Teaching Fellow' role, but does not explain the education-focused role further in the provision or elsewhere in the EBA. Furthermore, Flecknoe et al (n 7) discusses Monash University's introduction of education-focused roles in 2010. It would seem that Monash University has explicitly created teaching specialist roles, but this has not been reflected in the university's EBA.

[26] *Australian Catholic University Staff Enterprise Agreement 2017–2021*, s 5.2.4.1.

[27] *Australian National University Enterprise Agreement 2017–2021*.

[28] *Central Queensland University Enterprise Agreement 2017*, s 14.5.16.

[29] *Charles Darwin University and Union Enterprise Agreement 2018*, ss 74.17–19.

[30] *Charles Sturt University Enterprise Agreement 2018–2021*, s 30.14.

[31] *Curtin University Academic, Professional and General Staff Agreement 2017–2021*, s 21.3.

Deakin University[32]	No	
Edith Cowan University[33]	Yes	Teaching Focused Scholar
Flinders University[34]	Yes	Teaching Specialist
Griffith University[35]	No	
James Cook University[36]	Yes	Teaching Specialist
La Trobe University[37]	Yes	Teaching Focused
Macquarie University[38]	Yes	Teaching and Leadership Academic
Monash University[39]	No	
Murdoch University[40]	No	
Queensland University of Technology[41]	No	
RMIT University[42]	No	
Southern Cross University[43]	Yes	Teaching Scholar
Swinburne University of Technology[44]	No	
University of Adelaide[45]	No	
University of Canberra[46]	Yes	Education Focused
University of Melbourne[47]	No	
University of Newcastle[48]	Yes	Education Focused Academic
University of New England[49]	Yes	Education Scholar
University of New South Wales[50]	Yes	Education Focused Academic
University of Notre Dame Australia[51]	Yes	Teaching Scholar
University of Queensland[52]	Yes	Teaching Focused
University of South Australia[53]	Yes	Teaching Academic
University of Southern Queensland[54]	Yes	Teacher Specialisation and Scholarship
University of the Sunshine Coast[55]	Yes	Teaching Focus
University of Sydney[56]	Yes	Education Focused

[32] *Deakin University Enterprise Agreement 2017*.
[33] *Edith Cowan University Enterprise Agreement 2017*, s 9.7.
[34] *Flinders University Enterprise Agreement 2019 to 2022*, sch 11.
[35] *Griffith University Academic Staff Enterprise Agreement 2017–2021*.
[36] *James Cook University Enterprise Agreement 2016*, s 15.3.
[37] *La Trobe University Collective Agreement 2018*, ss 50.16–19.
[38] *Macquarie University Academic Staff Enterprise Agreement 2018*, s 17.5.
[39] *Monash University Enterprise Agreement (Academic and Professional Staff) 2014*.
[40] *Murdoch University Enterprise Agreement 2018*.
[41] *Queensland University of Technology Enterprise Agreement (Academic Staff) 2018–2021*.
[42] *RMIT University Enterprise Agreement 2018*.
[43] *Southern Cross University Enterprise Agreement 2018*, s 402.
[44] *Swinburne University of Technology, Academic & General Staff Enterprise Agreement 2017*.
[45] *University of Adelaide Enterprise Agreement 2017–2021*.
[46] *University of Canberra Enterprise Agreement 2019–2022*, s 44.6.
[47] *University of Melbourne Enterprise Agreement 2018*.
[48] *University of Newcastle Academic Staff and Teachers Enterprise Agreement 2018*, ss 55.26–55.31.
[49] *University of New England Academic and ELC Teaching Staff Collective Agreement 2014–2017*, s 20.2.2.
[50] *University of New South Wales (Academic Staff) Enterprise Agreement 2018*, s 15.0(b).
[51] *University of Notre Dame Australia Staff Enterprise Agreement 2015–2017*, sch 1 sub-cl 1.1.
[52] *University of Queensland Enterprise Agreement 2018–2021*, s 58.3.
[53] *University of South Australia Enterprise Agreement 2019*, s 35.4(c).
[54] *University of Southern Queensland Enterprise Agreement 2018–2021*, s 17.
[55] *University of the Sunshine Coast Enterprise Agreement 2014–2018*, s 8.2.2.
[56] *University of Sydney Enterprise Agreement 2018–2021*, ss 96–103.

University of Tasmania[57]	Yes	Teaching Focused and Teaching Intensive
University of Technology Sydney[58]	Yes	Education-Focused
University of Western Australia[59]	No	
University of Wollongong[60]	No	
Victoria University[61]	No	
Western Sydney University[62]	No	

Although this information does not explicitly specify the number of Australian law academics who are working in teaching specialist roles, it does illustrate the growing number of universities creating explicit teaching specialist academic positions. This suggests that the prevalence of teaching specialist academic roles in Australian law schools is increasing.

III THE PROJECT: AAUT LAW RECIPIENTS' VIEWS ON LEGAL EDUCATION

The preliminary purpose of the project was to explore the concept of effective legal teaching in higher education from the perspective of experienced Australian legal educators whose teaching has gained national recognition through the receipt of an AAUT Citation and/or Teaching Award. To ascertain the views of AAUT recipients within the discipline of law, legal academics who have been awarded an AAUT Citation or Teaching Award between 2009 and 2018 were asked to participate in a one-off, standardised, open-ended interview. All interviewees were asked the same questions and were provided with the questions in advance. A total of four AAUT legal academic recipients participated in the project.[63]

The project received human research ethics approval prior to commencement,[64] and all participants were provided with an information statement explaining the nature of the project before express consent was obtained. All interviews were conducted and finalised in 2018.[65] Due to the sample size of the project, qualitative data analysis software (such as NVivo) was not used.

