

THE FUNCTIONS OF ASSESSMENT: A RE-EXAMINATION

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INTRODUCTION

In the 1970s assessment, and examinations in particular, were the focus of world-wide university student protest.¹ In Australian tertiary institutions, greater use was consequently made of “continuous assessment”.² After a period of quietude assessment re-emerged a decade later as a “hot” national issue in North America³ and as the subject of research and discussion in England.⁴ In Australia, a report for the Commonwealth Tertiary Education Commission published in 1987 (the “Pearce Report”), discussed at length the question of assessment in Australian law schools.⁵ These more recent debates reflected in part the fact that assessment practices in at least the law schools of Australian universities had not fundamentally changed since the seventies revolt.⁶ While assessment modes had in the meantime diversified greatly,⁷ according to the Pearce Report the problem-type, written examination remained the dominant mode in Australian law schools.⁸

In the early 1990s) universities are undergoing a period of rapid change spurred on by Federal government initiatives.⁹ One important consequence of this re-evaluation is the affirmation that teaching is the university’s primary function.¹⁰ It is with this ultimate goal in mind that this article is written. The basic premise is that assessment¹¹ not only serves as a means of certification. It also performs, inevitably, an important teaching function.

It is submitted that assessment still suffers from being the “grand afterthought of the educational process”.¹² As is commonly observed, law teachers tend to repeat the methods of instruction that are familiar to them from their student days. In one study most academics surveyed saw assessment only in terms of it providing an incentive to make students work, and to enable their intellectual abilities to be measured.¹³ Students (including law students) in another study also viewed it in similar terms.¹⁴ Surveys conducted by the Pearce Inquiry reported widespread dissatisfaction with methods of assessment.¹⁵

Why assessment has been ignored from an educational viewpoint is a complex question. Possible explanations include the influence of the legal profession on teaching;¹⁶ teacher apathy;¹⁷ few incentives;¹⁸ external constraints (such as scarce resources)¹⁹ and the lack of training in and knowledge of educational theory.²⁰

There is not space to analyse all of these causes. This article’s main concern is more elementary — to remedy the lack of scrutiny of law school assessment as an educational tool. Assessment needs to be re-examined in the light of its teaching and certification functions, but especially the former. To understand what we do or fail to do when we implement assessment schemes, it firstly elaborates on the teaching and certification functions which may be fulfilled and are inevitably fulfilled by student assessment. Current assessment practices are then subjected to a critical analysis. The article concludes by providing a check-list of considerations for the thoughtful law assessor: considerations which, it is submitted, should form the basis of assessment practice.

ASSESSMENT AS A TEACHING STRATEGY

The great potential of assessment to aid teaching is being increasingly recognised.²¹ Assessment also has its drawbacks. Its potential depends to a large extent, as the following discussion reveals, on the kind of assessment scheme or regime chosen. Nevertheless, it is worth emphasising that whichever scheme is chosen profoundly affects student learning, simply because assessment is an integral part of the particular subject.

Potential

Assessment may promote teaching and learning in various ways. It is convenient to discuss them under the following broad headings.

Clarification of Subject Objectives and Content

The statement of one's educational objectives ought to be standard for law teachers.²² Although they have their limits,²³ such objectives are properly accepted by educationists as fundamental to good teaching. Stating objectives focuses the teacher's attention on her or his *raison d'être* — what is being sought to be achieved. They provide the means by which the subject may be assessed — by colleagues if it is a new subject; by students to better understand the subject content; and by the teacher to see whether any adjustment to the subject should be made in the light of its operation.

The assessment scheme is inextricably linked to the subject objectives (whether stated or not) because the assessed tasks demonstrate what the students have achieved.²⁴ Of course, other contributions such as informal consultations or non-assessed work do so also, but they are inherently ad hoc. Since assessment is closely related to the setting of objectives, good teaching practice demands that the teacher state, along with her or his assessment scheme, how the constituent parts give effect to the subject objectives. Relating the subject objectives to the assessment provides a measuring stick for the objectives as well. Settling an assessment scheme in the light of the objectives may also force a teacher to clarify or revise the objectives.

Once they are linked with the assessment scheme, the subject objectives are more relevant for the students. Standing alone, subject objectives tell them, in intellectual terms, what they ought to aim for. The assessment scheme, on the other hand, tells them in practical terms what they have to achieve. In effect, the assessment constitutes part of the “hidden” curriculum²⁵ which has been defined as

the whole of informal and implicit demands of study and study achievements that are to be met for someone to complete units of study.²⁶

In respect of assessment, what we assess and how we assess tells the students what we think is important in the subject.²⁷ The reality, long ago recognised,²⁸ is that students will tend to ignore material or approaches which are not assessed or which they do not think will be assessed. Of course, the motivations of students vary according to the individual. Mature age students and first year students, in the author's experience, tend to pursue learning more for its own sake.²⁹ But for all students the heavy workload demanded of them requires an ordering of priorities. It has been pointed out that prioritising assessed learning over other aspects of the subject is a habit learnt at school, where constant feedback and final examinations dominate a student's life.³⁰ This further indicates the endemic nature of assessment in forming the hidden curriculum.

It may be thought to be regrettable that a hidden curriculum exists. Whatever assessment scheme is chosen will indicate to students how and what they ought, at a minimum, to study. However, accepting this reality, a thoughtful teacher may use the assessment system to define effectively the curriculum and in a way which meets her or his objectives.³¹ A hidden curriculum only becomes a problem, it is submitted, where the teacher fails to think of assessment in terms of its relationship to the subject objectives. Since all material and approaches in the subject may in theory be assessed, the thoughtful teacher may readily minimise the gap between the official curriculum and the curriculum to be pursued by the students.

Implementation of Faculty Objectives

Faculties of law (or law schools) teach in the sense that they establish teaching objectives for its teaching staff³² and lay down the broad means by which it is to be conducted. Faculties thus play a crucial policy-making, co-ordinating and supervisory role in relation to the education of law students. In respect of assessment, Faculty committees may scrutinise the assessment schemes for new subjects and may monitor the schemes of established subjects. In an ad hoc way assessment may also be co-ordinated amongst teachers in the same subject.³³

But in the current era of legal education³⁴ law schools "are in the process of becoming more accountable".³⁵ It is inevitable

therefore that Faculties will be paying more attention to the achievement of their broad objectives. For the same reasons that assessment plays a vital role in the teaching of individual subjects,³⁶ assessment may come to be viewed as an important Faculty matter. It is submitted that it is. The question which should be asked then is — what potential is there in the assessment system for the greater achievement of Faculty objectives? At least three possible initiatives might be mentioned. The first is that greater control could be exercised over assessment schemes in new subjects. At Monash Law School the Faculty committee which scrutinises proposals for new subjects has recently introduced a requirement that such proposals must describe the relationship between the subject objectives and the assessment scheme. The idea is not to legislate particular means of assessment, but merely to ensure that the teacher has thought about assessment as a teaching strategy.

Other possible initiatives are of a legislative kind. Faculties may wish to prescribe either a particular assessment mode in *every* compulsory subject, or that a minimum number of certain modes of assessment must be completed by the end of the law degree. The first of these options could require, say, an assignment in each compulsory subject, it being a mode of assessment under-utilised in law schools. This option appears a trifle heavy-handed. Although ordinarily subjects benefit from an assignment component, the proposal is queried elsewhere in this paper³⁷ for the reason that its implementation may ignore the teacher's objectives for the particular subject. Nevertheless, if teachers of compulsory subjects rethink their assessment practices, they may well adopt an assignment component in any case. Faculty could have a role here at least in seeking a teacher's reasons for choosing their existing assessment regimes and for not including an assignment.

A less intrusive means by which Faculty could develop assessment as a teaching strategy could be by prescribing minimum requirements for the degree course as a whole. Whichever modes are thought necessary it is crucial that they be justified in terms of the Faculty objectives. This will give the initiative both coherence and legitimacy in this era of increased accountability.

Adapting Teaching Technique to Students' Needs

So far we have seen that assessment may have close links with Faculty objectives, subject objectives and the subject curriculum. It is mutually beneficial to appreciate these inter-relationships. Assessment in fact affects, and is affected by, all the major elements of teaching. This includes teaching technique, which does affect the quality of student learning.³⁸ Thinking about assessment may therefore benefit it also. But what are students' needs and how can assessment help? An educational researcher, Dr David Watkins, has suggested that, separate from assessment, students need

- (a) time to think;
- (b) active encouragement to think independently and some say in the way they go about their learning; and
- (c) their interest to be aroused in the content of the subject.³⁹

When students are given the time to practise the skill that is to be assessed⁴⁰ (or at least to be well informed as to the requirements) they are given time to think about what is required of them. Thus, students should desirably be given substantial opportunity in class to practise on past examination papers.⁴¹ Why is there still some resistance to such classwork? Is it because assessment is seen to be something done after teaching is over, or because the "content" of the subject is seen to be all important? Practising at examination papers with the teacher's guidance may reduce much of the unnecessary and harmful tension created by the surprise element in examinations, and may improve student performances which, as we all know but rarely admit publicly, are frequently very poor.

Students should at least be advised of the objectives of the assignment and the teacher's expectations. Class time may be given over to discussing the assignment. Not only may this save on the time spent on unnecessary individual consultations with the teacher, but it may also improve the students' performances.

