

# GUARDING OUR IDENTITIES: THE DILEMMA OF TRANSFORMATION IN THE LEGAL ACADEMY

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*Sufficient evidence now exists to justify profound changes to the way in which the academy teaches the LLB. Such changes would involve a shift from the adversarial individualistic doctrinal focus of the traditional law degree, to embracing appropriate dispute resolution, students' emotional intelligence and resilience, and the 'soft' skills called for in the 'real' world of work. This broad project, supported by the profession and called for by students and employers, is gaining traction with a growing body of research providing exemplars of strategies to enhance and actively evolve the curriculum to address concerning levels of psychological distress amongst law student (and lawyers). Transformation of students, and therefore lawyers, through an engaged and engaging curriculum is one thing – but where do legal academics stand on this contemporary shift in focus? This paper reflects on the genesis and the possible role of the academic lawyer's identity in contributing to, or supporting, the culture of the law more broadly. It poses the question: to what extent is the (academic) lawyer-identity itself a precondition for systematic and sustainable change in the law, and lawyering? If it is, how ready is the academy to embrace the array of strategies to engender the transformation needed?*

## I INTRODUCTION

The state of wellbeing of Australian legal practitioners and law students has been well described, particularly in recent years. The literature reveals extensive evidence of these high levels of mental distress<sup>1</sup> and, more hopefully, a wide range of evidence-based strategies designed to alleviate this.<sup>2</sup> In the Australian

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<sup>1</sup> Massimiliano Tani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19 *Legal Education Review* 3; Norm Kelk et al, 'Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers ' (2009); Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing Our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum ' (2011) 1&2 *Legal Education Review* 149; Kennon M Sheldon and Lawrence S Krieger, 'Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test and Extension of Self-Determination Theory' (2007) 33 *Personality & Social Psychology Bulletin* 883.

<sup>2</sup> Anna Huggins, Sally Kift and Rachael Field, 'Implementing the Self-Management Threshold Learning Outcome for Law: Some Intentional Design Strategies from the Current Curriculum Toolbox' (2011) 21(1&2) *Legal Education Review* 183; Anna Huggins, 'Autonomy Supportive Curriculum Design: A Salient Factor in Promoting Law Students' Wellbeing' (2012) 35(3) *University of New South Wales Law Journal* 683; Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37(1) *Monash*

context, these innovations include: teaching meditation;<sup>3</sup> alternative dispute resolution as a means of presenting law within an alternative context where principles differ from that of appellate court adversarial reasoning techniques;<sup>4</sup> embedding pastoral care strategies;<sup>5</sup> and engaging students in reflective practice as a technique to embed personal morality and ethics within the context of the law rather than building solely on doctrine.<sup>6</sup>

Through the activities of the *Tristan Jepson Memorial Foundation* and the *Wellness for Law Network*, for example, there is evidence of an active and committed community of practice around student wellness, and thoughtful and deliberate measures to address not just student wellbeing but also the long-term health of the legal profession. In spite of the depth of work being undertaken in this area, the question remains as to the extent to which the legal academy is able to design holistic, scaffolded and *consistent* curricula within our LLBs nationally. Put another way: how many of our colleagues will join in this project? For those who do not, what might be stopping them – particularly in light of the evidence that significant change is needed.

After canvassing the state of the LLB curriculum and how it needs to develop, this paper reflects on the culture of the law and the legal academy, to draw out the characteristic professional identity of the lawyer and the legal academic. In recognition of the contemporary context of the law degree within higher education, this paper will then suggest that it is the professional identity of the legal academic that forms a likely barrier to the shift in thinking required to generate effective and consistent embedding of innovative practice within the law curriculum.

## II THE STATE OF THE CURRICULUM

Legal thinking assumes a ‘gapless rule of law’,<sup>7</sup> a ‘coherent and unified body of rules’ that offers a ‘closed model of rationality’.<sup>8</sup> The pervasiveness of the closed

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*Law Review* 43; Rachael Field and James Duffy, 'Better to Light a Single Candle Than to Curse the Darkness: Promoting Law Student Well-Being through a First Year Law Subject' (2012) 12(1) *Queensland University of Technology Law and Justice Journal* 133.

<sup>3</sup> Judith Marychurch, 'Good Practice Guide (Bachelor of Laws) Self-Management' (ALTC, 2011).

<sup>4</sup> Field and Duffy, above n 2; Townes O'Brien, Tang and Hall, above n 2.