The primary aim of the project was to uncover any common thinking patterns or teaching approaches between nationally acclaimed legal academics on the topic of effective legal teaching. However, current developments in legal education and higher education more broadly were also asked about and discussed in the interviews. Given the trend towards specialist academic roles in higher education, this issue was raised to obtain the perspectives

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[57] *University of Tasmania Academic Staff Agreement 2017–2021*, s 74.1(a).
[58] *University of Technology Sydney Academic Staff Agreement 2018*, s 38.1.
[59] *University of Western Australia Academic Employees Agreement 2017*.
[60] *University of Wollongong (Academic Staff) Enterprise Agreement 2015*.
[61] *Victoria University Enterprise Agreement 2013*.
[62] *Western Sydney University Academic Staff Agreement 2017*.
[63] Between 2009 to 2018, 65 AAUT Citations and 9 AAUT Teaching Awards were conferred on recipients who teach in the discipline of law. Therefore, the four AAUT legal academics who participated in the project represent approximately 5.41 per cent of the possible AAUT law academic recipients who could have qualified for this project.
[64] Curtin University Human Research Ethics Office approval number: HRE2018-0175.
[65] For a more detailed discussion of the project methodology, see Do and Ricciardo (n 9).

of the experienced legal academics interviewed, all of whom have had at least 10 years of teaching experience in the higher education sector.

A *AAUT Law Recipients' Views Relating to Teaching Specialisation*

Interviewees were asked the following question: 'Do you think universities, in particular law schools, should move towards having specialist teachers and specialist researchers?' Generally the interviewees' responses to this question provided a balanced and reasoned perspective on teaching specialisation. All four interviewees expressed sentiments in favour of teaching specialisation in law schools, but also spoke of the dangers of such a shift.

The most common argument cited in support of teaching and research specialisation was that specialisation would enable legal academics to do more of what they enjoy and are good at, and be recognised for that:

> I think the problem is that you can have people that are really good researchers and not great teachers, and you know, maybe people who are great teachers, but they don't particularly like writing in their discipline area. So why not capitalise on people's strengths? Seems to make sense to me.

> I do think it's a good idea for people who have a particular interest — I think it is legitimate too — for people to be allowed to focus on different things … I do have a [teaching-intensive role] … I'm a really good teacher and I'm interested in good teaching. It's better for me to focus on that and be rewarded for my focus on that … I'm happy to write about things that come up, but it's not my natural interest … I can contribute more by being allowed to focus on what I'm interested in, and there are equally others who find [research] really fascinating — that's important too, but it's not my bag as much as it is someone else's. So I think well then let them focus on what they're uniquely good at.

> [Within my law school] there are some people on 'teaching-intensive' appointments so there are some people who are specialist teachers and specialist researchers, but the bulk of staff are in a teaching and research position, and that seems like a reasonable balance to me … I often hear people say that 'people who can be great researchers can also be great teachers'. I think researchers probably have a great wisdom and knowledge in their area, but whether that translates to being a great teacher probably has a lot to do with the individual themselves. Happily in many instances it probably does accord, but not always.

One interviewee also pointed to the positive impact that teaching specialists could have on teaching quality, practice and innovation within law schools:

> Yes [I do support teaching specialisation] because we really need people, I think, to have the energy and the drive to innovate and lead change. And I know that does sound cliché, but … without people that can focus on that, and then sort of be drivers of change and lead by example, we'll stagnate.

Three interviewees expressed views that complete teaching specialisation — that is, 'teaching-only' positions — may be undesirable because of the role that research plays in informing good teaching:

> I think if you're a teacher you do need to research to some extent, because I think that makes you a better teacher.

> I think there's something about research though, because what research does — you write — and in writing you learn so much! The act of writing is so important to being a teacher as well. Research is

> learning. You can forget how hard it is to write. You can mark student essays but when you're given a blank page, it's just not easy! It's hard. And it doesn't really matter who you are! There are all kinds of difficulties but when you're marking student work in this high-and-mighty position I think that you need to appreciate how hard it is to do that.
>
> The reason I thought [law schools should not engage specialist teachers] was because obviously you've got to be up with what's going on in the discipline, so you need to have the sort of subject research there.

However, one interviewee indicated that their views had changed on this issue, continuing:

> But then, I was thinking about it and I thought well, no, of course you're going to do that anyway — you might not be publishing in your discipline area if you're teaching-focused but you're still always learning about it because that's what a good teacher does.

In explaining their support of teaching specialisation in law schools, one interviewee even questioned the value of legal research:

> I think the notion of research in law is a little bit silly because we have judges. I think I'd lose that argument, but I don't see the problem with specialist roles.

Only one interviewee opined that the relationship between teaching and research is actually symbiotic, and cautioned that specialisation in law schools could negatively impact on the quality of the school's research contributions:

> I think it's a danger … because the thing is, too, research does inform my teaching and my teaching informs research. To make me 'teaching-only' and then to have no research expectation, I think, would be very narrow because then there'd be no impetus for me to share what I'm doing or to share my practices … I think I can contribute quite a bit writing about that.

That interviewee also warned that teaching specialisation could lead to a 'second class' of academic within law schools:

> If you have such a teaching load that you don't have time to research, I don't think that's a good practice at all, and I think … there's a danger that would lead to a ghettoisation workforce, and inevitably teaching would be viewed as lesser.