Watkins' second suggestion broadly requires students to participate in the learning process. The assessment of class performance is an obvious way to stimulate student involvement.⁴² This may be achieved in various ways. It is not necessary to turn the class into an "inquisition". Students may be given appropriate notice of when they will be expected to participate, whether by answering questions, delivering a seminar paper, or whatever.

Student interest can usually be aroused by adopting a wide variety of teaching methods, techniques and devices⁴³ and not falling into the trap that “all learning must be centred around what the professor says”.⁴⁴ In terms of assessment, the relationship between examinations and traditional “stand up” lecturing needs to be questioned.⁴⁵ Lectures can only ever present a generalised and simplified picture of the law. Do we teach in this way partly because of the limitations of examinations? Moving to a more pluralistic assessment system may be a catalyst for introducing a greater variety in our teaching techniques.

In short, thinking about the relationship between assessment and teaching technique may improve the quality and relevance of classroom instruction.

Instilling Appropriate Attitudes to Learning

Students are more likely to learn where they have an incentive to learn, where they have a degree of responsibility for setting the learning process, and where an appropriate learning style is adopted. It will readily be apparent from the above discussion of the way in which assessment defines the curriculum from the student perspective, that assessment provides a powerful incentive to learn.⁴⁶ This is not to say that assessment is essential to all learning. However, since assessment in the law school is required for certification purposes its use as a motivational tool ought not to be ignored. A strong argument for continuous assessment, therefore, is that it motivates students to learn throughout the year, rather than in one concentrated period at the end of the subject.

Learning at the university level ought not be seen in consumerist terms.⁴⁷ An appropriate attitude to foster in students is responsibility for their own learning.⁴⁸ Students therefore need a degree of autonomy in the learning process. This may be achieved in a number of ways. One suggestion is to involve students in setting the assessment scheme itself. Many teachers might see it as an abdication of their duty to permit self-interested students to choose the assessment scheme. Permitting students to participate in setting the assessment scheme may however take the form of consultation.⁴⁹ Again it might be argued that a lecturer ought not be obliged to consult students over “academic” matters. But assessment is also a teaching matter. Consulting students develops

the sense of student responsibility for what is, in the end, their own learning. Consultation at the outset makes it clear to the student that learning is their responsibility. Since it is their individual abilities which are to be assessed, consultation also seems to be fair. The importance of developing a responsible attitude is underlined by the “new assumption” in education to produce “autonomous life-long learners”.⁵⁰ It is a truism that changes in the law are a regular occurrence. The need for law graduates to meet these challenges demands that students be suitably prepared at university. Having said all this, it may be difficult for a teacher to accommodate multiple and conflicting suggestions without losing coherency and without breaking the relationship with the objectives. When students do not see changes occurring they will quickly sense tokenism. In such a case, an alternative course might be for the teacher to present a small number of options to the class. A uniform scheme might be preferred, or students might wish to have a choice of assessment schemes.

Student attitudes to learn affect, obviously, what they learn. Another way of expressing this is to say that their learning style shapes their learning. Studies of Australian students have shown that assessment schemes influence a student’s style or approach to learning. If students feel threatened by a particular system they will react by taking a “surface” rather than a “deep” approach to their learning. Their aim will be merely to reproduce or regurgitate the information passed on to them in class rather than to actively question it.⁵¹ Since an important aim of law schools is to foster individual, critical analysis⁵² it would seem advisable to adopt assessment schemes which do not unnecessarily threaten students. Various studies have shown that continuous assessment is less stressful than a scheme dominated by a final examination.⁵³

Encouraging both a responsible attitude to learning and appropriate learning styles may readily be achieved in the assessment process itself. Accepting responsibility for one’s own learning and encouraging “deep level processing” are the objects of assignments, rather than examinations.⁵⁴ Because of the different time involved, assignments can give students a valuable experience in self-teaching. A related advantage of assignments is that they afford students the opportunity to learn from each other. Some teachers may see any collaboration as denying the authenticity of

the assessment process, but assessment schemes can readily accommodate assignments and examinations. In any case student collaboration is, within limits, a good thing. Working cooperatively with others is an obvious skill needed in later life. The limits can be spelt out to the students. One such limit is that, as for academics, students should acknowledge all debts, including those to student colleagues. To seek to achieve authenticity at the cost of learning defeats the purpose of certification. For students who prefer to work alone, they may also have the time to reflect on their work and to improve it.

Development of a Fruitful Relationship Between Teacher and Student

From time to time many students consult with their teachers on an informal basis. These individual lessons promote learning by the active involvement of the student and by the personal feedback possible in an intimate learning environment.⁵⁵ A perceptive and sympathetic teacher may sense any anxiety the student has and may attempt to deal with it in a constructive manner. An assessment scheme may foster a fruitful relationship if it is one which requires students to work throughout the year. Providing the teacher is seen to be approachable, it gives a number of opportunities during the year for the student to approach the teacher on an individual basis. A scheme dominated by a final examination may, on the other hand, result in the teacher being approached by large numbers of students in a short period of time, and with little time afterwards for the relationship to benefit. Continuous assessment no doubt requires more time to be devoted to informal consultation. Staff who are apprehensive about the additional demands imposed upon them can always restrict their consultation to nominated hours of each week.

Positive Learning Outcomes⁵⁶

Assessment tasks demonstrate what the student has learnt. Notwithstanding notable drawbacks discussed below,⁵⁷ the potential for appropriate learning from assessment is enormous. A wide range of knowledge, skills, attitudes and values may be acquired. As the Pearce Report noted, the range of possible assessment tasks are limited in theory only by the lecturer's

imagination.

In terms of knowledge,⁵⁸ a basic knowledge of legal doctrine is encouraged by examinations (including multiple choice tests) and by problem-based assignments. A deeper and more critical, theoretical⁵⁹ or historical awareness is encouraged by appropriate essay questions, especially by means of an assignment. A practical awareness of how the law operates in a particular area may be fostered through a student placement or field trip, a report of which is written up or presented by the student.⁶⁰

In terms of skills,⁶¹ assessment tasks may be tailored to develop lawyerly skills as well as general intellectual skills. The development of the latter kind has been said to be the most important objective of Australian law schools.⁶² This would seem to require a wide range of assessment tasks, since general intellectual skills are not likely to be fostered by exercises aimed specifically at developing the lawyer's craft. The objective of developing law students' general intellectual skills is assisted by "[thinking] about what it is to think like a lawyer."⁶³ To be so engaged, law students require time for reflection. Their thinking would be also promoted by writing, as Watson makes clear:

... writing is not a simple act but a process. It is not remotely spontaneous, and to speak of "writing up" the result of research is to betray a total misunderstanding of how scholars work. Composing is not where they stop but where they start. It is only when words begin to appear on the page, whether as shorthand notes or as connected prose, that the mental activity of authorship begins at all.⁶⁴

Assignments are therefore better equipped to develop writing and thinking since they provide opportunities for rethinking or elaboration of thought. As Watson remarks, "writing is largely rewriting".⁶⁵ Ideally, some broader inquiry is needed since the capacity to think about the law in intellectual terms is truncated if students are only required to give a legal advice.

The lawyerly skills of "rule handling, fact analysis, questioning, reading and interpretation"⁶⁶ have been traditionally served by examinations. But problem assignments equally develop these skills, with the added benefit of reflective learning. There are a number of other skills which lawyers require and which may be promoted by appropriate assessment tasks. Drafting or practical writing may be the subject of assignments.⁶⁷ There seems no reason why such exercises need be restricted to a drafting or procedure

subject. Drafting simple legislation may be required in an introductory law subject or a legislation subject; statements of claim may be required in common law subjects; applications for judicial review may be set in administrative law, and so on. The skill of oral advocacy may be developed through assessed moots. Speaking skills generally may be developed by way of classroom performance.⁶⁸ The latter may be achieved even with largeish classes (40–50). The author assesses one or two students on nominated days which ensures everyone is given an equal opportunity to be assessed. Interpersonal skills may, it has been claimed, be assessed through oral examinations.⁶⁹ Finally, research skills are becoming increasingly important as the pace of legal change increases.⁷⁰ The development of these skills obviously requires assignments. Research would normally concentrate on library resources but empirical research is also possible (and desirable), especially with the assistance of the teacher.

Feedback

In the present context feedback encapsulates not only the grade or mark received for the assessed task, but also any accompanying comments made by the assessor. The opportunity to give students feedback on their development is an extremely important aid to learning.⁷¹ Informative feedback is essential because it makes a student aware of their standing in the subject and in the discipline. Since all learning is a “mental struggle” involving “censors” in the mind,⁷² every student needs reassurance : to know whether they are on “the right track. Unlike a traditional lecture, feedback on assessment is a personal communication to a student about their approach and understanding. Unlike even a tutorial or Socratic lecture, feedback on assessment may be a communication about their written work, work which ordinarily is the product of far more thought. Such feedback is also an opportunity for the teacher to be more frank with a student than is possible in the public atmosphere of a classroom or lecture theatre.