<sup>5</sup> Penelope Watson and Rachael Field, 'Promoting Student Well-Being and Resilience at Law School' in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis, 2011) 389; Kate Galloway et al, 'Approaches to Student Support in the First Year of Law School' (2011) 21(2) *Legal Education Review* 235; Kate Galloway and Rachel Bradshaw, 'Responding to Changed Parameters of the Law Student: A Reflection on Pastoral Care in the Law School' (2010) *Journal of the Australasian Law Teachers Association* 101.

<sup>6</sup> Maxine Evers, Leanne Houston and Paul Redmond, *Good Practice Guide (Bachelor of Laws) Ethics and Professional Responsibility* (ALTC, 2011); Diana Henriss-Anderssen, 'Teaching Legal Ethics to First Year Law Students' (2002) 13 *Legal Education Review* 45; Michael Robertson, 'Providing Ethics Learning Opportunities throughout the Legal Curriculum' (2009) 12 *Legal Ethics* 59.

<sup>7</sup> Brian Simpson, 'The Common Law and Legal Theory' in William Twining (ed) *Legal Theory and Common Law* (1986) 8, 9.

<sup>8</sup> David Sugarman 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed) *Legal Theory and Common Law* (Basil Blackwell, 1986) 26, 27.

loop logic of legal thinking and the traditional doctrinal focus of the law degree reinforces the existing legal cultural paradigm<sup>9</sup> of the individualistic, competitive and adversarial advocate, providing little scope for the generation of creative thinking in terms of critical perspectives and soft skills.

Evidence suggests that legal education in the US and Australia at the very least, retains a particular focus on central (doctrinal) tenets to the exclusion of these 'soft skills'.<sup>10</sup> The traditional law curriculum focuses on doctrine through study of appellate decisions and legal problem solving in an adversarial context, and in terms of skills, tends to focus on legal research and writing.<sup>11</sup> Indeed the Pearce Report in 1987 accepted the central role of the law degree as imparting doctrinal content – though it did also suggest that the law degree should be concerned with criticism and evaluation of the law as well as legal skills.<sup>12</sup>

In terms of pedagogy, Keyes and Johnstone point out, traditional legal education is 'teacher-focused' paying little attention to student learning.<sup>13</sup> That the legal academy persists with this emphasis perhaps indicates the extent to which legal academics themselves adhere to such doctrinal modes of thought. Some suggest that doctrinal teaching is reinforced by the imposition of the Priestley 11, the core required subjects for an accredited law degree. The *International Legal Services Advisory Council* for example, found in its 2004 report that the Priestley 11 were 'subject to the criticism that they are outmoded and inflexible to change, preventing dynamic innovations in course methodology and content'.<sup>14</sup> The *Australian Law Reform Commission* likewise criticized traditional legal education, urging a shift in focus in particular towards a broader engagement with the law and the integration of skills.<sup>15</sup> The *Law Admissions Consultative*

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<sup>9</sup> Kate Galloway, 'Statutory Modification of Contract Law in Queensland: A New Equilibrium or Entrenching the Old Power Order?' (2008) 15 *James Cook University Law Review* 67; David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 26.

<sup>10</sup> William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law ('Carnegie Report')* (Jossey Bass, 2007); Gary Davis, 'Report to Council of Australian Law Deans on International Conference on the Future of Legal Education' (Council of Australian Law Deans, 2008) < <http://www.cald.asn.au/docs/FutureOfLegEdConfRptSummy.doc>>; Mitch Bailin, 'Soft Is the New Hard' (Paper presented at the *Legal Education for a Global Community: Conference of the Australasian Law Teachers' Association*, Sydney Law School, 1-4 July 2012).

<sup>11</sup> Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24(3) *Melbourne University Law Review* 965; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26(4) *Sydney Law Review* 537. In terms of property law courses, see Penny Carruthers, Natalie Skead and Kate Galloway, 'Teaching Skills & Outcomes in Australian Property Law Units: A Survey of Current Approaches' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 66.

<sup>12</sup> Dennis Pearce et al, *Australian Law Schools: A Discipline assessment for the Commonwealth Tertiary Education Commission*, Vol 1 (Australian Government Publishing Service, 1987).

<sup>13</sup> Keyes and Johnstone, above n 11.

<sup>14</sup> International Legal Education and Training Committee, 'Internationalisation of the Australian Law Degree' (International Legal Services Advisory Council, 2004), 7.

<sup>15</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) – see generally chapter 2. See also Australian Law Reform Commission, *Equality Before the Law: Women's Equality Report No 69 Part 2* (1994).