Similarly, another interviewee discussed the perception of teaching as being less difficult or worthy than research, and offered opinions about institutional reforms that would need to take place if teaching specialisation were to occur in law schools:

> My only caution would be that [the workload model] tends to be thought up by the researchers … and people think teaching is easy. So because it's easy to quantify, it's not apples with apples. It's hard to achieve equity in those roles and obviously organisationally there would have to be a clear career progression for those teaching-only staff.

Finally, one interviewee associated law school specialisation with the erasure of choice and variation in the academic role, stating:

> I wouldn't want to see it that you're either a teacher or a researcher because I love both! So I wouldn't like it for that.

IV IMPLICATIONS OF TEACHING SPECIALISATION IN AUSTRALIAN LAW SCHOOLS

As the interviewees' responses indicate, the potential implications of teaching specialisation in law schools are varied. This part considers in greater depth the effects of teaching specialisation that may be unique to, or particularly felt within, law schools and the teaching of law. This part will first explore whether specialisation in law schools might position teaching specialists as a lesser 'class' of legal academic. It will then examine the potential consequences of teaching specialisation for the health and wellbeing of legal educators who are teaching specialists.

Much has already been written on the nexus between teaching and research in higher education generally,[66] with some of this literature relating specifically to the legal academy.[67] As such, this paper does not seek to speculate about the potential impact of role specialisation on the overall quality of teaching and research within law schools.[68]

A *Implications for Perceptions of Teaching Specialist Legal Academics*

Much of the literature on teaching specialisation in universities has pointed to a danger that specialisation could lead to a 'two-tiered' academic workforce, with teaching specialists being valued less than traditional teaching-research academics.[69] This view also seems to be present within law schools, as reflected in one interviewee's perspective (extracted more fully in Part III): '[T]here's a danger that would lead to a ghettoisation workforce, and inevitably teaching would be viewed as lesser.'

In speaking of teaching and research within Australian law schools, Arvanitakis and Matthews note that legal academics 'appointed to "teaching only" positions, even those with distinguished practice experience, are considered to be in an inferior situation to research-teaching and research-only appointments'.[70] This observation explicitly corroborates the view that teaching specialists might be perceived as a lesser 'class' of academic within law schools, but an important and interesting point is also implied within Arvanitakis and Matthews' observation. Implicit within their statement seems to be a perception that teaching specialist

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[66] See, for example, Ruth Neumann, 'Researching the Teaching-Research Nexus: A Critical Review' (1996) 40(1) *Australian Journal of Education* 5; Malcolm Tight, 'Examining the Research/Teaching Nexus' (2016) 6(4) *European Journal of Higher Education* 293; Esther Gottlieb and Bruce Keith, 'The Academic Research-Teaching Nexus in Eight Advanced-Industrialized Countries' (1997) 34(3) *Higher Education* 397; Ademir Hajdarpasic, Angela Brew and Stefan Popenici, 'The Contribution of Academics' Engagement in Research to Undergraduate Education' (2015) 40(4) *Studies in Higher Education* 644.

[67] See, for example, Marina Nehme, 'The Nexus between Teaching and Research: Easier Said than Done' (2012) 22(2) *Legal Education Review* 241; Deborah Jones Merritt, 'Research and Teaching on Law Faculties: An Empirical Exploration' (1998) 73(3) *Chicago-Kent Law Review* 765.

[68] For an analysis of the effect of teaching specialisation on the quality of teaching and research in Australian universities, see generally Probert (n 1) 26–35.

[69] See, for example, Flecknoe et al (n 7) 275, 286; Bennett et al (n 7) 10–11; Nyamapfene (n 1) 23.

[70] James Arvanitakis and Ingrid Matthews, 'Bridging the Divides: An Interdisciplinary Perspective on the Teaching-Research Nexus and Community Engagement' (2014) *Adelaide Law Review* 4, 37.

legal academics with distinguished practice experience may be considered to be in a superior situation to teaching specialist legal academics without such experience.

More so than many other disciplines, current and former practitioners play a prominent role in teaching within law schools.[71] Legal academics who have come to teach law during or after a distinguished practicing career are typically highly respected by students and valued greatly by law schools.[72] The existence of practitioner-teachers in law schools may in fact mean that teaching specialisation within law schools risks creating something more problematic and divisive than a 'two-tiered' workforce or a 'second class' of academic. Rather, wider teaching specialisation within law schools could in fact lead to a 'multi-tiered' workforce with 'third class' academics and beyond. This is because teaching specialist academics without distinguished careers in legal practice may be valued less than teaching specialists with such experience, and less than academics with traditional teaching-research or research specialist positions.

