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HOW TO DEVELOP LAW STUDENTS' CRITICAL AWARENESS? CHANGE THE LANGUAGE OF LEGAL EDUCATION

LUCY MAXWELL*

I INTRODUCTION

There is broad consensus that legal education should develop in every law student an appreciation of the legal profession's ethical obligations and an understanding of the social and political context of the law. Both the Council of Australian Law Deans (CALD) and the Australian Learning and Teaching Council (ALTC) consider these to be key objectives of the law curriculum.¹ The *Standards for Australian Law Schools*, adopted by CALD in 2009, require that the law curriculum develop students' knowledge and understanding of 'the principles of ethical conduct and the role and responsibility of lawyers'² and the 'values that underpin' these principles.³ Further, the *Standards* require that law graduates understand 'the broader context within which legal issues arise, including, for example, the political, social, historical, philosophical, and economic context.'⁴ These objectives are referred to collectively in this article as the promotion of 'critical awareness': that is, the capacity of a law graduate to reflect upon the responsibility of lawyers, and the role of law in society, as a guide to their own legal practice.

* An earlier version of this article was submitted in completion of the LLB subject 'Public Interest Lawyering' at the Melbourne Law School in 2010. I am grateful to Associate Professor John Tobin for encouraging me to explore the power and possibilities of legal education, and for his comments on this article. I would also like to thank Associate Professor Simon Rice of the Australian National University, Dr Wendy Larcombe of the Melbourne Law School, and the anonymous referees for their comments and guidance on this article.

¹ Council of Australian Law Deans (CALD), *The CALD Standards for Australian Law Schools* (2009) para 2.3.3 (a), (d) <<http://www.cald.asn.au/docs/CALD%20-%20standards%20project%20-%20final%20-%20adopted%2017%20November%202009.pdf>>; Australian Learning and Teaching Council (ALTC), 'Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement.' (December 2010) <<http://www.altc.edu.au/standards/disciplines/law>>, 14–16.

² CALD, above n 1, para 2.3.3 (a).

³ *Ibid*, para 2.3.3 (d).

⁴ *Ibid*, para 2.3.3 (a).

Agreeing upon the objectives is, however, only the first step. The question remains: what approach to legal education will most effectively develop critical awareness? Various answers have been proposed. These include: introducing more ‘ethical issues’ in the substantive curriculum;⁵ increasing the number of subjects on public interest law and human rights law or making them compulsory;⁶ integrating ‘the legal problems of all segments of society’ in the selection of ‘cases, hypotheticals, and exam questions’;⁷ and providing more opportunities for clinical legal education.⁸

The contention of this article is that much more is required. Critical awareness depends on understanding two key propositions about the nature of the law and legal practice. The first is that in a highly legalised society, the law is an instrument of power. The second is that the law is normative and dynamic, its development shaped by a broad range of political, social and economic factors. Students need to conceive of the law as an instrument of power — and legal skills as a means to power — in order to appreciate the ethical obligations that attach to their legal skills. Further, they need to understand the normative and political nature of the law in order to recognise the full potential of their skills.

How can the teaching of law promote critical awareness? One opportunity lies in the presentation of substantive legal doctrine. This article seeks to show how the language used to explain legal doctrine can dramatically affect whether these propositions are elucidated or obscured. To illustrate this, selected extracts from a reading guide and a prescribed textbook, *Douglas and Jones’s Administrative Law*, used in an administrative law subject, are considered.⁹ The purpose in using such extracts is to examine the effect of language in legal education. The aim is not to evaluate a particular subject. Consequently, the analysis does not encompass either the whole subject or all teaching materials used.

In the extracts, the language used creates the impression that the law is a neutral, apolitical entity. Principles of administrative law

⁵ Carrie Menkel-Meadow, ‘Can a Law Teacher Avoid Teaching Legal Ethics?’ (1991) 41 *Journal of Legal Education* 3, 9.

⁶ Tamara Walsh, ‘Putting Justice Back Into Legal Education’ (2007) 17 *Legal Education Review* 119, 141.

⁷ Henry Rose, ‘Law Schools Should Be About Justice Too’ (1992) 40 *Cleveland State Law Review* 443, 451.