*Committee* (LACC) in 2010 referred to ‘sustained criticism of the Priestley 11 for at least the past 10 years.’<sup>16</sup>

Reflecting on this situation more broadly, Vivienne Brand<sup>17</sup> and Margaret Thornton<sup>18</sup> amongst others, have argued that the economic drivers of higher education generally and the law school in particular, have reinforced the conservative tradition of legal education within a vocational degree serving the student customer. This trend is reported in spite of the hopeful moves of the 1970s and 1980s towards a more critical engagement with the law, and the emergence of a lively literature in the scholarship of legal education. The persistence of such observations does not, however, indicate that no moves have been made to approaching legal education from different directions.

James, for example, has observed the increasing inclusion of practical skills into the law curriculum since the 1990s,<sup>19</sup> and Johnstone and Vignaendra likewise reported on increasing integration of outcomes and skills.<sup>20</sup> These authors noted that despite diverse approaches, ‘[m]ost, if not all, law schools’<sup>14</sup> had shifted from a teacher-focused approach to legal education to a student-focused approach with a greater emphasis on outcomes and skills – indicating a move away from traditional approaches to legal education.

Addressing criticisms of the restrictive nature of the Priestley 11, some have argued that the Priestley 11 focus on content, in not mandating *how* a subject is to be taught, leaves academics free to teach according to a variety of pedagogies, or through a variety of theoretical lenses. The LACC report for example, cites Professor Gillian Triggs as saying that ‘much change is taking place under the surprisingly light hand of the Priestley 11.’<sup>21</sup> The legal education literature likewise contains a wealth of evidence of forward-thinking pedagogy and approaches to content that indicate the possibilities for innovative curriculum that engages with a variety of perspectives and skills.<sup>22</sup>

In addition to innovations in legal education that teach law in broader contexts and embed skills in legal education, there has been an increasing call for embedding ‘soft skills’ in the law degree. Soft skills are recognised as crucial for

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<sup>16</sup> Law Admissions Consultative Committee, ‘Rethinking Academic Requirements for Admission’ (2010), 17 (‘LACC Report’).

<sup>17</sup> Brand, Vivienne, ‘Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education’ (1999) 10 *Legal Education Review* 109.

<sup>18</sup> Margaret Thornton, ‘The Law School, the Market and the New Knowledge Economy’ (2008) 17 *Legal Education Review* 1; Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012).

<sup>19</sup> James, above n 11.

<sup>20</sup> Richard Johnstone and Sumitra Vignaendra, ‘Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee’ (2003) <<http://www.austlii.edu.au/au/journals/LegEdDig/2004/8.html>>.

<sup>21</sup> *Ibid.*, 21.

<sup>22</sup> See for example, S Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis, 2011). As well as general editions of the *Legal Education Review*, see special editions in: (2009) 2 *Legal Education Review* Special issue: Incorporating Indigenous Perspectives in the Law Curriculum; (2001) 12 (1&2) *Legal Education Review* Special Issue: Teaching of Legal Ethics and Professional Responsibility. Alex Steel, *Good Practice Guide (Bachelor of Laws): Law in Broader Contexts* (ALTC, 2013). Most law reviews in Australia and other jurisdictions also contain articles on legal education.

the making of a successful legal practitioner. They include ‘the ability to build and sustain interpersonal relationships ... across borders and languages and cultures ... [as well as] resilience, self-awareness, and the ability to take multiple perspectives.’<sup>23</sup> Importantly, soft skills form an vital component in educating law graduates who will be better able to deal with the affective impacts of legal practice: graduates who will not suffer the disproportionately high levels of mental unwellness reported in the legal profession – and indeed in law school.<sup>24</sup> Soft skills therefore represent not only a ‘marketable’ skill-set for graduate lawyers, but also embody a new view of professionalism that incorporates self-care.

Calls for graduates to develop these skills reflect moves in the profession to promote different ways of thinking.<sup>25</sup> This is supported by a growing number of legal academics who have already undertaken this journey.<sup>26</sup>

In spite of these examples of change, the weight of evidence seems to suggest that overall legal education retains its traditional approach.<sup>27</sup> For example, the struggle to embed critique and alternative perspectives within the law degree has endured now for decades internationally<sup>28</sup> but arguably without the impact that might have been hoped for. Even to the extent that the LLB has increasingly integrated critical thinking within its curriculum<sup>29</sup> there is evidence that this is done widely on an abstract intellectual level. Maxwell<sup>30</sup> for example, examines the language of administrative law teaching materials, and suggests that the tenor of language used fails to communicate the central problem of governmental power. Such an approach reflects the discipline’s own adherence to its traditional systems of knowledge but in doing so it fails to raise for our students the personal ethical and moral dimension that is crucial to self-development.<sup>31</sup> That is, whatever the problem presented to students, the approach is to intellectualise it and to resolve it still within existing discourses of law.<sup>32</sup> The distancing of emotion in the context of legal education represents a now well-documented issue for law students and the lawyers they become.<sup>33</sup> This is a reflection of the

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<sup>23</sup> Bailin, above n 10.