Arguably, however, this varied composition of researchers, teachers and practitioners within law schools is nothing new and not something that the legal academy should be wary of. Referring to academic roles generally, Probert notes that what we now regard as '[t]he "traditional" academic [role] is not, in fact, very traditional'.[73] Specifically within Australian law schools, Cowley observes:

> The picture one gains of legal education during the 19th and much of the 20th century in Australia is that it was primarily vocational; content of the programs was largely dictated by the professional admitting bodies and *taught by practitioners in a part-time capacity*.[74]

Whilst law is now largely taught by 'legal academics with postgraduate qualifications, whose teaching is informed by wide-ranging and in-depth research',[75] this was not always the case. Arguably, the legal academy is now well accustomed to accepting and respecting teachers of law who come from a range of backgrounds with varied specialisations that — in different ways — equip them to teach law students well. As such, it may be that law schools are well equipped to thrive with a mix of specialised and non-specialised academics, just as they have (and do) with a mix of academics who come from distinguished practice backgrounds or other backgrounds. This diversity may also better suit the needs of diverse cohorts of law students who now have a range of aspirations within and beyond the legal profession.[76]

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[71] Cowley (n 2) 284; Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50(6) *Modern Law Review* 709, 710–12; John H Wade, 'Legal Education in Australia — Anomie, Angst, and Excellence' (1989) 39 *Journal of Legal Education* 189, 191.
[72] See Wade (n 71) 194, which posits: 'In Australia, substantial credibility lies with successful legal practitioners who also teach. Giving recent "practical" examples in class clearly adds credibility and authority.' See also Hugh W Silverman, 'The Practitioner as a Law Teacher' (1971) 23(3) *Journal of Legal Education* 424, 434.
[73] Probert (n 1) 7.
[74] Cowley (n 2) 284 (emphasis added).
[75] Ibid.
[76] Ibid.

Law schools may therefore be uniquely positioned to capitalise on their history to accommodate a mix of specialised and non-specialised academics without developing a 'multi-tiered' workforce. This will, however, depend greatly upon an appropriate approach being taken by law schools that specialise their academic workforce — a matter that is considered in greater depth in Part V of this paper.

B *Implications for Teaching Specialist Legal Academics' Health and Wellbeing*

It is well recognised that the nature of academic life can carry with it serious adverse consequences for health and wellbeing.[77] Teaching specialist academics are likely to encounter varied occupational health issues compared to their colleagues with traditional teaching-research roles. For example, academics with heavy teaching loads and large class sizes are at high risk of developing dysphonia, a voice disorder that can have a significant impact on quality of life. According to Carding and Wade:

> The main risk factors for non-organic dysphonia include excessive use of the voice, limited vocal recovery time, and stress … These problems are typically reported not only by the actor with a demanding performance schedule but also by the teacher of a large class.[78]

Academic life also presents challenges to psychological wellbeing.[79] Though the wellbeing of legal academics is under-researched compared to the vast literature examining psychological distress in law students and lawyers,[80] many legal academics also experience psychological distress.[81] Some of the factors that can lead to higher levels of stress and psychological distress in legal academics may be disproportionately experienced by teaching specialist legal academics. A recent study by Wilson and Strevens explored the wellbeing of law teachers in the United Kingdom, and observed that sources of stress for legal academics include having 'too much to do, feeling out of control, overwhelmed by demands, and [having] bad relationships with co-workers'.[82] Drawing on self-determination theory, Wilson and Strevens concluded that surveyed law teachers who felt lower levels of autonomy, competence and relatedness reported higher levels of depression, anxiety and stress.[83] In particular, the study noted that autonomy over one's work seems to be of high importance to law teachers.[84]

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[77] Paula Baron, 'Thriving in the Legal Academy' (2007) 17(1&2) *Legal Education Review* 27, 27.
[78] Paul Carding and Andrew Wade, 'Managing Dysphonia Caused by Misuse and Overuse' (2000) 321(7276) *British Medical Journal* 1544, 1544.
[79] Baron (n 77) 27, 43–44.
[80] Ibid; Paula Baron, 'A Dangerous Cult: Response to the Effect of the Market on Legal Education' (2013) 23(2) *Legal Education Review* 273, 283–84.
[81] Clare Wilson and Caroline Strevens, 'Perceptions of Psychological Well-being in UK Law Academics' (2018) 52(3) *The Law Teacher* 335.
[82] Ibid 345. Note that Australian research concerning the wellbeing of legal academics in Australia has been conducted by Rachel Field and Colin James, and is forthcoming.
[83] Wilson and Strevens (n 81) 344.
[84] Ibid 346–49.

1 *Self-Determination Theory and Teaching Specialist Legal Academics*

Wilson and Strevens' study did not directly explore the particular experience of legal educators who are teaching specialists. However, there are a number of indications that teaching specialist legal academics would be likely to experience feelings of low autonomy, competence and relatedness, which may lead to poor wellbeing.

Teaching specialist legal academics may have less autonomy over their work than other legal academics. The academic role has traditionally been characterised by a high degree of autonomy and relatively low levels of day-to-day supervision.[85] Arguably, this traditional characterisation has changed for all academic roles in the wake of corporatisation of the higher education sector in Australia and many other countries.[86] Research, however, is still conceptualised as the function that provides academics with more freedom and autonomy in relation to what the academic does, how they do it, and when they do it.[87] Teaching, on the other hand, can be characterised by lower levels of freedom.[88] Class times, sizes and formats are not always flexible and are often dictated by the institution. Unlike researchers who are generally free to research in any area that is of interest to them, teaching academics are not always able to choose the particular units they teach, and are often not able to adjust the curriculum of their units in any material way.[89] This is particularly the case in Australian law schools, where the highly prescriptive requirements of the Law Admissions Consultative Committee's Academic Requirements for Admission (previously called the 'Priestly 11') mean that there is often very little 'wriggle-room' for academics teaching core units to choose the individual topics that they do or do not teach within their units. Teaching academics taking core units may also have little freedom in relation to choosing the form of assessment in their units, in part due to 'curriculum-mapping' within law schools to ensure that students build a number of core skills through the various assessment pieces in the course structure (for example, some units may be allocated research papers, whereas assessment in other units may involve presentations, moots, or mock client interviews).[90] As a consequence of these factors, it seems probable that legal academics with higher teaching loads — including teaching specialists — might feel that they have less autonomy in their work than their academic colleagues with fewer or no teaching responsibilities.[91]