⁸ See Michael Coper, ‘Law Reform and Legal Education: Uniting Separate Worlds’ (2007–08) 39 *University of Toledo Law Review* 233, 239–40; Judith Dickson, ‘Teaching about Justice as well as Law’ (2003) 28 *Alternative Law Journal* 18, 20; Rose, above n 7, 451; Stephen Wizner, ‘The Law School Clinic: Legal Education in the Interests of Justice’ (2001–02) 70 *Fordham Law Review* 1929, 1930. See also Julie E Bennet, and Sharon H Fischlowitz, ‘Risks and Rewards of Law Student Volunteer Service: A Supervisor’s Perspective’ (2003–04) 30 *William Mitchell Law Review* 109, 113. The authors describe how, ‘a rewarding volunteer experience can help instill a career-long commitment to public interest law’.

⁹ Roger Douglas, *Douglas and Jones’s Administrative Law* (Federation Press, 5th ed, 2006).

are discussed largely without reference to the identity of lawmakers, their objectives, or the broad range of social, political and economic factors that influence the law's development. The language in the extracts gives little indication of the power of administrative law — and thus, of the accompanying ethical obligations on legal practitioners. Nor is there substantial reference to the social and political consequences of administrative law actions.

An alternative and, it is submitted, better approach to the presentation of legal doctrine would be one that is explicit about the normative and political nature of the law. This approach uses the language of 'purpose', 'objective' and 'design' in its discussion of substantive law. It identifies *who* the lawmakers are, raises questions about the *values* that underpin the law, and alerts students to the existence of scholarly debate. It also aims to communicate that administrative law, like all forms of law, may be used by clients to bring about far-reaching social and political consequences, thereby demonstrating that practitioners need to make active, ethical decisions about the use of their legal skills. This approach can be implemented consistently throughout an entire subject, in the reading materials, class presentation and discussion questions.

It is argued that changing the presentation of legal doctrine and developing critical awareness can be achieved simply, requiring neither additional class time nor additional resources. Fundamental change can be achieved by simple changes in language and in the structure of discussion questions, to raise students' awareness of the objectives sought to be achieved by legislation and the social and political consequences of legal decisions.¹⁰

Part II of this article points to the choices that legal educators make in structuring a subject and the way topics are taught. Parts III and IV examine the two elements of critical awareness — understanding the power of the law and the normative quality of the law — and consider how these elements can be illuminated or obscured through the language of course materials. Part V contains concluding remarks.

¹⁰ Advocates for reform to legal education often acknowledge that changes to the law curriculum require additional resources and highlight the existing strain upon law schools' resources; see, eg, Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537, 564; Coper, above n 8, 246. I also acknowledge that the time and resources available to law teachers are limited; however, I believe that the changes proposed in this paper are relatively modest in terms of their resource intensiveness. Unlike proposals to create or expand clinical legal programs or offer new subjects, the changes I propose relate to the language used to describe legal principles in existing subjects. They can be achieved without significant additional resources.

II CHOICES IN LEGAL EDUCATION

Legal education is a value-laden enterprise.¹¹ Legal theorist Karl E Klare describes how a ‘hidden curriculum’ exists behind the ‘formal curriculum’, consisting of ‘a set of very powerful although usually unarticulated messages about substantive law, the definition of professional role and expertise’.¹² Law schools and law teachers are constantly making decisions about the structure and content of legal education. These range from formal macro-level decisions, about the type and range of subjects offered, the forms of assessment used, and opportunities to engage in clinical legal education, to micro-level decisions about the topics to be covered in each subject and the choice of prescribed textbook. There are also informal influences in legal education, such as the humour that law teachers employ in class and the anecdotes they recount about legal practice.¹³ All of these can influence students’ conceptions of the law and lawyering.¹⁴

Particular attitudes towards the law and lawyering are conveyed through the presentation of legal doctrine to students. Scholars such as Duncan Kennedy, Carrie Menkel-Meadow, June Chapman and Judith Cownie, have written extensively about the values conveyed by law teachers to students in legal education.¹⁵ To pay close attention to the conduct of law teachers is not, however, to overlook the process of active learning that occurs in the classroom.¹⁶ As John Biggs, eminent educational theorist, has written:

learners construct knowledge with their own activities, building on what they already know. Teaching is not a matter of transmitting but of engaging students in active learning, building their knowledge in terms of what they already understand.¹⁷