<sup>24</sup> See Tani and Vines; Kelk et al; Townes O'Brien, Tang and Hall; Sheldon and Krieger, n 1.

<sup>25</sup> Michael Kirby, *Judicial Stress and Judicial Bullying* (paper delivered at National Forum on Wellness for Law, Melbourne, 21 February 2013); Resilience@law <[www.collaw.edu.au/about-us/education-philosophy/resiliencelaw/](http://www.collaw.edu.au/about-us/education-philosophy/resiliencelaw/)>.

<sup>26</sup> See Tani and Vines; Kelk et al; Townes O'Brien, Tang and Hall; Sheldon and Krieger, n 1.

<sup>27</sup> Kelk et al, above n 1.

<sup>28</sup> Margaret Thornton, 'The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy' (2001) 8(1) *International Journal of the Legal Profession* 37.

<sup>29</sup> Christine Parker and Andrew Goldsmith, “‘Failed Sociologists’ in the Market Place: Law Schools in Australia’ (1998) 25 *Journal of Law and Society* 33; James, above n 11; Fiona Cownie, ‘Exploring Values in Legal Education’ (2011) 2 *Web Journal of Current Legal Issues* 1.

<sup>30</sup> Lucy Maxwell, ‘How to Develop Law Students’ Critical Awareness? Change the Language of Legal Education’ (2012) 1 & 2 *Legal Education Review* 99.

<sup>31</sup> Wendy Larcombe, Ian Malkin and Pip Nicholson, ‘Law Students’ Motivations, Expectations and Levels of Psychological Distress: Evidence of Connections’ 2012 1 & 2 *Legal Education Review* 71.

<sup>32</sup> Parker and Goldsmith, above n 29.

<sup>33</sup> Peter Jones and Kate Galloway, ‘Professional Transitions in the Academy: A Conversation’ (2012) 10(2) *Journal of Transformative Education* 90; Field and Duffy, above n 2; Colin James, ‘Law Student Wellbeing: Benefits of Promoting Psychological Literacy and Self-

academy's own struggle to shift modes of thought, and students' lack of opportunity to do so.

In another example, a decade ago Johnston and Vignaendra<sup>34</sup> reported that the LLB nationally was embracing new methods of assessment – yet a recent survey of Australian property law teachers shows that this may not be the case within property law courses (one of the Priestley 11 subjects). The survey asked property law teachers about what they are teaching and how.<sup>35</sup> With 18 respondents representing approximately half of all Australian law schools, the survey ascertained that this subject's curriculum was primarily doctrinal, using mainly exams as assessment and with little focus on skills outside (legal) research. The survey found little evidence in this subject area of a broader engagement in student-centred approaches.<sup>36</sup>

Numerous studies in Australia<sup>37</sup> have confirmed a resistance to change from the traditional approach to teaching law, to a curriculum that encompasses a variety of critical approaches, skills and knowledge considered essential for the contemporary graduate.<sup>38</sup> Keyes and Johnstone<sup>39</sup> a decade ago identified a number of impediments to such change in legal education. These include the corporatisation of the university and the student as consumer, the academy's subservience to the legal profession and a focus on content reflecting the Priestley 11. In terms of law teachers, they suggest that legal academics protect the status quo because of insufficient resources and increasing workloads, as well as a lack of awareness of or concern with legal education as a discipline itself. In spite of the evidence in favour of cultural shifts in the profession and in legal education, resistance remains.<sup>40</sup> The ongoing work of the *Tristan Jepson Memorial Foundation* is evidence of this.

One of the clear implications of this protection of the status quo, and resistance to change, is that the important issues of student (and staff) wellbeing are unlikely to be addressed in a thorough and effective manner across the legal education sector. Developing curriculum and teaching and learning practices that will begin to

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Awareness Using Mindfulness, Strengths Theory and Emotional Intelligence' (2011) 21(1&2) *Legal Education Review* 217; Kelk et al, above n 1.

<sup>34</sup> Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Development in Law' (Australian Universities Teaching Committee, 2003).

<sup>35</sup> Penny Carruthers, Natalie Skead and Kate Galloway, 'Teaching Property Law in Australia in the 21st Century: What We Do Now, What Should We Do in the Future?' (2012) 21 *Australian Property Law Journal* 57.

<sup>36</sup> Carruthers, Skead and Galloway, above n 11.