Although feedback is an inherent aspect of any assessment scheme, the usefulness of the information depends very much on the kind of assessment scheme adopted and on the quality of the information given to the student. If the assessment scheme is dominated by an end of subject examination, rather than being

spread across the duration of the subject, the benefits of feedback are very much curtailed.⁷³ There is first the practical problem of the student receiving the feedback, since law schools frequently rely on the student taking the initiative to request the examination script.⁷⁴ Secondly, the opportunity to learn from the grade/mark given and any comments made is reduced by the fact that the subject is over. Comments of a general nature, such as the way she or he goes about giving a legal advice, can help the student. But comments on the particular subject will not be of great interest, except if the student has failed and has been granted a supplementary examination. Thirdly, the incentive for the teacher to make detailed comments is reduced by the fact that her or his professional relationship with the students is seen to be at an end. Perhaps this explains the disturbing practice adopted by some teachers of not making comments on examination scripts. Fourthly, where the assessment scheme is dominated by an examination, the kind of feedback will be limited to the knowledge and skills able to be displayed in an examination.

Even if an assessment scheme meets the above criteria, it will not be of much benefit unless useful information is provided to the student.⁷⁵ Merely appending a grade or a mark, for example, does not give any guidance as to where the student went wrong or of the remedy for such errors. Nor can it be assumed that standard marks (such as a tick or wavy line) or comments on the paper will accurately communicate the teacher's opinion. This "methex" reflects a much more complex process than many teachers have acknowledged.⁷⁶

Benefits to the Teacher

There are several benefits for teachers from thoughtful assessment. Assessment can operate as an incentive to conscientious and purposeful teaching⁷⁷ for the success of a teacher and of a law school is judged, rightly or wrongly, by the grades students ultimately achieve.⁷⁸

In the classroom, a tertiary teacher, unlike a school teacher, does not often have to discipline a student or a class. But a teacher may feel that work to be performed by students would be taken more seriously if it were assessed, rather than merely required. In other words the incentive to perform engendered by assessment

may be a tool for the teacher. The use of assessment to control student learning must obviously be done cautiously. The teacher's motives must be honourable. Aggressive use of assessment is unacceptable in a learning environment. Nor will assessment necessarily remedy lack of interest. There may be problems in the teacher/student relationship which need addressing for instance. However, in the event that there is no serious underlying problem, assessment may be used to give an aspect of the subject a higher profile. Classroom performance is frequently assessed for this reason. The need for such classroom control will vary from class to class. Of course, in any case in which assessment is to be used as a form of classroom control, it must be in accordance with the objectives of the subject, and it would be desirable to review the practice in the light of its operation.

Another benefit flowing from student assessment is to provide teachers with one means of feedback as to how well the subject has been conducted.⁷⁹ Continuous assessment has the advantage of providing early information on the students' progress. Such feedback necessitates the assessment being carried out by the teacher concerned.

Finally, assessment systems which are simple to administer obviously give the teacher more time for research and administration. Such systems therefore benefit the research function of the institution.⁸⁰ The difficulty which a conscientious teacher faces is that until teaching is in reality highly valued by an institution simple assessment systems may be preferred at the expense of methods which promote teaching to a greater extent.

Drawbacks

Incentive to Learn

Assessment does not wholly aid teaching. It will be apparent from the above discussion that the extent to which assessment may act as a positive or negative force for learning will depend to a substantial extent upon the scheme chosen. The possibility must be acknowledged, however, that any form of assessment has some deleterious effects on learning. For instance, since assessment provides a powerful incentive to learn, students may not develop any intrinsic motivation to learn which could otherwise be the

subject of much learning at university and certainly in the future.⁸¹ It might be argued that it is an idealistic view of university life to envisage students learning substantially by self motivation. If student workload is the problem, however, then to the extent possible, we should give thought to lessening it to afford the students time to explore on their own account.

Learning Style

The inevitable pressure to perform created by any assessment scheme⁸² also affects the way students think. Bowden and Ramsden claim that under any assessment system there is “a tendency to conservatism and areas of doubt tend to be covered up, rather than exposed”.⁸³ Assessment has been said to diminish student freedom to learn new ways of thinking⁸⁴ but this must be balanced against the new mental pathways created by stimulating assessment tasks.⁸⁵

Workload

Since students may be well occupied with normal class work, assessment runs the risk of overburdening the student. This is particularly the case with continuous assessment,⁸⁶ although similar effects may occur with final examinations. An overloaded student may react by taking a surface approach to their learning with the result that little of importance is learnt. Of course, with continuous assessment, the extra workload during the course of the year reduces the need to set an examination or a long examination. Nevertheless it will be necessary for the teacher to ascertain that the assessment tasks are realistic. Widespread use of continuous assessment may require further compensating measures, discussed below.⁸⁷

Inappropriate or Questionable Values

At a more fundamental level assessment schemes promote certain values or policies which are either not acceptable because of changed community values, or are given greater emphasis than may be in the community's interests. These values include⁸⁸ individualism, political conservatism and the tacit approval of dominating male behaviour.

Most assessment schemes require work to be submitted by a single student. Furthermore, it must be the student's own work. The

use of marking curves and “norm referenced” assessment⁸⁹ enhances a competitive atmosphere. Of course, individualism and competition are fundamental to the modern capitalist society.⁹⁰ But so are values of sharing, co-operation and the pursuit of the collective good.⁹¹ Notwithstanding the critical importance of individualism and competition in assessment generally, the extent to which these values are “taught” depends to some degree on the type of assessment scheme adopted. Examinations, where the student is compelled to work alone, place an extreme value on individualism. But assignments may also teach students to be competitive where co-operation is discouraged or linked with plagiarism. To the extent that individualism is over emphasised, it is submitted that these assessment systems do not prepare the students for a working and community life which requires a high degree of co-operation and working towards the common good.⁹²

The political conservatism of assessment arises largely out of the schemes usually adopted in Australian law schools. The dominant mode being an examination of the problem type, the value of the status quo is emphasised. Certainly, the legal advice is often required in a “borderline.” case, but the student is not expected (or not taught?) to engage in a critical analysis of the law in order to choose between the possible positions. “Critical” questions do frequently appear as essay questions on an examination paper, but, if they are not optional, such questions are marginalised by the time constraints of the examination. With the exception of the brilliant student, only a superficial response is possible in the time available.

It is not only the absence of critical questions which reflects the general conservatism of law school assessment. Examinations foster conservative values in positive ways, as Kissam points out:

... quickness, surprise, comprehensiveness in lieu of depth, a reliance on oral communications to deflect serious questions, and an aggressive division and separation of ideas and issues into many parts are methods of conserving power, of listening without hearing, that persons with interests in any status quo are certain to favour.⁹³

Of course, conservative political values assist in providing for a stable society. But change is also fundamental!⁹⁴ Therefore, to the extent that many assessment schemes do not pay attention to legal change, or to the need for it, they do not adequately prepare law

students.

Finally, the “over participation” of male law students in the classroom is, I think, well recognised.⁹⁵ It is a relatively small step to argue that assessment schemes may also favour male over female students. The assessment of class performance is an obvious case, especially where students are assessed on their “voluntary” contributions. This is not to suggest that class performance should not be assessed. But a sensitive teacher should be prepared to counter the “over participation” of men or to adopt a method of assessment which does not depend on competition for the teacher’s attention.

Examinations may also be discriminatory in that they are also tailored to a “masculine discourse”. Applying the influential writings of the feminist writer Carol Gilligan,⁹⁶ Kissam has pointed out that the language of examinations —

is a male code that employs rules, boundaries, game playing, speed and numbers in order to characterise and divide many matters, interests, and persons into separate and disconnected elements. This discourse ignores the more distinctively feminine patterns of thought, moral discourse, and judgment that feature an ethic of caring or a morality of the web — in other words, thinking and caring about complex relations and interdependencies among persons, ideas and situations.⁹⁷

There is no reason why these observations are not applicable to Australian law schools and to Australian law students. Australian society is particularly sexist, as evident in its sexual segregation.⁹⁸

Symbolic Value

For some students, assessment may take on a meaning wholly unintended by the assessors — a value of that person’s worth. Although this is to some extent probably a consequence of any assessment system, the more bureaucratic the mode, the more pressure there is created by the assessment system, and the greater is a vulnerable student’s fall in the event of failure.⁹⁹

Inevitability

Whatever we do in terms of assessment and regardless of whether we see assessment as a teaching strategy, it will profoundly affect our teaching. To take a simple case as an example, imagine a teacher who, with little thought to its use as a

teaching strategy, opts for a 100% problem-type examination. In brief, that assessment scheme would —

- by their lack of participation in setting the task, give the students the message that education is something which is “given” and not searched for;
- still operate as an incentive to learn — but only the knowledge and skills the subject of a legal advice and only at a depth possible in a three-hour or so examination;
- affect the teaching style adopted by the teacher; by increasing student anxiety, indirectly determine their learning styles;
- by separating the time for teaching and for assessment, and by instituting a scheme which may well be intimidating, encourage a “them and us” relationship between teacher and student;
- by over-emphasising individualism, the status quo and “male” behaviour, implicitly teach inappropriate or questionable values;
- allow students to demonstrate only a limited range of knowledge and skills in the time available;
- give feedback on assessment after the subject is over and only if sought by the student; and
- by permitting them to demonstrate their achievement under difficult conditions in which only the brilliant student can, objectively, do well, detrimentally affect our morale.