The choices made by law teachers affect active learners. The contention here, like that of Kennedy and Menkel-Meadow, is that

¹¹ Duncan Kennedy, a Harvard Law Professor and prominent member of the Critical Legal Studies movement, produced one of the first comprehensive critiques of legal education and its effects on students’ conceptions of the law and lawyering. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the system* (first published 1983, 2004 ed). For an account of the value-laden nature of legal education, see June Chapman, ‘Why Teach Legal Ethics to Undergraduates?’ (2002) 5 *Legal Ethics* 68, 84; Fiona Cownie, ‘Alternative Values in Legal Education’ (2003) 6 *Legal Ethics* 159, 164; Menkel-Meadow, above n 5.

¹² Karl E Klare, ‘The Law School Curriculum in the 1980s: What’s Left?’ (1982) 32 *Journal of Legal Education* 336, 336.

¹³ Menkel-Meadow, above n 5, 8–9.

¹⁴ Rose, above n 7, 447; Menkel-Meadow, above n 5, 3–4.

¹⁵ See above n 11 and accompanying text, and Menkel-Meadow, above n 5.

¹⁶ John Biggs, *Teaching for Quality Learning at University* (Open University Press, 2007) 21. See, for example, Marie Larochelle, Nadine Bednarz and Jim Garrison (eds), *Constructivism and education* (Cambridge University Press, 1998); Catherine Twomey Fosnot (ed), *Constructivism: theory, perspectives, and practice* (Teachers College Press, 2004).

¹⁷ Biggs, above n 16, 21.

the particular conceptions of the law and lawyering conveyed by law teachers will inevitably influence the development of students' critical awareness. It is therefore important that we analyse them closely.

A single law faculty is likely to embody numerous different approaches, each conveying a slightly different conception of the law and the lawyer's role. Extracts from a set of course materials enables a close examination of the choices made in the presentation of legal doctrine and their effect on the development of students' critical awareness. The two specific topics examined are 'Introduction to Administrative Law' and the topic on freedom of information legislation. Each provides abundant opportunities for discussing the power of administrative law and the associated ethical obligations, as well as 'the political, social, historical, philosophical, and economic context' in which the law operates.¹⁸

III COMMUNICATING THE POWER OF THE LAW

'Ethics and Professional Responsibility' is one of 11 compulsory subjects required for admission to practise as a legal practitioner in Australia.¹⁹ CALD, in its *Standards for Australian Law Schools* (2009), prescribes that the law curriculum must develop students' knowledge and understanding of 'the principles of ethical conduct and the role and responsibility of lawyers including, for example, their *pro bono* obligations.'²⁰ In addition, it must develop students' 'awareness of and sensitivity to, and ... internalisation of the *values* that underpin' these principles.²¹

The ALTC has determined that 'Ethics and Professional Responsibility' is one of six Threshold Learning Outcomes (TLO) for a Bachelor of Laws degree course. In anticipation of a national regulatory system for legal education in Australia, the ALTC has described the content of this TLO as comprising:²²

- (a) an understanding of approaches to ethical decision-making,
- (b) an ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts,
- (c) an ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community, and
- (d) a developing ability to exercise professional judgement.

¹⁸ CALD, above n 1, para 2.3.3 (a).

¹⁹ See, for example, the Council of Legal Education and the Board of Examiners, 'Requirements for Admission to the Legal Profession in Victoria' <http://www.lawadmissions.vic.gov.au/admission_requirements> at 21 June 2011.

²⁰ CALD, above n 1, para 2.3.3 (a).

²¹ *Ibid*, para 2.3.3 (d) (emphasis added).

²² ALTC, above n 1, 14.