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[85] Nick Fredman and James Doughney, 'Academic Dissatisfaction, Managerial Change and Neo-liberalism' (2012) 64(1) *Higher Education* 41, 45.
[86] Mary Henkel, 'Academic Identity and Autonomy in a Changing Policy Environment' (2005) 49(1) *Higher Education* 155; Nickolas James, 'The Good Law Teacher: The Propagation of Pedagogicalism in Australian Legal Education' (2004) 27(1) *University of New South Wales Law Journal* 147, 162.
[87] Arvanitakis and Matthews (n 70) 37.
[88] Ibid; James (n 86) 162.
[89] See generally Richard Johnstone and Sumitra Vignaendra, Higher Education Group, Department of Education, Science and Training, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (Report, January 2003) 224–26.
[90] Universities largely undertake 'curriculum-mapping' processes for the purposes of assuring and demonstrating integration of the university's course learning outcomes and university graduate attributes pursuant to the *Higher Education Standards Framework (Threshold Standards) 2015* (Cth).
[91] See generally Nick James, 'How Dare You Tell Me How to Teach!: Resistance to Educationalism within Australian Law Schools' (2013) 36(3) *University of New South Wales Law Journal* 779, 804.

In relation to feelings of competence, Wilson and Strevens observe that many legal academics associate 'feelings of low competency (inability to do a good job due to work demands) with stress'.[92] Wilson and Strevens point to a number of factors as the source of low competency feelings in legal academics, with those particularly relevant to teaching specialists including 'increased student numbers and new notions of student contracts with universities … [and] more regular curriculum redesign with demands for more diverse modes of delivery'.[93] Whilst there are therefore aspects of a teaching specialist legal academic's work that might lead to lower feelings of competency, it is possible that the very reason why many teaching specialists are in such a role is because they feel more competent doing teaching than other aspects of academic work. As such, those individuals might feel higher levels of competency than if they were in a traditional teaching-research role. This perspective is corroborated by a 2017 Australian study on education-focused academics by Flecknoe et al, which found that the majority of participants 'had strong confidence in their teaching skills, with some contrasting this to a lack of self-confidence in their discipline research'.[94] This view is also broadly reflected in one of the interviewee's responses to the present project (extracted more fully in Part III):

> I do have a [teaching-intensive role] … I'm a really good teacher and I'm interested in good teaching. It's better for me to focus on that and be rewarded for my focus on that … I can contribute more by being allowed to focus on what I'm interested in.

However, this perspective cannot necessarily be generalised to all teaching specialists within law schools — in part because not all teaching specialist academics have made an active choice to be in such a role. Whilst some teaching specialists applied for those roles, other people in teaching specialist roles at Australian universities experienced 'enforced transition' as part of institutional restructuring and reshaping.[95] Even for those who do apply for teaching specialist roles, this may not be out of any real choice. For those looking to commence an academic career the only roles open for them to apply for may be teaching specialist positions.[96] These cohorts would perhaps be less likely to feel the same heightened feelings of competence as those academics who have made an active and genuine choice to be teaching specialists.

Relatedness refers to the forming of positive relationships with others, for example, colleagues. Wilson and Strevens note that the 'ability to build collegiality at work may be more difficult for law teachers than for other academics'.[97] They also identify increased expectations from students and 'increased role demands including increased student numbers' as some of the factors that contribute to difficulty with building collegiality.[98] These factors are likely to be of

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[92] Wilson and Strevens (n 81) 346.
[93] Ibid 346–47.
[94] Flecknoe et al (n 7) 5–6.
[95] Bennett et al (n 7) 276. In relation to this cohort, Bennett et al state that 'a majority would find it challenging to "repackage" their knowledge and skill sets to align with enforced and potentially impermanent role transitions, thereby compromising their employability, marketability, and even their survival in their new positions'. This indicates that they may be particularly prone to lower feelings of competence.
[96] Ibid 277.
[97] Wilson and Strevens (n 81) 347.
[98] Ibid 347–48.

particular relevance for teaching specialist legal academics. Further, whilst there are research networks, hubs and centres within law schools and across faculties to foster collegiality, comparable teaching networks within law schools and institutions are less common.

Arguably legal academics may also feel relatedness as a result of their interactions with students and the connections they form with their students. Meaningful connectedness between a law teacher and their students can be characterised as a foundation for effective legal teaching.[99] As such it may be contended that because teaching specialist legal academics typically have more contact with students due to the nature of their heavier teaching loads, they have many opportunities for this kind of relatedness open to them in the course of their work. However, there are a number of difficulties that may hinder a legal academic's ability to foster meaningful connections with their students. For example, many legal academics — particularly those who are teaching specialists — may teach many hundreds of students in any given teaching period.[100] As a consequence of this, the sheer quantity of opportunities for relatedness with students may actually be counterproductive, jeopardising the potential quality of those connections and in fact resulting in lower feelings of relatedness for the teaching specialist legal academic.