<sup>37</sup> For an overview of the reviews of legal education, see Keyes and Johnstone, above n 11; Law Admissions Consultative Committee, 'Rethinking Academic Requirements for Admission' (2010)

<<http://www1.lawcouncil.asn.au/LACC/images/pdfs/RethinkingAcademicRequirementsforAdmission.pdf>>; and Robert French CJ, 'Legal Education in Australia – a Never Ending Story' (Paper presented at the *Australasian Law Teachers' Association Conference*, Brisbane, 4 July 2011).

<sup>38</sup> These approaches, skills and knowledge are encapsulated in Sally Kift, Mark Israel and Rachael Field, 'Bachelor of Laws Learning and Teaching Academic Standards Statement' (Australian Learning and Teaching Council, 2010) ('TLOs').

<sup>39</sup> Keyes and Johnstone, above n 11.

<sup>40</sup> See eg Victorian Equal Opportunity and Human Rights Commission *Changing the Rules: Experiences of Female Lawyers in Victoria* (December 2012).

seriously engage with these issues requires a change in subject structure, content, pedagogy and assessment. If an academic perceives a law degree as a core set of content knowledge and inculcation into 'thinking like a lawyer' in the traditional doctrinal sense, then it is possible that a degree embedding soft skills may challenge the academic's perception of what it means to teach law. To the extent that soft skills are reflective more of self-management and modes of thought desirable in legal practice than academic pursuits, it is also possible that not all legal academics, as subject specialists, will have the requisite skills themselves.

While the embedded nature of culture in the profession might be obvious, we ask whether academic lawyers are able to transform the law curriculum to embed the skill-set and thinking required of the lawyers of tomorrow. We posit that the capacity of the academic lawyer to contribute to a structural change in curriculum depends on their very professional identity. The thesis explored here suggests that law teachers may be predisposed against change because of their professional identity, fostered by the mode of 'thinking like a lawyer' that is at the heart of the traditional law degree. An identity grounded in the traditions of the law may itself require a personal transformation to equip the academic for the shift required.

### III PROFILING THE ACADEMIC LAWYER

It is easy enough to suggest that legal educators need to facilitate the transformation of our graduates into practitioners with soft skills, including the capacity for self-management reflected in the discipline's *Threshold Learning Outcomes* (TLOs).<sup>41</sup> However, this fails to recognise that legal educators themselves are of the system, rooted within the existing framework of doctrine and thought. Thus, the change required exists within a complex matrix addressing the personal transformation of student and teacher, and systemic transformation of the academy, alongside transformation in the profession. The necessary changes are required both within the conceptual framework of the law (including the learning of law in broader contexts), as well as in terms of the types of practical skills considered a necessary part of the law degree.<sup>42</sup> Such transformation reflects a particular type of, and approach to, knowledge, skills and attitudes of students, academics and legal practitioners. If successfully embraced, the transformation will ultimately transform the legal system itself. It is suggested though that it also, and fundamentally, requires transformation of academics' own professional identity so that legal academics can all contribute to a broader and more contemporary education of law students.

As with legal practitioners, the tradition within which legal academics are educated and practice is itself a reproduction of the culture and modes of thought of the common law that are presently being reconsidered. The genesis of this culture is the genesis of the common law itself. As Sugarman points out, 'the common law frame of mind continues to overshadow the way we teach, write and think about law.'<sup>43</sup> Globally the success of the common law has been its capacity to adapt, but also its capacity for consistency. Adaptation is evidenced by its

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<sup>41</sup> Kift, Israel and Field, above n 38.

<sup>42</sup> Cownie, above n 29; Sally Kift, 'Lawyering Skills: Finding Their Place in Legal Education' (1997) 8 *Legal Education Review* 43.

<sup>43</sup> Sugarman, above n 9, 26.

reception (or imposition) throughout the British Empire and the US, where in each jurisdiction the fundamental tenets have taken on their own flavour according to social, cultural and political context.