What teaching approaches will most effectively develop law students' appreciation of the ethical decision making required by their professional role? Deborah Rhode and Carrie Menkel-Meadow have proposed that the teaching of legal ethics must be 'pervasive' in the law curriculum.²³ Menkel-Meadow argues for the inclusion of more 'ethical issues' in the substantive curriculum.²⁴ Michael Robertson and other faculty members at Griffith Law School also propose the integration of legal ethics throughout the law curriculum. They envisage a 'vertical' subject that would engage students with issues of legal ethics as they arise in substantive law subjects.²⁵ Others argue that clinical legal education is crucial.²⁶ Stephen Wizner insists that 'the law school clinic is the primary place in the law school where students can learn to be competent, ethical, socially responsible lawyers'.²⁷

One key strategy to the development of ethical awareness that may be overlooked in these discussions is the need to communicate to students the *power* of the law. Students need to appreciate that the law is a means to power for a client, and that lawyers facilitate access to this power. To appreciate why it is important to make active, ethical choices about the application of legal skills, one needs to understand the role of the lawyer in facilitating that access. It is the power offered by access to the law — and the accompanying power conferred by legal training — that makes consideration of ethical norms indispensable for all lawyers. Without the language of power in legal education, exhortations to students that 'it matters what interests and whom [one] serves' and that one should consider 'how the tools of [one's] craft are being put to use'²⁸ are largely meaningless.

Power is here conceived of as the ability to bring about intended consequences. It may also include the ability to resist an attempted exercise of power by another.²⁹ The ability to act so as to produce or prevent particular consequences carries commensurate responsibility — including moral responsibility — for the outcome.³⁰ As political theorist Steven Lukes writes:

²³ For example, Deborah L Rhode, 'Ethics by the Pervasive Method' (1992) 42 *Journal of Legal Education* 31; Deborah L Rhode, 'Into the Valley of Ethics: Professional Responsibility and Educational Reform' (1995) 58 *Law and Contemporary Problems* 137; Menkel-Meadow, above n 5.

²⁴ Menkel-Meadow, above n 5, 9.

²⁵ Michael Robertson, 'Providing Ethics Learning Opportunities throughout the Legal Curriculum' (2009) 12(1) *Legal Ethics* 59, 63, 71.

²⁶ See above n 8 and accompanying text.

²⁷ Wizner, above n 8, 1930.

²⁸ Menkel-Meadow, above n 5, 5.

²⁹ Steven Lukes, 'Power and the battle for hearts and minds: On the bluntness of soft power' in Felix Berenskoetter and Michael Williams (eds) *Power in World Politics* (Routledge, 2007) 84. See more generally Steven Lukes, *Power: A Radical View* (Palgrave Macmillan, 2nd ed, 2005).

³⁰ Clarissa Hayward and Steven Lukes, 'Nobody to shoot? Power, structure, and agency: A dialogue' (2008) 1 *Journal of Power* 5, 7–8.

There is a link between power and responsibility: ... part of *the point* of locating power is to fix responsibility for consequences held to flow from the action, or indeed inaction, of specifiable agents.³¹

The first step to developing critical awareness is for students to appreciate that, for the client, the law is a means to power. In a highly legalised society, as Stephen L Pepper argues, an individual's 'autonomy is often dependent upon access to the law'.³² The law is the key to self-realisation in fields as diverse as employment, commerce or recreation. The lawyer plays an important role in facilitating access to power. She is 'the means to first-class citizenship, to meaningful autonomy, for the client'.³³ Legal training, therefore, confers on graduates a considerable measure of power. As practitioners, law graduates provide access to the law. As policy-makers, judges, politicians and scholars, they 'help create the legal rules through which power is defined, allocated, exercised, and denied in the real world'.³⁴

The next step is to understand the range of positive and negative social consequences that can flow from the use of legal skills. This requires examination of the existing power — or lack of power — of the parties to a case, and the consequences that flowed. The law can be used to empower marginalised and disadvantaged people as well as to oppress them, to reinforce the interests of already-powerful individuals and entities in society as well as to challenge them. In administrative law, for example, the law defines rights and freedoms, protects them against unreasonable interference,³⁵ and ensures that services established for the public benefit are administered impartially and consistently.³⁶ Students need to appreciate that the 'law is not simply a value-free or value-neutral mechanism for dispute resolution ... but is also a political mechanism for the acquisition, exercise, and defense of power'.³⁷

It is crucial that the presentation of legal doctrine convey to students that the law is a means to power and that lawyers facilitate access to this power. Without this, students cannot appreciate the necessity of 'the principles of ethical conduct and the role and responsibility of lawyers including, for example, their *pro bono*

³¹ Ibid, 7.

³² Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities' (1986) *American Bar Foundation Research Journal* 613, 617.

³³ Ibid.

³⁴ Wizner, above 8, 1936.

³⁵ Richard L Abel, 'Speaking Law to Power' in Austin Sarat and Stuart Scheingold (eds), *Cause lawyering: political commitments and professional responsibilities* (Oxford University Press, 1998) 69.

³⁶ Roger Cotterel, *Law's community: legal theory in sociological perspective* (Clarendon Press, 1995) 4.

³⁷ Wizner, above n 8, 1936.

obligations.³⁸ Section A demonstrates how the presentation of legal doctrine may obscure this conception of the law. Section B provides an alternative approach.

A ‘Introduction to Administrative Law’: Denying Law’s Power

Administrative law is defined by — and is part of — the discourse of power and politics. It controls the lawful exercise of power, and is itself a powerful tool by which individuals and others can protect fundamental rights to liberty and economic security. Administrative law, like other areas of law, involves disputes over significant forms of power: the state’s power over human life,³⁹ over information,⁴⁰ and over economic benefits;⁴¹ the power of companies over other entities;⁴² and power over our shared environment.⁴³

The extracts from the course materials below give little indication that administrative law is a dynamic and powerful instrument. They downplay the role of administrative law in controlling executive power, and the fundamental nature of the rights commonly at stake in administrative law cases.

A key aspect of the power of administrative law is the existence of a conflict between the interests of the individual and the state. Administrative law has developed as a field of law precisely because of the tendency of the executive to exceed its power and because of the importance, in a democratic society, of protecting individuals from abuses of government power.⁴⁴ Neither the relevant extracts from the reading guide nor the textbook communicate this basic truth to students. The language used downplays the existence of any such conflict, leaving the impression of the executive branch as a benign entity, and administrative law as a passive regulator of government action.

Administrative law is presented not as an important *limit* on government power, but rather as a tool that *facilitates* the lawful exercise of power by the state.

³⁸ CALD, above n 1, para 2.3.3 (a).

³⁹ *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 (‘Kioa’); *Minister for Immigration and Multicultural Affairs v Vardalis* (2001) 110 FCR 491 (‘Tampa Case’).

⁴⁰ *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 (‘McKinnon’).

⁴¹ *Green v Daniels* (1977) 51 ALJR 463.

⁴² *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.

⁴³ *Australian Conservation Foundation Inc v Minister for Resources* (1989) 20 FCR 377.

⁴⁴ Michael Head, *Administrative Law: Context and Critique* (Federation Press, 2005) 1.

This is how the reading guide introduces the subject:

INTRODUCTION TO ADMINISTRATIVE LAW

Welcome to Administrative Law. *Administrative law regulates the relationship between the state and its people and the relationship between the government and the governed.* In particular, it regulates the powers and procedures of the executive branch of government and establishes the mechanisms for ensuring legality, transparency and accountability in executive decision-making. This subject completes the core curriculum's examination of the legal framework of government in Australia.

The Course

Government affects us in many different ways. They provide various benefits and services, and regulate many areas of activity from driving and occupational licensing to mining. Administrative Law looks at government powers to act (derived from legislation, delegated legislation, or the common law), how those powers can legally be exercised, and how individuals may challenge government decisions that affect them, using the courts and other mechanisms. It involves issues such as:

- whether fair procedures must be followed in the exercise of government powers,
- to what extent privatised government services are subject to public law regulation, and
- the validity of attempts by governments to limit the ability of individuals to challenge government decisions in the courts, for example in refugee law.

Underlying ideas include the rule of law, which requires that government powers be exercised according to law, and principles such as responsible government, the separation of powers, and individual rights. Examples of government regulation involving administrative law include immigration, social security, land rights, planning, building and environmental law, export and import, many business decisions, and local government regulations.