2 *Teaching Law and Emotional Labour*

Teaching specialist legal academics may be at greater risk of burnout and emotional exhaustion than their teaching-research colleagues due to the emotional labour inherent in teaching work. Emotional labour refers to the exchange of emotional work for payment, and usually occurs within professions and occupations that require workers to exhibit certain 'appropriate' emotions whilst managing the feelings of other people.[101] As put by Heath et al:

> Law teachers are implicitly (if not explicitly) expected to be able to build rapport with and between students; exercise tact in providing effective constructive feedback; deal with inappropriate and, at times, confrontational in-class interactions; manage the delivery and impact of sensitive and challenging material; [and] encourage confidence, persistence and resilience in students … These are among the many aspects of academic work which could be characterised as emotional labour … academics are routinely expected to manage their own feelings so as to provide the customer service demanded by universities and law students … and to generate particular emotions in others (students, for example).[102]

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[99] Do and Ricciardo (n 9).
[100] Johnstone and Vignaendra (n 89) 321–44.
[101] Da-Yee Jeung, Changsoo Kim and Sei-Jin Chang, 'Emotional Labor and Burnout: A Review of the Literature' (2018) 59(2) *Yonsei Medical Journal* 187, 187–88; Blake Ashforth and Ronald Humphrey, 'Emotional Labor in Service Roles: The Influence of Identity' (1993) 18(1) *The Academy of Management Review* 88, 90; Alicia A Grandey, 'Emotion Regulation in the Workplace: A New Way to Conceptualize Emotional Labor' (2000) 5(1) *Journal of Occupational Health Psychology* 95; Heath et al (n 18) 433. See also Amy S Wharton, 'The Affective Consequences of Service Work: Managing Emotions on the Job' (1993) 20(2) *Work and Occupations* 205.
[102] Heath et al (n 18) 433. See also Emmanuel Ogbonna and Lloyd C Harris, 'Work Intensification and Emotional Labour among UK University Lecturers: An Exploratory Study' (2004) 25(7) *Organization Studies* 1185, 1188–93.

Though emotional labour can be enjoyable, it also contributes to exhaustion, stress and psychological distress.[103] Heath et al contend that 'some aspects of emotional labour are specific to teaching law', pointing to factors such as teaching about injustice and receiving student disclosures of trauma.[104] This emotional labour is disproportionately experienced by legal academics with high levels of student contact, including sessional law teachers and teaching specialists.[105]

Receiving disclosures of trauma and mental health issues from students can be particularly troubling for law teachers. Wilson and Strevens note that increased student disclosures may impact on a legal academic's perceptions of competency.[106] Many teaching specialists are in such a role because they genuinely care about students, and it can be distressing when they feel unable to assist their students with these issues.[107] The troubling nature of this impact is compounded by the fact that teaching specialist legal academics may have relatively weak collegial support networks to reach out to if they feel distress (as outlined above in relation to relatedness).[108]

V HOW LAW SCHOOLS SHOULD PROCEED

To capitalise on any shift towards a specialist academic workforce in the higher education sector, it is critical that law schools navigate this transition carefully. Law schools need to address the negative perceptions and implications associated with teaching specialist academic roles to ensure that teaching specialist legal academics are afforded opportunities to thrive professionally. Whilst some of the negative perceptions and implications of teaching specialist roles are systemic within the higher education sector nationally and internationally, in order to achieve broad cultural and attitudinal change such change must first occur locally at a school, faculty and institutional level. Law schools taking active measures to address the negative perceptions and implications arising with the implementation of teaching specialist roles will in turn be better placed to maximise any inherent benefits of a specialised workforce.

A *Addressing Perceptions of Teaching Specialist Legal Academics*

The concern that teaching specialist academics would be valued less than traditional teaching-research academics or research specialist academics stems from the long-standing university culture that promotes and favours research over teaching,[109] which has ultimately led to

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[103] See, for example, Wharton (n 101); Amy S Wharton, 'Service With a Smile: Understanding the Consequences of Emotional Labor' in Cameron Lynne Macdonald and Carmen Sirianni (eds), *Working in the Service Society* (Temple University Press, 1996) 91; Karen Pugliesi and Scott L Shook, 'Gender, Jobs and Emotional Labor in a Complex Organization' in Rebecca J Erickson and Beverley Cuthbertson-Johnson (eds), *Social Perspectives on Emotion* (Emerald Group Publishing, 1997) vol 4, 283.
[104] Heath et al (n 18) 433–34.
[105] See ibid 435 in relation to the disproportionate impact on sessional academics.
[106] Wilson and Strevens (n 81) 348.
[107] As put by ibid, 'neither lawyers nor academics are experts in mental health issues or counselling'.
[108] Ibid 347–48.
[109] See, for example, Flecknoe et al (n 7) 275, 286; Bennett et al (n 7) 10–11; Nyamapfene (n 1) 23.

disparity of esteem between the two activities.[110] There have been attempts nationally by the Australian government to alter this perception — for example, one of the aims of establishing the AAUT scheme in 1997 was to raise the status of teaching in higher education.[111] Whilst the AAUT 'have become a valued form of recognition for university educators Australia wide',[112] the award scheme has not successfully elevated the status of teaching to that of research in the higher education sector, as it is still reported that research is valued over teaching.[113] Evidently, there needs to be a cultural shift within the higher education sector if teaching specialist roles are ever to be seen as equal. As this is a significant change, it will take time to transform the attitudes and perceptions of the sector, and it is not necessarily something that any individual law school may be able to achieve. What law schools can do is take measures to raise the profile of teaching within their school and, over time and with the collective efforts of others, the perceptions of teaching may change.