These points are discussed in greater detail below.¹⁰⁰

ASSESSMENT AS A MEANS OF CERTIFICATION

General Role

Law school assessment certifies a student in a number of principal ways, reflecting the responsibilities owed by the law teacher to the university, to the profession and to the public.¹⁰¹

Possessing a law degree signifies that the holder has successfully completed a university course in law. The degree being bestowed by the University, it certifies the graduate as having been educated in the liberal, university tradition.¹⁰² The law school’s function in this respect has been described by a former Dean as providing a “general certificate of intellectual competence”.¹⁰³

A law degree is also in most cases the primary qualification for legal practice. The Australian Law School Deans have recognised

the vocational role university law schools play by describing their role as to “endeavour to do [what] is consistent with the training of future practitioners.”¹⁰⁴ A law degree does not, however, certify a person as fit for unrestricted practice in law. In Victoria, for example, a student must also successfully complete either a six month practical legal course and six months’ legal experience or one year of articles before being free to practice in her or his own right.

Additionally, assessment usually certifies the *level* of competence reached by the graduate. By marking or grading student work, law teachers are fulfilling a teaching function of providing more detailed feedback to the student. In terms of certification, the sorting and ranking of students provides valuable information for potential employers, scholarship applications and academic prizes.

While these principal functions are generally understood, there are debates about the relationship between the certification and teaching functions of assessment and about particular aspects of certification. The latter include the appropriateness of students having a wide choice in the tasks they will be assessed on, the needs of students from minority cultures, the need for consistency amongst teachers in the same subject, and the old chestnut — the reliability of assessments for certification purposes. These issues are now examined in turn.

Teaching and Certification

Clearly, if the teaching function of assessment is to be taken more seriously, we cannot afford to ignore its other main function, that of certification. This is especially so since the two are said to conflict.¹⁰⁵ The alleged conflict arises, according to the Pearce Report, because of the “tension that exists in all law schools between educating students for the legal profession and meeting perceived university education goals.”¹⁰⁶ Bates has similarly analysed the law teacher’s “dilemma” as caused by

[owing] responsibilities to the legal profession, the community and to their academic institution, which place them in a paradoxical situation. If they seek to fulfil the responsibility to the profession in the profession’s terms they may well fail in regard to the other two.¹⁰⁷

In relation to the profession, he thinks that their “sectarian

interests may not be the interests of legal education”.¹⁰⁸ However, he does not make clear why the profession’s interests are opposed. In a further article, he hints that the difficulties are caused in part “by the ways in which groups perceive themselves and others”.¹⁰⁹ This theme has been picked up and emphasised by Wade in a more recent offering. While believing that “tradition, ignorance and physical separation will continue to fuel the tensions between certain legal practitioners and legal academics” he implies that that need not be the case for all:

Many notable bridges exist and more are being built ... It is too late in history to discover who started the war. In my experience, however, the divide is entirely traversed by respect and animated discussion (“What would you say to this? Why do you think that happens?”) when two secure representatives from each camp meet.¹¹⁰

Other commentators challenge directly the idea that the needs of the profession are different from those of the university. Sampford and Wood argue that “there is no real tension between the need for university and professional education”.¹¹¹ They observe that a mere knowledge of legal rules and skills is a hopelessly inadequate form of training without knowledge of the context within which those rules and skills operate and without a capacity to criticise them.¹¹² The authors do not deny “the obvious truth that a person may be a successful lawyer without any appreciation of theoretical legal issues”.¹¹³ Their point is that “all practice is enhanced by a knowledge of the context in which [law] operates and the medium through which it is effective”.¹¹⁴ Their views have been echoed by Hunt and Wade. Hunt argues that the provision of a critical legal education “has the potential to overcome the tension between intellectual and practical objectives in legal education by enhancing student ‘understanding’ of legal phenomenon.”¹¹⁵ Wade agrees with Kahn Freund’s argument that:

There is in fact no contradiction between the needs of an academic professional education and those of a vocational training. English law does not consist of an uncoordinated mass of rules for practitioners which can only be learnt by rote. The unquestioning acceptance of judicial decisions or utterances is not part of the professional equipment of an English lawyer.¹¹⁶

The supposed conflict between the teaching and certification functions of assessment may therefore be more a problem of perception than a reflection of reality. Why ought not the

profession be interested in employing students who have accepted responsibility for their own learning, who have not engaged in “surface learning”, who have a positive but not uncritical attitude to the law, who have acquired a range of knowledge and skills, and so on? The profession would only have cause for concern, it is submitted, if examinations were done away with completely or if the traditional skills of lawyers were ignored in the assessment process. But this is not being suggested here or, to the author’s knowledge, elsewhere. Reform of assessment should not entail throwing the baby out with the bathwater. A scheme of assessment in a subject with direct application to legal practice might well include an examination, especially one of the problem-type, but, given their inadequacies as a teaching strategy and a means of certification, examinations ought not, in the author’s view, to constitute more than 50% of the total possible mark.

Student Choice

A number of law schools present students with a wide choice of assessment schemes in any one subject. Is this consistent with the teaching and certification functions of the law school? The main reason for affording such a choice is presumably to ensure that the assessment system gives a proper account of a student’s abilities. On the assumption that the student knows best where her or his strengths lie, the argument is that the student ought to be able, within limits, to show their “best face”. The present writer admits to having several reservations about wide student choice in the assessment regime. The first arises from the danger that students will continually choose what for each individual is the “soft option”. For example, a student who performs well in exams may consistently choose this option and consequently not develop their knowledge and skills in other departments. Alternatively, a student may consistently choose research assignments, and consequently their individual competence under examination conditions may never be tested. In either case, across the range of subjects where a wide choice is available, the teaching function of assessment will have been stunted, and the certification flawed, by the narrow focus of the assessment.

A second reservation is whether a wide choice gives a coherent picture of what the assessment programme is about, including how

it relates to the subject and faculty objectives. Might it tend to suggest the assessment is rather arbitrary? Such a situation is likely to confuse the student.

Practical matters are relevant. With students each doing their own thing, the class would cease to be a cohesive group working with the same aims. Managing the class would be more difficult, on top of the extra work required in designing the assessment regime and in the subsequent marking.

Student choice in assessment regimes may also be seen as an unnecessary diminution in the authority of the teacher. This is likely because the wider the choice the more likely the regime will reflect student and not teacher preference. It is not fashionable these days to talk of teacher “authority”, but the responsibilities of the teacher are ever present. The teacher ought not to adopt a regime which effectively gives up the teacher’s control over teaching and certification.

In any case student choice may be effected in other ways. Assignments can be offered with choices available, including, in appropriate cases, a topic of the student’s own choosing. Consultation¹¹⁷ and co-ordination¹¹⁸ should help ensure that the students are capable of doing the work required.

Students of Minority Cultures

In any class of law students, there are likely to be students of minority cultures whose different cultural background may cause them difficulties with certain forms of assessment. For instance, Aboriginal students are disadvantaged by having to do written examinations as opposed to being examined orally.¹¹⁹ Should their special needs be recognised and, if so, in what way? As a point of general principle, the needs of minority students ought not be submerged by those of the majority.¹²⁰ In the end, assessment is a certification of an individual’s knowledge and abilities. Clearly though, it would not be possible to offer select groups a specially tailored assessment scheme. (This is not to suggest any such group would seek favoured status.) But, given a range of students with differing strengths and weaknesses, the assessment regime ought to be broad enough to give each student a chance to show their flair. As argued above, it would be detrimental to the teaching and certification functions of assessment to permit wide student choice.

The preferable course then would seem to be to include forms of assessment which are appropriate to the various groups of students. For example, Aboriginal students may wish to do a moot, and students from migrant families may wish to do a field trip (required to be written up or presented orally) where they may examine the impact of law on their cultural group. In practice, however, how is a teacher to ascertain the background and special needs of each student? A survey may be viewed as intrusive. If the literature made clear the various strengths and weaknesses in relation to various groups, some answers would be forthcoming, but little appears to have been published.¹²¹ In the meantime, a broad range of assessment modes, including the ones referred to above, may be the best way of accommodating the special strengths of particular students.

Consistency Amongst Teachers

Where a number of teachers are at the same time each taking a stream of students in the one subject, various pressures may be brought to bear upon individual teachers to conform to some degree with the assessment regime(s) of the others. At one extreme, the teacher may be pressured to adopt a common one hundred per cent examination. Alternatively, difference in the modes of assessment may not in practice be allowed, but different questions may be permitted. More flexible still, complete uniformity regarding the modes may not be the rule, but a common examination component at least required.

Is consistency desirable and, if so, to what extent? The reason behind moves to ensure consistency are presumably partly practical and partly to do with the certification process. The latter arises because ultimately the degree is one awarded by an institution. A variety of approaches may appear to be at odds with an institutional assessment. There is merit in this viewpoint as there is with the “practical” aspects. Assessment is a time consuming process. Some degree of uniformity in assessment regimes saves time in the design of the assessment tasks and assists in cross-marking.

However, the effects on the teaching and the standard of the certification need to be considered. If the teachers share similar teaching philosophies and objectives there will be little problem in adopting the same assessment regimes. But our teaching

philosophies¹²² and objectives¹²³ vary considerably. Where they differ significantly and uniformity completely or in large part is required, a number of consequences might ensue. The assessment could bear little relation to the way the subject is taught, giving rise to the “hidden curriculum” problem discussed above. A compromise could be reached, in which case the subject of the assessment could still differ somewhat from that of the subject. Or the teacher(s) concerned could be led to modify their subjects for the sake of consistency. None of these consequences, it is submitted, is desirable. On the other hand, it is not suggested that teachers ought to have carte blanche whatever with assessment. As mentioned already it is desirable that each teacher should articulate why they have chosen the particular assessment scheme — how it gives effect to the subject and faculty objectives. Standardisation of marks across streams may also be carried out. In practice teachers will usually find they have some common ideas on assessment and will find it convenient to agree on assessment regimes to that extent. Therefore, in most cases the question will not be whether there ought to be uniformity in assessment, but whether the assessment schemes ought to be more uniform than an individual teacher feels is appropriate to the subject she or he is taking.