What is of more interest here though is its *consistency*. The law's stability is the product of training and perpetuation of a particular culture within the law that preserves modes of thought and discourages deviation from the central tenets of the law<sup>44</sup> – those very tenets that remain central to contemporary legal education itself. The doctrine of precedent promotes adherence to what has gone before. The predominance of white, affluent, able-bodied men in the profession reinforces particular modes of thought, exposed by various critical approaches to reading law.<sup>45</sup>

The legal system including its particular brand of education has either created or enhanced<sup>46</sup> a particular mode of thinking in legal practitioners. Capacity for insight and methods of practice that retain a sense of self are well recognised as supporting a healthy personal outlook<sup>47</sup> yet what the studies of Seligman, Verkuil and Kang,<sup>48</sup> and Kelk et al<sup>49</sup> reveal is that self-reflection is antithetical to traditional legal modes of thought, and that these modes of thought are inculcated by common law legal education. Maxwell, in her review of administrative law teaching, highlights the abstracted concepts offered that obstruct the capacity for deeper and more reflective engagement.<sup>50</sup>

It is important to remember however that like legal practitioners, legal academics were also educated in this system. As we are educated, so do we absorb the culture of the profession embedded in the law and its modes of reproduction. Margaret Thornton and Fiona Cownie<sup>51</sup> have both described the extent to which the academy reflects the norms of the profession. Indeed the particularly lawyerly aspects of culture they describe are the very traits described by Kelk et al as damaging to student and practitioner well-being.<sup>52</sup> While Thornton and Cownie describe the academy in terms of a workplace, these traits spill over to the lecturer/student relationship. Comments often heard by legal academics in discussing relating to student capabilities reflect these traits as follows:

Individualistic    If they can't cut it here, they'll never make it in practice

Competitive        I made it through this system, so they can too

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<sup>44</sup> Ibid; Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591.

<sup>45</sup> Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (The Federation Press, 2nd ed, 2002); Kennedy, *ibid*.

<sup>46</sup> Martin Seligman, Paul Verkuil and T Kang, 'Why Lawyers Are Unhappy' (2005) 10(1) *Deakin Law Review* 49.

<sup>47</sup> Marychurch, above n 3.

<sup>48</sup> Seligman, Verkuil and Kang, above n 46.

<sup>49</sup> Kelk et al, above n 1.

<sup>50</sup> Maxwell, above n 30.

<sup>51</sup> Thornton, above n 28; Margaret Thornton, 'Discord in the Academy: The Case of the Feminist Scholar' (1994) 3 *The Australian Feminist Law Journal* 53; Fiona Cownie, *Legal Academics: Culture and Identities* (Hart, 2004).

<sup>52</sup> Kelk et al, above n 1.



It was a *lot* harder in my day...

Adversarial      I'm doing the public a service by weeding out those who can't cope

This is not to suggest that legal academics do not like their students – but rather to illustrate that in terms of changing academic practice to include student-wellbeing initiatives in their teaching, their professional identity and its culture of individualism, competition and adversarialism is directly challenged. As Keyes and Johnstone point out, the traditional pedagogy of legal education is teacher-centred.<sup>53</sup> It is possible that the reason for this is that the task involves changing the very culture of the discipline; to change our very identities.

The dilemma of the profession in terms of the wellbeing of its members has engaged the minds of a number of academics and practitioners.<sup>54</sup> Together this work provides a spectrum of practices through which lawyers' mindset and their practice might shift. It is this movement that represents a grassroots transformation in legal education via the beliefs and practice of individual legal academics. While this has the potential for a transformative learning experience for law students, the question remains as to its effect on academics themselves and the capacity for a broad range of academics to teach in this new mode.

What is telling about contemporary innovations in legal education is that many would be wholly unremarkable to many other disciplines, and in particular, to educators engaged in the practice of transformative education.<sup>55</sup> Yet these innovations in the context of legal education represent a response to law and all it represents that fundamentally differs from a centuries-old acceptance of a particular mode of thought and a particular way of teaching it. They represent a challenge to the traditional lawyerly identity – including that of the legal academic.

#### IV TRANSFORMATION

Penelope Watson<sup>56</sup> has written an excellent overview of the organizational and professional change required to lead the law school into a new way of practice. In her paper, she conceptualizes the law school as a learning organization and

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<sup>53</sup> Keyes and Johnstone, above n 11.

<sup>54</sup> See for example, Watson and Field, above n 5; Townes O'Brien, Tang and Hall, above n 1; James, above n 33; Field and Duffy, above n 2; Galloway et al, above n 5. The Law Society of New South Wales Young Lawyers, *How to Survive and Thrive in your First Year of Law* (2010); Kirby, above n 30. See also projects such as Resilience@law, above n 30.