One suggested approach to ensure teaching specialist legal academics feel as valued as their teaching-research or research specialist colleagues is for law schools to create tangible recognition schemes to reward teaching excellence.[114] A majority of Australian universities have formalised teaching award schemes at both a faculty and institutional level that are aligned to the AAUT criteria. Law schools that have not already done so should follow suit and also establish a teaching award scheme within the school. These school-based teaching awards can be used as a basis for academics to progress towards applying for faculty and institutional awards. Given that research indicates a vast majority of teaching specialist academics consider awards for teaching excellence to be important, this is a simple and effective way to demonstrate to teaching specialist academics that their work is valued at a school level and by their direct line management.[115]

B *Promoting Health and Wellbeing for Teaching Specialist Legal Academics*

As universities shift towards recognising and implementing teaching specialist academic roles, law schools must handle this transition with caution in order to support the health and wellbeing of legal academics who take on teaching specialist positions. Drawing on Wilson and Strevens'

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[110] Probert (n 1) 2.

[111] Mark Israel and Dawn Bennett, 'National Teaching Awards and the Pursuit of Teaching Excellence' in Christine Broughan, Graham Steventon and Lynn Clouder (eds), *Global Perspectives on Teaching Excellence: A New Era for Higher Education* (Routledge, 2018) 106, 107.

[112] 'Australian Awards for University Teaching', *Universities Australia* (Web Page, 2020) <https://www.universitiesaustralia.edu.au/policy-submissions/teaching-learning-funding/australian-awards-for-university-teaching>.

[113] See, for example, Probert (n 1) 2.

[114] See Bennett et al (n 7) 278; see also Probert (n 1) 26–27, quoting Mark Israel, Australian Learning & Teaching Council, *The Key to the Door?: Teaching Awards in Australian Higher Education* (Fellowship Final Report, 2011) 4.

[115] See Emmaline Bexley, Richard James and Sophie Arkoudis, Centre for the Study of Higher Education, University of Melbourne, *The Australian Academic Profession in Transition: Addressing the Challenge of Reconceptualising Academic Work and Regenerating the Academic Workforce* (Report prepared for the Department of Education, Employment and Workplace Relations, September 2011) 26–27, which finds that 71 per cent of teaching-only academics regard teaching excellence awards as important.

work and self-determination theory generally, it appears that poor psychological wellbeing in law teachers is linked to lower feelings of autonomy, competence and relatedness.[116] Therefore, where possible within the constraints of university bureaucracy, law schools should make attempts to enable autonomy, foster competence, and create opportunities for teaching specialist legal academics to feel relatedness with colleagues and students.

In order to reap the benefits of a specialist academic workforce, legal academics must have autonomy in choosing whether to take up or move into a teaching specialist role. Any perceived lack of choice (for example, through enforced transition) may not only have negative implications for the health and wellbeing of academics who are forced to take on these positions,[117] but the learning experience of students could also be adversely impacted.[118] Consistent with the importance of this choice, some university EBAs state that teaching workload allocations should not be used as a punitive measure for academics who have not met their research outputs in the previous year.[119] Additionally, with respect to teaching-only and education-focused positions, some university EBAs indicate that staff can move from these positions to a more traditional teaching-research role at the discretion of the school management, depending on the staffing and budgeting needs of the school.[120]

Where possible, law schools should provide academics with autonomy by allowing law teachers to select the units that they teach. Aligning a legal academic's interest with the units that they are assigned to teach has inherent benefits for both the academic and their students.[121] Whilst academics responsible for core units may have restricted autonomy with respect to the content that must be covered and learning outcomes that must be assessed, where possible law schools should include teaching academics in periodic curriculum mapping discussions and reviews. Being involved in such discussions and reviews will permit academics to have some input in determining the learning outcomes and assessment items to be covered in the units they teach. Research also indicates that involving academics in curriculum mapping processes and empowering academics to be involved in the mapping of university graduate attributes increase the likelihood of successful integration of graduate attributes.[122]

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[116] Wilson and Strevens (n 81) 344.
[117] See Bennett et al (n 7) 278, which notes that teaching specialist academics who encounter enforced transition are described as 'less content' and 'not too happy'.
[118] Ibid 283.
[119] For example, *University of the Sunshine Coast Enterprise Agreement 2014–2018*, sch 6.
[120] For example, *University of Tasmania Academic Staff Agreement 2017–2021*, s 74.1(e) states that an 'Academic Staff Member's workload category may be altered for an agreed period. Requests to alter the workload category will not be unreasonably refused.' Similarly, *University of South Australia Enterprise Agreement 2019*, s 35.5 states that '[n]othing in this clause restricts a staff member from changing their career pathway with the agreement of their Head of School (or equivalent) as part of performance development and management discussions'.
[121] Feng Su and Margaret Wood, 'What Makes a Good University Lecturer? Students' Perceptions of Teaching Excellence' (2012) 4(2) *Journal of Applied Research in Higher Education* 142, 149; see also Wilson and Strevens (n 81) 345–46, which notes that choice in processes such as workload allocation is important to law teachers who value autonomy. It is also likely that this choice will increase feelings of competence, as presumably academics would choose to teach subjects that they feel confident teaching.
[122] Beverley Oliver, LSN Teaching Development Unit, Curtin University, *Teaching Fellowship: Benchmarking Partnerships for Graduate Employability* (Final Report, 2010) 18.