For the above reasons, in this writer’s view, the potential detrimental effects on teaching and certification resulting from imposed uniform assessment schemes outweigh their benefits.

Reliability

Aside from criticisms which have been frequently levelled at the reliability of examination marks,¹²⁴ one study of Australian tertiary students concluded with the suggestion that “high grades do not necessarily require high quality learning strategies or outcomes”.¹²⁵ Although this might throw doubt on the reliability of assessment schemes generally, this is speculative in the absence of information as to the modes the subject of the study.

CRITIQUE OF EXAMINATIONS¹²⁶

To reiterate, the Pearce Report observed that assessment in Australian law schools is dominated by the problem-type examination. While some liberalisation has occurred, there seems

no reason to doubt that the basic situation described in 1987 remains the same.

It was suggested above that the place of examinations in the assessment process, especially examinations solely of the problem-type, ought to be reduced. Some of the reasons will be apparent from the preceding discussion. At the risk of some repetition, the case for reform is now specifically pleaded.

Teaching Perspective

A number of criticisms may be levelled at the use of examinations as a teaching strategy.

- (a) The incentive to learn is greatly telescoped, since the student is only required to “know” what can feasibly be demonstrated in a short time span. Where the timing of the examination is left until the end of the subject, as is common, the assessment system does not provide an incentive to learn until the end of the subject. As a consequence, the student’s involvement in the subject is lessened.
- (b) It is well known that examinations cause increased levels of anxiety.¹²⁷ This in turn detrimentally affects a student’s learning style by fostering a surface approach to their learning.
- (c) Examinations permit little or no time for reflection or rewriting while the work is being completed. A period of reflection is essential for deeper thought. Since writing promotes thinking the lack of time for re-writing curtails thinking. These restrictions send a message to students which is:
You are being assessed by examination. You do not have to learn any examinable topic in depth because only a superficial knowledge can be shown.
- (d) The teacher’s position as an assessor and “expert” means inevitably that she or he is perceived as a kind of controlling, authority figure. Examinations, because of the strictness with which they are necessarily conducted, accentuate the teacher’s position in the education hierarchy. The more the teacher is perceived as an authority figure, the more intimidated the student may become. The relationship between teacher and student must on the other hand be one

where the student feels able to take risks, such as asking apparently simple questions.

- (e) Examinations are an obstacle to greater experimentation with and diversification of styles of teaching. Because examinations cannot require deep analysis, the traditional lecture tends to be the dominant teaching style. Lectures have their uses. But they present only an overview and are moreover a “teacher-centred” rather than “student-centred” approach to learning.
- (f) Examinations implicitly teach inappropriate or questionable values. They over-value individualism at the expense of encouraging co-operation. Problem-type examinations over-value the status quo. Examinations have also been linked with dominating male behaviour.
- (g) Since coverage rather than depth of treatment is required by examinations, the extent to which examinations develop students’ intellectual capacities must be queried.¹²⁸ There is moreover a “modest but growing body of evidence” that demonstrates examinations are unsuccessful as teaching strategies.¹²⁹ Students may acquire sufficient jargon to perform quite well. Nevertheless examinations have been linked with inadequate understanding of fundamental concepts and theory, and a poorly developed repertoire of intellectual skills.¹³⁰
- (h) There are many skills which examinations cannot assess or can only assess at a very low level. These include research and writing skills: organisation, attention to detail and thoroughness.¹³¹
- (i) Because they are frequently conducted at the end of a subject, examinations provide limited feedback to the student. Regardless of when they are held, examinations can only provide feedback on the knowledge and skills that are examinable and examined which, as seen from above, is limited.
- (j) Examinations also provide limited feedback to the teacher for similar reasons to (i).¹³²
- (k) Because the general standard of examination papers is, in the circumstances, low, teaching morale is undermined. This may in turn affect the teaching performance.¹³³

Notwithstanding the above criticisms, examinations have some positive features.¹³⁴ Since a large amount of material must usually be “known”, students are encouraged to synthesize and inter-relate large amounts of material. The skill of responding rapidly under pressure to a legal problem is also assessed.

When the dominant mode is an examination composed of hypothetical legal problems, the above critique of examinations applies a fortiori. For instance, teachers may be led to restrict the curricula to black letter issues only.¹³⁵ In any case, the incentive to learn is further telescoped. There is no compelling incentive for the student to learn the law from several perspectives which many think ought to form part of the curriculum of every law subject. This view was endorsed in the Pearce Report:

In a submission made to us by the tutors at Melbourne the perceptive point was made that assessment primarily by problem questions ... severely constrains the way in which law can be taught. It was said that “most students are only interested in preparing for examinations by learning problem-solving techniques and are, therefore, not interested in any theoretical, critical, reformist, jurisprudential or policy issues.”¹³⁶

Subjects which adopt problems as the dominant mode of assessment nevertheless frequently include these “perspectives” in the teaching program by way of lectures, allotted reading or, bravely, tutorial discussion. The effect of doing so is for many students (and the teacher) a waste of time since the students’ learning is focussed on the hidden curriculum defined, inter alia, by the assessment system.

Certification Perspective

Because examinations have been designed to measure rather than to teach¹³⁷ its certification function has traditionally been seen as a strength.¹³⁸ Yet examinations suffer serious flaws in this area too, as the following points attest.

- (a) Although examinations purport to measure the attainment of a student in relation to specified material (commonly an entire subject) this is not nearly possible. Because of time constraints and for other reasons, as is well known, many students concentrate their study on only those aspects of the subject which they think will be examined on the day. Students are frequently encouraged to do so by being given

options in the examination paper. Whether they succeed may depend upon luck or good judgement. Perhaps because of the inevitable selection involved in studying for an examination, students acknowledge that continuous assessment assesses a greater proportion of the year's work.¹³⁹

- (b) In the examination room, the time constraints are so great that the student's performance can at best only reliably reflect what they are capable of under such circumstances. Although legal practice sometimes imposes severe time constraints, it is suggested that three quarters of an hour or so for a complex problem is unreal even by those standards.¹⁴⁰
- (c) In any case written examinations do not assess, and therefore do not foster, the development of a range of abilities which are important for the practice of law. These include oral, research, self-teaching and interpersonal skills, and the capacity for thoroughness and attention to detail.
- (d) Because of the time constraints, there are added marking difficulties over what the student has written (handwriting problems) or intended to write (interpretative problems).
- (e) Empirical studies have found examinations to be unreliable. Inconsistency amongst examiners has been found to be both common and serious.¹⁴¹
- (f) Examinations may also unfairly discriminate against particular groups, including women students.¹⁴²

Problem-type examinations might be defended on the basis of their relevance for certification purposes. But should the basic certification for practice be based solely on giving an outline of legal advice in a contrived situation? Is it possible that problem-type examinations are linked to the public's "negative perception" of the legal profession?¹⁴³ In the United States of America, Kissam has argued that the "fragmentation of thought and analysis" which is required in examinations of the problem variety is directly linked to "the criticism of practicing lawyers ... that we are 'too legalistic', too rarely appreciative of the personal or social values that are implicated in our work, and too often incapable of integrating complex materials in innovative, imaginative, and persuasive ways".¹⁴⁴ In Australia similar criticisms have been made about our profession. A 1985 study conducted in Sydney revealed that

Persons from lower socioeconomic backgrounds, older persons, and migrants were most dissatisfied with the legal profession. Specific complaints were about delay, lack of communication and a perceived “air of superiority”.¹⁴⁵

In this light it is submitted that certification should reflect a range of skills and knowledge such as that mentioned in the Pearce Report as well as practical writing and oral abilities.

Examinations shall probably never disappear, however, if only because they alone guarantee that a student’s written work is her or his own. The need for the assessment to be authentic is central to certification. But the pursuance of this goal ought not to overshadow the important teaching functions which assessment performs as well as other certification objectives. Some sacrifice of authenticity is necessary to improve our teaching as well as the overall value of the certification.

Other reasons are often advanced for the continuance of examinations as certifiers, but this writer admits to some scepticism about their validity. First, it is claimed that examinations are a mechanism for “assessing all students equally”.¹⁴⁶ But this equality exists only in the narrow sense of imposing uniform conditions for completion of the paper. Even these conditions are diminishing. The principal leveller today is the strict time limit for completion. With the rise of “open book examinations there is no effective limit to the materials which may be brought in. And examinations frequently provide for a choice of questions. In many other aspects, as pointed out above, examinations do not assess equally. This stems from the element of luck, the artificial constraints, their narrow focus, marking and grading difficulties, and possible discrimination.

Secondly, the argument that examinations must be used because there is no other way to assess learning over an entire subject is not compelling. Examinations may appear to be necessary, but this may be simply because they are familiar. There is no logical reason why assignments could not be due in after the end of the teaching period. Students would not be overburdened where there was some time during term to work on aspects of the paper. In any case they are already overburdened by examination timetabling.