<sup>55</sup> Stephen D Brookfield, *Becoming a Critically Reflective Teacher* (Jossey-Bass, 1995); Paolo Freire, *Pedagogy of the Oppressed* (Myra Bergman Ramos Trans) (Harmondsworth: Penguin. [Trans of: *Pedagogia do Oprimido*], 1972); Jack Mezirow, 'Learning to Think Like an Adult: Core Concepts of Transformation Theory' in Jack Mezirow and Associates (eds), *Learning as Core Transformation: Critical Perspectives on a Theory in Progress* (Jossey-Bass, 2000); Peter Jones, 'Teaching for Change in Social Work: A Discipline-Based Argument for the Use of Transformative Approaches to Teaching and Learning' (2009) 7(1) *Journal of Transformative Education* 8; Peter Jones, 'Transformative Learning, Ecopedagogy and Learning Ecology: Pathways for Social Work Education' in Peter Jones et al (eds), *Eco-Social Justice: Issues, Challenges and Ways Forward* (Books for Change, 2011) 1.

<sup>56</sup> Penelope Watson, 'Leading Change in Legal Education: Interesting Ideas for Interesting Times' (2012) 1 & 2 *Legal Education Review* 199.

thereby situates each of us in the academy as a learner. Within this model, the organization continuously transforms itself.<sup>57</sup> Watson highlights the role of 'mental models' within the learning organization, and their role in tethering us to 'familiar ways of thinking and acting.'<sup>58</sup>

This account identifies a feasible approach to organizational change, identifying clearly that it is the mental model that needs to shift. Yet the discussion so far has sought to identify the limits of the existing mental model of the legal academic. The challenge the academy faces to shift this mental model, lies in the centuries of tradition of the law and legal education, the fetishisation of tradition within the profession, and the very identity of practitioners and legal academics alike interwoven with these central tenets.

To complement Watson's approach, the work of transformative learning may provide insights into what is required to generate the change in mental models within the academy (and the profession) – the change needed to move beyond 'adaptive' or 'survival' learning, to 'generative learning'<sup>59</sup> or in other words, personal transformation.

Mezirow<sup>60</sup> describes the need for a 'disorienting dilemma' to generate transformation not just in thinking, but in action. In the context of the change necessary for the academy, such a disorienting dilemma might engender not only a change in the way academics think about legal education and indeed the law, but also action to agitate for solutions to the challenge of student wellness, and indeed the mental health (and the culture) of the profession more broadly.

Cranton provides a clear description of the nature of such a disorienting experience and the change it can engender, pointing to a process whereby:

through some event ... an individual becomes aware of holding a limiting or distorted view. If the individual critically examines this view, opens herself to alternatives, and consequently changes the way she sees things, she has transformed some part of how she makes meaning out of the world.<sup>61</sup>

We have already identified the need to provide our students with stimulus to guide their intellectual, emotional<sup>62</sup> and spiritual development<sup>63</sup> within the context of the law, to develop their capacity for resilience and effective self-management in practice. Yet without exposing ourselves as educators to such a disorienting dilemma, without a commitment to changing our mental models through assessing our own capacity to learn, we in the academy are contributing to the ongoing circularity in the modes of thinking and behaving in the profession. This helps to

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<sup>57</sup> Ibid, 212, citing M Pedler, J Bourgoyne and T Boydell, *The Learning Company: A Strategy for Sustainable Development* (2<sup>nd</sup> ed, McGraw-Hill, 1997).

<sup>58</sup> Ibid, 213.

<sup>59</sup> Ibid, 212, citing Pedler, Bourgoyne and Boydell.

<sup>60</sup> Mezirow, above 55.

<sup>61</sup> Patricia Cranton, 'Teaching for Transformation' (2002) 104 *New Directions for Adult and Continuing Education* 63, 64.

<sup>62</sup> James, above n 33.

<sup>63</sup> Patricia Easteal, 'Teaching About the Nexus between Law and Society: From Pedagogy to Andragogy' (2008) 18(1&2) *Legal Education Review* 163; Cormack Cullinan, *Wild Law* (Siber Ink, 2002).

ensure that the problematic frames of reference underpinning the legal profession, which Mezirow would describe as sets of fixed assumptions and expectations,<sup>64</sup> remain unchallenged and unchanged. To the extent that we fail in the academy to embrace this transformation in thinking about the law and legal education, our impact on individual students and the profession as a whole will be provision of a limited and distorted worldview without the action required to produce significant and beneficial change.

## V THE DILEMMA OF TRANSFORMATION

At both individual and institutional levels, such transformation must involve a dramatic shift in worldview, a perspective transformation<sup>65</sup> which calls into question the very underlying assumptions upon which current values and practices are based.<sup>66</sup> The central challenge then involves identifying the drivers of such change, given the inherently conservative nature of the profession as it currently exists.