Creating occasions for academics to network with likeminded peers will help teaching specialist legal academics feel a sense of relatedness.[123] At a regional level, the Australasian Law Academics Association ('ALAA') is an established platform for legal academics to 'network, collaborate and share expertise'.[124] The annual ALAA conference provides an opportunity to engage and share in SoTL, and also connect with other legal academics across the Australasian region. In Western Australia, representatives from three of the Western Australian law schools organised the Western Australian Teachers of Law ('WAToL') forum in 2017, an event that has since been held annually. Similar to ALAA, the intended purpose of WAToL is to 'establish and promote collegial networks and collaboration' at a state level.[125] To facilitate collegial opportunities at a school level, law schools should establish teaching and education-related networks, hubs and centres, equivalent to those established for the purposes of research.[126] These teaching and education groups will not only provide opportunities for academics to share learning and teaching practices, but can also facilitate research opportunities in the area of SoTL. Creating avenues for teaching specialists to engage with academics with similar academic profiles and interests can increase feelings of relatedness, which may in turn have a positive impact on a legal academic's overall mental health and wellbeing.[127]

Given that establishing meaningful connections with students has been identified as a basis for establishing effective legal teaching,[128] it is important for academic workloads to adequately reflect the time it takes to build such connections with students. If this time is not appropriately accounted for in academic workloads, it may impose a disproportionate burden of emotional labour on teaching specialist legal academics and thereby adversely impact their health and wellbeing.[129] As part of addressing this concern, law schools should incorporate reasonable student consultation hours within teaching specialist academic workload allocations to account for the time spent with students outside of the classroom.

Common concerns associated with teaching specialist academic roles include whether there are genuine career pathways and progression opportunities for academics who assume these roles.[130] Similar sentiments were raised by an interviewee as a part of the project:

> It's hard to achieve equity [between teaching specialist roles and traditional teaching-research roles] and obviously organisationally there would have to be a clear career progression for those teaching-only staff.

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[123] Flecknoe et al (n 7) 11.
[124] 'About Us', *Australasian Law Academics Association* (Web Page, 2019) <https://www.alaa.asn.au>.
[125] The intended purpose of the WAToL forum was stated in the forum flyer distributed via email in January 2017.
[126] Though many law schools have formal learning and teaching committees, these are typically concerned with broad learning and teaching issues that arise within the school, and do not typically provide academics with opportunities to network, collaborate and share ideas in relation to teaching and education more generally.
[127] Flecknoe et al (n 7) 11; Wilson and Strevens (n 81) 347.
[128] Do and Ricciardo (n 9).
[129] Heath et al (n 18) 434–35.
[130] See, for example, Probert (n 1) 17; Dawn Bennett, Lynne Roberts and Subramaniam Ananthram, 'Teaching-Only Roles Could Mark the End of Your Academic Career', *The Conversation* (Web Page, 28 March 2017) <https://theconversation.com/teaching-only-roles-could-mark-the-end-of-your-academic-career-74826>.

Although academic promotion policies are established by university management with little input at school level, law school management can nevertheless encourage teaching specialists who have tangible evidence demonstrating teaching excellence to apply for promotion within the confines of the promotion criteria. Probert notes that, despite perceptions that universities do not value teaching as highly as research, 'evidence suggests that academics who apply for promotion on the basis of teaching excellence are not in fact disadvantaged by this compared to those claiming research excellence'.[131] Whether teaching specialist applications are approved may be beyond the control of law school management, however encouragement and recognition from direct management can boost the academic's morale and feelings of competence.[132] In order to begin developing university cultures that genuinely facilitate teaching specialist career pathways, law schools must support and encourage teaching specialist academics to apply for promotion when appropriate.

VI CONCLUSION

Academic roles at Australian universities are increasingly deviating from the traditional 40:40:20 model. As part of this shift, universities are employing more academics in teaching specialist roles that require them to undertake a higher proportion of teaching and education-related duties. Despite the trends towards teaching specialisation in higher education generally, there has been little consideration of the impact of teaching specialisation within law schools in the relevant literature. The research presented in this paper seeks to contribute to understanding the potential impact of teaching specialisation within Australian law schools, in part by providing insights from four experienced legal academics who are AAUT recipients.

The four AAUT law recipients interviewed provided mixed opinions on academic role specialisation within law schools, with all four interviewees pointing to both positive and dangerous implications of such a shift. Considering these responses in light of perspectives from the relevant academic literature, the authors contend that there are potential implications of teaching specialisation that may be unique to, or particularly felt within, law schools and the teaching of law.

One implication is that teaching specialisation within law schools could lead to a 'multi-tiered' academic workforce in which teaching specialist legal academics are valued less than other academics. To address this, the authors suggest that law schools need to play an active role in tackling the established culture in higher education that prizes research at the expense of teaching. One way to do this is by recognising the value of teaching work through teaching award schemes within law schools.

It is also contended that teaching specialist legal academics may encounter obstacles to their health and wellbeing that differ from those experienced by other legal academics. To promote optimal health and wellbeing for teaching specialist legal academics, law schools need to

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[131] Probert (n 1) 17, citing Belinda Probert, Peter Ewer and Kim Whiting, *Gender Pay Equity in Australian Higher Education* (Report prepared for the National Tertiary Education Union, 1998) 59.
[132] See generally Bennett et al (n 7) 276–77; Flecknoe et al (n 7) 8–9.

ensure that teaching specialists are provided with autonomy, duties that facilitate competence, and genuine opportunities for relatedness. Amongst other measures, this may occur through the careful consideration and planning of workload allocations in a way that involves teaching specialist legal academics in decisions that are made about their work.

Despite the varied opinions of legal academics and the potential for undesirable implications, shifts towards teaching specialisation are a reality in Australian universities and law schools. Given this reality, law schools that specialise their academic workforce must approach any transition and the new landscape in a way that visibly respects, rewards and values teaching specialist legal academics.