Finally, it is claimed that examinations are more efficient in terms of faculty resources than other forms of assessment.¹⁴⁷ True, examinations may be marked in non-teaching periods, but so may

assignments. Then it is said that there are savings because the questions are standardised — but choice is frequently given and in any case there is no compelling reason against offering a variety of assignment questions once it is accepted that student collaboration is inevitable and to a degree a good thing. It is also thought that less time is involved in marking examinations because the answers are shorter. There is truth in this, but it must be balanced against the added handwriting and interpretative problems, and the lack of opportunity for the student to think deeply and to show her or his abilities.

Resources

As the funds available to universities per student continue to Shrink,¹⁴⁸ the inevitable question is raised, namely, do law schools have the capacity to adapt their assessment schemes to be more in tune with students' needs? While resources are rightly seen as powerful considerations in the debate about assessment, it is important to realise that they ought not be wholly determinative of the issue. Firstly, some improvements require little or no resources. Thinking about how we assess in the light of subject and faculty objectives is one example. Formative (voluntary) assessment¹⁴⁹ also requires few resources since it may be carried out by the student or a classmate, with the assistance of a marking guide supplied by the teacher. Secondly, some alternatives to exams may not be as costly as we think. A problem assignment with a word limit of 2,000–2300 words would reduce the need for a long examination paper. Assignments may be marked during teaching time which would spread the marking over the teaching year, or they may equally be marked in nonteaching time. Ultimately, as others have observed,¹⁵⁰ so declining Faculty resources raises the question of priorities, a question for government as much as for law schools. If teaching and assessment is under-resourced, what is the real priority of teaching?

RETHINKING ASSESSMENT

The basis for a more desirable assessment practice than the one which currently dominates Australian law schools is now proposed. To a large extent it summarises ideas discussed above. In general,

the model seeks to elevate and enlarge the important but underrated teaching function which assessment inevitably performs. It takes account also of the need to certify, although it is argued that the conflict between the two functions has been exaggerated. The model is built around nine key principles. Principle 1 is of a general nature. Principles 2–4 refer to the preliminary steps which may be taken by the particular teacher. The remainder describe the general criteria for the design of assessment schemes.

1 Assessment is a Teaching Strategy

Assessment does more than merely certify. Thoughtful assessment is a requisite element of good teaching along with the curricula, teaching method, and the implementation of faculty and subject objectives. It is properly seen as a teaching strategy because of the close relationship it shares with the other elements referred to. Assessment should thus be considered “globally”, that is, with thought to how it affects and is affected by the other aspects of teaching.

2 Assessment Schemes Should Be Consistent With One’s Articulated Teaching Philosophy and Objectives

A proposed assessment scheme must be one to which the teacher concerned has given serious thought.¹⁵¹ The starting place ought to be the faculty and subject objectives. Since the assessment scheme is not separate from the subject but is an integral part of it, it would be desirable for the teacher to draft a statement demonstrating the link between the assessment system and the subject and faculty objectives. Failure to do so may result in an inappropriate assessment scheme being adopted, and the teacher and students being at cross-purposes. It ought to be routine for a copy of the statement to be given to the Dean and to each student in the subject. The former course would help ensure its production. The latter course would result in the students being better informed about the nature of the assessment as well as the relevant objectives.

3 The Setting of Assessment Schemes Should Be

Co-ordinated

To ensure their easy implementation, the conduct of examinations is usually co-ordinated by the University administration. If greater use is to be made of other modes, then there is a like need here too for co-ordination. Failure to co-ordinate with colleagues may result in students being set tasks which they cannot be expected to meet. The co-ordination could take several forms. One suggestion is for the setting up of an assessment register detailing the subject, the nature of the task, and the due date. It could also indicate the subjects which are frequently taken simultaneously. This level of co-ordination leaves it up to the individual teacher to make the ultimate decision. It may be that an assessment register is too rough a guide to the individual teacher. A more effective approach could be for the teacher to consult directly with the students about the timing of assessment during the year. This could work, provided that law teachers act as a group.

4 Fair Procedures Should Precede the Implementation of Assessment Schemes

Assessment is in the end a judgment about an individual's knowledge and skills. Students are obviously affected by it. It would seem to be fair for the teacher to consult with students about the proposed scheme of assessment. This may give the teacher an opportunity to allay some unnecessary fears. Such consultation is not an undue interference with academic freedom where the teacher retains the final power to decide. To work, the consultation may require the presentation of options to the students. An added benefit of involving the students would be to encourage the development of student responsibility for their own learning. It is well recognised that at the point of entry many young university students are not intellectually mature.¹⁵²

5 Assessment Schemes Should Be Broadly Based

The critical weaknesses of assessment schemes which have as their dominant mode an examination, especially a problem-type examination, suggest strongly that broadly-based assessment ought to be a key feature. A broadly-based system is one in which

students are required to do at least three different tasks each worth at least 10% of the total.¹⁵³ For these purposes, there is no difference between a “test” and an “examination”. Apart from written examinations these tasks might include assignments (problem, essay or research in nature), moots, drafting exercises, classroom performance and oral examinations.

Although it would be ideal to aim for a broad assessment in each subject, it may not be practicable in all cases. In any case the assessment in a particular subject should be considered in the context of a student’s entire law course. These considerations suggest that, at a minimum, broadly based assessment should be required *across each course*. Under such an arrangement a student would be required to perform a certain number of research assignments, moots, seminar papers or whatever, before graduation.¹⁵⁴ The advantages of this approach are that it can be a means of implementing faculty objectives, it focuses on the student’s needs rather than giving effect simply to student choice, and it may well prod law teachers to rethink their assessment programs.

Whether particular modes ought to be required in every subject is not clear. It has been suggested to the author that all compulsory subjects ought to have an assignment component. Although assignments are highly desirable, such a requirement, without further thought, may prevent the teacher giving thought to the higher goal of implementing the faculty and subject objectives. In a special case, this may require alternative modes of assessment, such as suggested above.

6 Assessment Schemes Should Correspond With the Official Curriculum

Flowing from the drafting of a statement linking the proposed assessment scheme and the faculty and subject objectives, the assessment scheme arrived at should, with one qualification, correspond as much as possible with material taught in lectures and discussed in seminars and tutorials. To do otherwise is to render either the teaching material irrelevant or the assessment task inappropriate. An exception must be made for research tasks which necessarily go beyond the taught material, though they still ought to fall within the broad confines of the subject as expressed in the

subject objectives.

7 Assessment Schemes Should Impose a Realistic Workload on Students and Teachers

One of the purposes of consultation with students is to assess the likely workload of a proposed assessment scheme. An assessment scheme which required more than two substantial pieces of written work per semester might be regarded as going too far.

As regards the teacher, it goes without saying that assessment schemes which require marking to be done at the same time as other university commitments are unlikely to achieve all their teaching objectives.

8 Assessment Schemes Should Seek to Minimise Expenditure of Resources

The reality of limited resources only becomes an issue in assessment when *significant additional resources overall* are required. Some steps such as justifying our assessment schemes do not involve significant resources. The implementation of new modes which require relatively few resources, such as multiple choice or short answer tests and the grading of class performance, can also be considered. Finally, the resources which are required by new modes need to be set off against the *reduced* resources required to run the current modes. For instance requiring an assignment enables a shorter examination to be set.

9 Assessment Schemes Should Seek to Give a Proper Account of an Individual's Achievement

The certification function of assessment requires, as far as possible, a proper account of each student's achievement. Yet, regardless of the assessment scheme adopted, it must be recognised that the actual carrying out of assessment — the marking and grading — is grounded in subjective judgements.¹⁵⁵ Subject to these constraints, the teacher's responsibility in so far as the scheme is concerned must be to ensure that it is a fair one. From the student's perspective a proper account needs to recognise an

individual's range of relevant knowledge and skills. Any scheme dominated by a single mode of assessment is unlikely to measure adequately those abilities. Measuring these abilities in other subjects may compensate but only roughly. In the absence of information about the strengths of the students, a broad range of assessment tasks relevant to the subject is appropriate.

From the institution's perspective, a proper account does not require assessment by examination alone or as the dominant mode. Rather, it requires assessment of a range of tasks relevant to a critical understanding of the law and to legal practice. Each Faculty should, consistent with its stated objectives, desirably set minimum standards of accomplishment. In terms of assessment, this would mean requiring that every graduating student have satisfactorily completed a minimum number of specified modes.

CONCLUSION

Examinations, the dominant mode of assessment in Australian law schools, have a legitimate, but limited, role to play in the assessment of students. From a teaching perspective, they encourage students to synthesize large amounts of material. From a certification perspective, they measure the ability to display some relevant knowledge and skills in conditions where examiners can be assured of authenticity. But they fail to meet many of the principles elaborated above. Where they are the sole or dominant assessment mode, they function poorly as a teaching strategy and as a means of certification.

The resurgence of interest in law teaching is an opportunity to correct our past mistakes in respect of assessment practices. Rethinking assessment as a teaching strategy will improve our teaching and the value of the certification it ultimately affords.