The TLOs<sup>67</sup> may, for example, provide an impetus for rethinking curriculum. The TLOs' focus on self-management, creative thinking and broader contexts of law will by necessity draw out a different pedagogy and set of skills. Resources are available to support curriculum design around the TLOs, including a range of *Good Practice Guides*.<sup>68</sup> While there has been a legal education literature for some time, the real imperative to engage in this literature now, is the accreditation power of the Tertiary Education Quality Standards Agency (TEQSA). While this is possibly another marker of the neoliberal university, driven by an agenda of standards and continuous improvement, it may result in curriculum evolution. Whether it amounts to a perspective transformation however, remains to be seen.

Likewise the university's push for distinctiveness in the law degree may engender a variety of innovative approaches to legal education.<sup>69</sup> With a widening focus on student wellness and a market imperative to attract students, there may be a pragmatic acceptance of an integrated curriculum incorporating diverse strategies

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<sup>64</sup> Jack Mezirow, 'Transformative Learning as Discourse' (2003) 1(1) *Journal of Transformative Education* 58, 58.

<sup>65</sup> Jack Mezirow, 'Perspective Transformation' (1978) 28 *Adult Education* 100; Mezirow, above n 55; Edward W Taylor, *The Theory and Practice of Transformative Learning: A Critical Review* (ERIC clearinghouse on adult, career, and vocational education (ERIC Document reproduction service No. 423422), 1998).

<sup>66</sup> Stephen D Brookfield, 'Transformative Learning as Ideology Critique' in J Mezirow and Associates (eds), *Learning as Transformation: Critical Perspectives on a Theory in Progress* (Jossey-Bass, 2000) 125.

<sup>67</sup> Kift, Israel and Field, above n 38.

<sup>68</sup> Catherine Brown, Judith McNamara and Cheryl Treloar, 'Good Practice Guide (Bachelor of Laws) Statutory Interpretation' (ALTC, 2011); Maxine Evers, Leanne Houston and Paul Redmond, 'Good Practice Guide (Bachelor of Laws) Ethics and Professional Responsibility' (ALTC, 2011); Elizabeth Handsley, 'Good Practice Guide (Bachelor of Laws) Collaboration Skills' (ALTC, 2011); Nick James, 'Good Practice Guide (Bachelor of Laws) Thinking Skills' (ALTC, 2011); Judith Marychurch, 'Good Practice Guide (Bachelor of Laws) Self-Management' (ALTC, 2011); Sharon Wesley, 'Good Practice Guide (Bachelor of Laws) Communication' (ALTC, 2011); Alex Steel, 'Good Practice Guide (Bachelor of Laws) Law in Broader Contexts' (ALTC, 2013).

<sup>69</sup> Kate Galloway, 'Refreshed in the Tropics: Developing Curriculum Using a Thematic Lens' (2011) 4 (1&2) *Journal of the Australasian Law Teachers Association* 119.

promoting a more reflective approach to the study and practice of law. Again, however, pragmatism is unlikely to represent an attitudinal change amongst academics who hold close their traditional legal identity.

Finally, to the extent that there is a growing movement within the profession itself to recognize the need for a different skillset amongst its practitioners, calls for change may come from the profession. Insurers and professional bodies, for example, are requiring practitioners to engage in regular professional development including personal management. The wide consultation undertaken in the drafting of the TLOs, including the academy, student body, profession, admitting bodies and judiciary, indicates an acceptance of a much broader curriculum than has traditionally been the norm. The waters are muddied somewhat by the central role of the Priestley 11 and their doctrinal focus, and contemporary calls for increasing emphasis (and perhaps a 12<sup>th</sup> subject) on statutory interpretation. It may be that in navigating the contradictions in the profession's assumptions of what is legal education and the reality of what it expects in a graduate, that the academy will have no choice but to shift its own conceptions about legal education – though again this seems unlikely to engender the shift in culture, and Mezirow's characterisation of transformation that would truly bring change.<sup>70</sup>

While there is ample support for development of strategies to support transformative learning in students, the challenge for the law lies in a widespread cultural transformation of the profession and the academy – not restricted to those educators already engaged in the transformative project. Even if there is a sufficiently disorienting dilemma to bring change in the profession, so far legal academics have not been required to engage at this level. Change is coming in an instrumentalist way, but it is doubtful whether this will engender true change. The approach of so many colleagues is that of guardian of the 'true' identity of the law. Anecdotally, the issue seems to be one of such a shift in thinking that the discipline – and therefore the self – becomes something or someone else: not a lawyer at all. For this reason, while a shift in mental models is imperative, the barriers to doing so are high. In light of the challenge of entrenched modes of thinking evident in the history and fabric of the common law, including legal education, generating the disorienting dilemma to facilitate transformation is a dilemma of its own.

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<sup>70</sup> Mezirow, above n 55 and n 64.