* Faculty of Law, Monash University. This article is based on talks given to meetings of the Teaching Interest Groups at Monash University and University of Melbourne law schools. Comments from participants assisted me. I am grateful also for the comments on a draft of this article made by my colleagues Professor Richard Fox and Mr John Glover, and by the anonymous referees.
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¹ FCL Beighton & CM Maxwell, Student Attitudes to Undergraduate Assessment (1975) 18 *Vestes* 161; University of London Teaching Methods Unit, *Improving Teaching in Higher Education* (London: Methuen, 1976) at 96.

² A Miller, An Assessment of Assessment, in *Schooling and Learning: How Interdependent* (Australian Association for Research in Education, 1978) 400.

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- 4 DMR Tribe & AJ Tribe, Assessing Law Students (1986) 20 *The Law Teacher* 160; AJ Tribe & DMR Tribe, The Assessment of Students on Law Degrees in the Public Sector — Law Lecturers' Views on Student Assessment (1988) 22 *The Law Teacher* 68.
- 5 D Pearce, E Campbell & D Harding, 1 *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Pearce Report) (Canberra: AGPS, 1987) at secs 3.49 ff.
- 6 JA Bowden & P Ramsden, *Assessment Practices and Student Learning* (Melbourne: University of Melbourne, 1986) at 7.
- 7 Pearce Report, *supra* note 5, at sec 3.51. The latest development in North America is the use of oral examinations in law: SI Friedland, Towards the Legitimacy of Oral Examinations in American Legal Education (1988) 39 *Syracuse L Rev* 627.
- 8 Pearce Report, *supra* note 5, at secs 3.50–3.52. At sec 3.51 it was reported that “in all law schools except Macquarie and UNSW, a substantial majority of the subjects taught are assessed as to 50 per cent or more of the possible marks by means of formal end of year or semester examinations”. On American practice see Friedland, *supra* note 7, at 628; KP Cross, Using Assessment to Improve Instruction, in Educational Testing Service, *supra* note 3.
- 9 Australia, *Higher Education: A Policy and Discussion Paper* (Canberra: AGPS, 1987); Department of Employment, Education and Training, *Higher Education: A Policy Statement* (Canberra: AGE, 1988).
- 10 CR Williams, New Directions in Legal Education (1989) 63 *LIJ* 611.
- 11 In this article assessment generally refers firstly to “summative” as opposed to “formative” assessment. According to GI Feletti, Assessment for Capability (1984) 21 *Prog Learning Educ Tech* 294, at 294–295, the former is formal and mandatory and demonstrates the acquisition of certain knowledge, skills, values and attitudes. The latter is voluntary, informal, and instituted for the purposes of providing feedback. Secondly, it refers to only the higher order decisions of *what to assess* and *which criteria to use* in the assessment, rather than with marking or grading issues of *how to apply that criteria* and *doing the assessment itself*: terminology adopted from J Heron, Assessment Revisited, in D Boud (ed), *Developing Student Autonomy in Learning* (London: Kogan Page, 1981) 55 at 66. For discussion of these lower order decisions, see HR Pollio & WL Humphreys, Grading Students, in JH McMillan (ed) *Assessing Students' Learning* (San Francisco: Jossey-Bass, 1988) 85; D Newble & R Cannon, *A Handbook for Teachers in Universities and Colleges: A Guide to Improving Teaching Methods* (New York: Kogan Page, 1989) ch 6.
- 12 J Heywood, *Assessment in Higher Education*, 1st ed (London: Wiley, 1977) at vii.
- 13 D Watkins & B Morstain, The Educational Orientations of Lecturers and their Students: A Case Study of an Australian University (1980) 24 *Aust Educ* 155, at 160. No law lecturers were surveyed.
- 14 Beighton & Maxwell, *supra* note 1.
- 15 A majority (63 per cent) of the respondents did agree that the methods of assessment were generally satisfactory. However only law *graduates* were sampled. Two of the top three approval ratings were also at the only law schools rated by the Report as not dominated by examinations (Volume 4, sec 5.2.7). And all but five of the 77 respondents who made individual comments on assessment were highly critical of their experience, describing the assessment as “too academic”: *id* at sec 5.2.8.

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- 18 G Lyons, Assessment Methods: the Time for Review (1979/80) *Laura* 31, at 33.
- 19 *Legal Education in Australia: The Submission of Australian Law School Deans to the Commonwealth Assessment Committee for the Discipline of Law* (1986) (“Australian Law School Deans”) at 11.
- 20 JH Wade, Legal Education in Australia — Anomie, Angst, and Excellence (1989) 39 *J Legal Educ* 189, at 199.
- 21 Heywood, *supra* note 12 at 1; M Josephson, 1 *Learning and Evaluation in Law School* (1984) at 3; Lyons, *supra* note 18, at 35; G Loaker, Faculty as a Force to Improve Instruction Through Assessment, in JH McMillan (ed) *Assessing Students’ Learning* (1988), 19 at 23–29.
- 22 See generally, AJ Pirie, Objectives in Legal Education: The Case for Systematic Instructional Design (1987) 37 *J Legal Educ* 576.
- 23 University of London Teaching Methods Unit, *supra* note 1, at 120–121.
- 24 The submission of the Australian Law School Deans to the Pearce Inquiry stated that “[i]t is axiomatic that assessment procedures should relate directly to course aims”: *supra* note 5, at 11.
- 25 G Bergenhenegouwen, Hidden Curriculum in the University (1987) 16 *Higher Educ* 535.
- 26 *Id.* At 536.
- 27 *Id.*; PC Kissam, Law School Examinations (1989) 42 *Vanderbilt L Rev* 433, at 451–452.
- 28 RE Megarry, Law as Taught and Law as Practised (1966/67) 9 *J Soc Pub Teachers Law* 176, at 184.
- 29 See also D Watkins, The Approaches to Learning of Australian Tertiary Students: A Replication (1986) 5 *Higher Educ Res Develop* 185, at 186.
- 30 Bowden & Ramsden, *supra* note 6, at 2. In Victoria, final year students from 1991 onwards are to be assessed by a variety of mechanisms instead of solely by examination. Significantly, the debate over assessment has been the most controversial aspect of the new certificate: DN Caulley, CATS show well in trials, *The Age* 12 June 1990, at 20.
- 31 C Ward, *Designing a Scheme of Assessment* (London: Stanley Thornes, 1980) at 29.
- 32 Cf Feletti, *supra* note 11.
- 33 Cf *infra*, at 202–204.
- 34 Williams, *supra* note 10.
- 35 *Id.* at 612.
- 36 *Supra*, at 180–182.
- 37 *Infra*, at 213.
- 38 Despite the pessimism of some teachers, the quality of teaching has been rated by students to be of “considerable importance” to their learning: D Watkins, How Students Explain Their Academic Performance (1985) 4 *Higher Educ Res Develop* 89, at 92. It also has a significant association with “deep” as opposed to “surface” approaches to learning: D Watkins, Student Perceptions of Factors Influencing Tertiary Learning (1984) 3 *Higher Educ Res Develop* 33, at 41.
- 39 Watkins (1984), *supra* note 38, at 47–48.
- 40 Loaker, *supra* note 21, at 26.
- 41 Kissam, *supra* note 27, at 494–496.
- 42 This is not easy to achieve even in smallish classes in view of “over

- participation” of male students: J Morgan, *The Socratic Method: Silencing Cooperation* (1989) 1 *Legal Educ Rev* 151; *see further infra*, at 195.
- 43 See G Gibbs et al, 53 *Interesting Things to do in Your Lecture* (Bristol: Technical and Educational Services, 1985); Newble & Cannon, *supra* note 11, ch 1.
- 44 Kissam, *supra* note 27, at 502.
- 45 *Id* at 470.
- 46 Beighton & Maxwell, *supra* note 1, at 163; D Thoday, *How Undergraduates Work* (1957) 11 *Universities Quarterly* 172, cited in Tribe and Tribe (1986) *supra* note 4, at 162.
- 47 A D’Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism* (1987) 37 *J Legal Educ* 461.
- 48 Australian Law School Deans, *supra* note 19, at 6; University of London Teaching Methods Unit, *supra* note 1, at 109; Heron, *supra* note 11, at 58.
- 49 Pearce Report, *supra* note 5, at secs 3.60–3.61.
- 50 MS Knowles, *Reface* in D Boud (ed), *Developing Student Autonomy in Learning* (London, Kogan Page, 1981) at 8.
- 51 Bowden & Ramsden, *supra* note 6, at 4–5.
- 52 Australian Law School Deans, *supra* note 19; Pearce Report, *supra* note 5, at sec 1.52.
- 53 E Gaudry & PG Power, *A Study of Anxiety Level under Continuous and Terminal Assessment* (1973) 11 *Australian University* 26.
- 54 Watkins (1984, *supra* note 38, at 47–48.
- 55 University of London Teaching Methods Unit, *supra* note 1, at ch 6.
- 56 A 1986 study at the Australian National University found results “which were much more in accord with the avowed aims of tertiary education”: Watkins, *supra* note 29, at 188. Cf Powell, *supra* note 17, who, after reviewing the literature and his own empirical research, is sceptical of many of the educational benefits often assumed to be brought about by higher education.
- 57 *Infra*, at 193–196.
- 58 But see Powell, *supra* note 17, at 128 who cites studies which show a substantial loss in the ability to recall “factual” information. “Naive” ideas also remained, the changes in conceptual knowledge being “superficial” and “linguistic”: *id*.
- 59 On the development of theoretical dimensions in substantive law subjects, see C Sampford and D Wood, *Legal Theory and Legal Education — The Next Step* (1989) 1 *Legal Educ Rev* 107.
- 60 Although clinical legal education tends to be relegated to the final years of the law school, it could sensibly form part of every subject, with few exceptions. See further, *infra*, at 202.
- 61 See generally W Twining, *Legal Skills and Legal Education* (1988) 22 *The Law Teacher* 4.
- 62 Australian Law School Deans, *supra* note 19, at 4. But a theoretical and uncritical education is the “norm”: Sampford and Wood, *supra* note 59, at 132,134n; Powell, *supra* note 17, at 140.
- 63 Sampford and Wood, *supra* note 59, at 39.
- 64 G Watson, *Writing a Thesis: A Guide to Long Essays and Dissertations* (London: Longman, 1987) at 9.
- 65 *Id*.
- 66 Twining, *supra* note 61, at 13.
- 67 KS Bean, *Writing Assignments in Law School Classes* (1987) 37 *J Legal Educ* 276.

- 68 SL Hayes & RA Hayes, Towards Objective Assessment of Class Participation (1973) 12 *J Soc Pub Teachers Law* 323; R Sappideen, Evaluating Class Participation: Some Reflections on the University of New South Wales and Macquarie University Experience (1982) 16 *The Law Teacher* 179.
- 69 Friedland, *supra* note 7, at 634–635.
- 70 Australian Law School Deans, *supra* note 19, at 8.
- 71 Heywood, *supra* note 12, at vii.
- 72 D’Amato, *supra* note 47, at 464. The author also describes learning as an “antipleasure experience” but this seems an exaggeration.
- 73 Bean, *supra* note 67, at 277; cf Tribe and Tribe (1986) *supra* note 4, at 162.
- 74 It has been argued that student deference to law teachers lies behind the reluctance to take this step: Kissam, *supra* note 27, at 472.
- 75 LF Del Duca & DB King, Student Examination Answers: Educational Tool or Incinerator Fuel? (1961) 13 *J Legal Educ* 499, at 500.
- 76 C Symons, More Crosses than Ticks: An Assessment of Assessment (1989) 35 *Educ Link* 5, at 6–7, 8.
- 77 Ward, *supra* note 31, at 6.
- 78 Tribe and Tribe (1986), *supra* note 4, at 161. —
- 79 See further Cross, *supra* note 8.
- 80 Kissam, *supra* note 27, at 488.
- 81 University of London Teaching Methods Unit, *supra* note 1, at 99.
- 82 Gaudry & Power, *supra* note 53; see also GAH Benjamin et al, The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers [1986] *Am Bar Foundation Res J* 225.
- 83 *Supra* note 6, at 2.
- 84 University of London Teaching Methods Unit, *supra* note 1, at 103.
- 85 D’Amato, *supra* note 47.
- 86 Miller, *supra* note 2.
- 87 See “coordinated setting” and “fair procedures”, *infra*, at 212.
- 88 See further Kissam, *supra* note 27.
- 89 TH Greco, Is There Really a Difference Between Criterion-Referenced and Norm-Referenced Measurements (1974) 14 (12) *Educ Technology* 22.
- 90 N Preston, The Dawkins et al Managerial Assessment Push (1989) 35 *Educ Links* 21, at 22.
- 91 See generally A Hunt, The Rise and Ruse of Administrative Law and Scholarship (1985) 48 *Mod L Rev* 293, at 295–296. Cf M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (OUP, 1991).
- 92 See further Kissam, *supra* note 27, at 481–482.
- 93 *Id.*, at 453n.
- 94 See M Krygier, Law as Tradition (1986) 5 *Law and Philos* 237, at 251.
- 95 Morgan, *supra* note 42.
- 96 See further, *id.* at 161–162.
- 97 *Supra* note 27, at 457.
- 98 C Falkus, How’s It Going, Sport? in R Braddon (ed) *Australia Fair? Recollections, Observations and Irreverence* (1984) 65, at 69.
- 99 Kissam, *supra* note 27, at 48243.
- 100 *Infra*, at 204–207.
- 101 See generally F Bates, The Law Teacher’s Dilemma (1983) 17 *The Law Teacher* 151.
- 102 A “liberal” education is one of the express objectives of the Monash University

- Law School: 1 *Monash University Calendar* 1989 (Melbourne: Monash University, 1988) at 7/2.
- 103 Professor Ivan Shearer, former Dean of the Faculty of Law, University of New South Wales, *The Law Report*, Radio National, 17 July 1990.
- 104 *Supra* note 19, at 4.
- 105 Thomson, *supra* note 16.
- 106 *Supra* note 5, at para 3.49.
- 107 Bates, *supra* note 101, at 160.
- 108 F Bates, “Like an Unwelcome Guest”: The Moral Crisis in Modern Legal Education (1984) 18 *The Law Teacher* 181 at 193.
- 109 F Bates, The Responsibility of the Law School (1981) 15 *The Law Teacher* 172 at 178.
- 110 Wade, *supra* note 20, at 194,195.
- 111 Sampford & Wood, *supra* note 59, at 3311.
- 112 *Id* at 33.
- 113 *Id* at 39n.
- 114 *Id* at 40.
- 115 A Hunt, The Case for Critical Legal Education (1986) 20 *The Law Teacher* 10, at 16–17; RW Gordon, Critical Legal Studies as a Teaching Method, Against the Background of the Intellectual Politics of Modern Legal Education in the United States (1989) 1 *Legal Educ Rev* 59, at 76–77.
- 116 *Supra* note 20, at 195.
- 117 *Supra*, at 185–186.
- 118 *Infra*, at 212.
- 119 Information kindly supplied by MS V Waller (Monash Orientation Scheme for Aborigines at Monash University) and my colleague Ms A Frayman.
- 120 See generally, G Bird, *The Process of Law in Australia: Intercultural Perspectives* (Sydney: Butterworths, 1988).
- 121 But see DA Bell, Law School Exams and Minority Group Students (1981) 7 *Black L J* 304.
- 122 PJ Hams & JO Buckle, Philosophies of Law and the Law Teacher (1976) 10 *The Law Teacher* 1.
- 123 J MacFarlane, M Jeeves & A Boon, Education for Life or for Work? (1987) 137 *New L J* 835.
- 124 See note 141, *infra*
- 125 Watkins, *supra* note 29, at 189. Law students were not surveyed.
- 126 See further Kissam, *supra* note 27.
- 127 Gaudry & Power, *supra* note 53.
- 128 Bowden & Ramsden, *supra* note 6, at 1
- 129 Powell, *supra* note 17, at 140.
- 130 *Id* at 128,140.
- 131 Kissam, *supra* note 27, at 477–478.
- 132 University of London Teaching Methods Unit, *supra* note 1, at 98.
- 133 Kissam, *supra* note 27, at 483–484.
- 134 *Id* at 458–461.
- 135 *Id* at 451.
- 136 Sec 3.52.
- 137 Bean, *supra* note 67, at 277.
- 138 Queensland Institute of Technology, cited in Pearce Report, *supra* note 5, at sec 3.51; *id* at sec 3.53.

- ¹³⁹ Beighton & Maxwell, *supra* note 1, at 164.
- ¹⁴⁰ University of London Teaching Methods Unit, *supra* note 1, at 102–103; Kissam, *supra* note 27, at 453; cf submission of Queensland Institute of Technology cited in Pearce Report, *supra* note 5, at sec 3.51.
- ¹⁴¹ Examinations have traditionally been much vaunted for their reliability, but this advantage, if it exists, is a relative one, since there is a long record of research documenting the weaknesses of examinations in yielding consistent results or of measuring what it was intended to measure: Tribe & Tribe (1986), *supra* note 4, at 164–165. Examinations are also biased in favour of students whose background is “traditional privilege”: PS Broadfoot, cited in JC Mathews, *Examinations: A Commentary* (London: Allen and Unwin, 1985) at 34.
- ¹⁴² Kissam, *supra* note 27, at 457.
- ¹⁴³ D Weisbrot, *Australian Lawyers* (Melbourne: Longman Cheshire, 1990) at 19.
- ¹⁴⁴ *Supra* note 27, at 479.
- ¹⁴⁵ Weisbrot, *supra* note 143, at 19.
- ¹⁴⁶ Pearce Report, *supra* note 5, at sec 3.53.
- ¹⁴⁷ *Id* at secs 3.53,3.55; Friedland, *supra* note 7, at 630.
- ¹⁴⁸ Williams, *supra* note 10, at 611.
- ¹⁴⁹ *Supra* note 11.
- ¹⁵⁰ Sampford & Wood, *supra* note 59, at 38.
- ¹⁵¹ Pearce Report, *supra* note 5, at sec 3.61.
- ¹⁵² See R Beard, *Teaching and Learning in Higher Education*, 3rd ed (Harmondsworth: Penguin, 1976) at 17–21; WG Perry, *Forms of Intellectual and Ethical Development in the College Years: A Scheme* (New York: Holt, Rinehart and Winston, 1970).
- ¹⁵³ In the case of a one semester subject, three different modes would be a desirable maximum.
- ¹⁵⁴ Cf Pearce Report, *supra* note 5, at sec 3.55. It favoured “differing means” of assessment such as “not less than one” research assignment. But the authors retreated to the position that “staff resources may not be able to encompass them”.
- ¹⁵⁵ Symons, *supra* note 76, at 8.