The relationship between the individual and government is here portrayed as straightforward and harmonious. The text does not mention the negative ways in which the executive can affect the lives of citizens. It does not, for example, communicate to students that the executive can 'affect' people through 'the involuntary detention of people, the confiscation of private property and papers, and intrusion into the privacy of residential and business premises'.⁴⁵ Nor, in consequence, does it encourage students to consider the need for law to control the power of the executive. The use of the homogenised term 'us' — 'Government affects *us* in many different ways' — creates the impression that the executive affects all people equally. It hides the fact that many groups in society, such as asylum-seekers, migrants and those on social security benefits, are particularly vulnerable to the coercive power of the executive. This

⁴⁵ John McMillan and Neil Williams, 'Administrative Law and Human Rights' in David Kinley (ed), *Human Rights in Australian Law* (Federation Press, 1998) 63.

use of seemingly innocuous language conveys a powerful message to students: that the law is a ‘rational and universally applicable phenomenon’.⁴⁶

The effect of the language used is marked. Administrative law appears to be a passive regulator. In the extract, administrative law ‘regulates’ relationships, ‘establishes’ mechanisms and determines rules for how ‘powers can legally be exercised’. It is notable that the language of ‘regulation’ is used rather than that of ‘control’ or ‘limit’. The language of ‘control’ would signal the potential for abuse of power by the government and the need for administrative law to prevent it; the term ‘regulation’, by contrast, implies that the executive is largely law-abiding and that the role of administrative law is merely to set guidelines and ground rules. The extract does use the word ‘challenge’ — for example, ‘the ability of individuals to challenge government decisions in the courts’. It does not, however, foreground this concept as a defining characteristic of administrative law, as do other administrative law texts, discussed below.

Finally, the extract characterises the protection of individual rights as one of the ‘underlying ideas’ of administrative law rather than one of its core objectives. Such language does not actively communicate to students the fundamental nature of the rights at stake in administrative law. The same impression is created by the initial examples of government regulation provided. Students are given three examples: driving, occupational licensing and mining. It is only the last sentence that refers to ‘immigration, social security, land rights ... environmental law’, and then only in a list form. The language and structure of the introduction fail to engage students with the idea that administrative law ‘has become one of the most pervasive and controversial areas of law, profoundly affecting the lives of millions of people’, as another textbook author describes it.⁴⁷

The prescribed textbook similarly understates the power of administrative law. This is how the opening chapter begins:⁴⁸

Administrative law has been one of the law’s growth areas. Once treated as a mere branch of constitutional law, the subject is now generally recognised in law schools as a subject in its own right — and in the wider law industry. Administrative law is the subject of at least four major sets of law reports, and at least five loose-leaf services. Administrative law has also become an increasingly reputable area of the law. Once seen as the kind of law to be found only in semi-civilised legal systems where bureaucratic behaviour was guided by laws specifically applicable to bureaucrats, administrative law has come to be seen as an important

⁴⁶ Nickolas James, ‘Expertise as Privilege: Australian Legal Education and the Persistent Emphasis Upon Doctrine’ (2004) 8 *University Western Sydney Law Review* 1, 2.

⁴⁷ Head, above n 44, 1.

⁴⁸ Douglas, above n 9, 1 (emphasis added).

means of controlling *bureaucratic excess* — even where it is administered by bodies which have distinct resemblances to the bodies which aroused so much criticism from such constitutional theorists as Dicey.

This book is predicated upon the importance of administrative law. However, lest we be accused of naiveté, we wish to make it clear that *we are aware of the limits to administrative law*. First, we would emphasise how important it is to avoid succumbing to the belief that it is only Administrative law which keeps administrators from committing all kinds of unspeakable bureaucratic excesses. The truth is rather more mundane — namely that *bureaucrats are inveterate rule-obeyers* whose characteristic sin is more likely to be ritualistic insistence on obedience to rules than attempts to defy them: Merton (1968) ch VI. Insofar as bureaucrats need controlling, there are many ways of doing so. Administrative law is only one such way, and *it is best seen as an option of last resort*, whether one is concerned with the rectification of patterns of bureaucratic *misbehaviour*, or whether one is concerned with the righting of a particular *bureaucratic wrong*.

The authors here convey the impression that administrative law is a dry, bureaucratic instrument that should 'best be seen as an option of last resort'.⁴⁹ There is no reference to the key roles of administrative law — protecting individual rights, ensuring compliance with the rule of law and maintaining government accountability. Instead, the starting-point is the growing importance of administrative law in law schools and in the 'law industry'.⁵⁰ The importance of administrative law is evidently to be measured by the number of loose-leaf services available: 'Administrative law is the subject of at least four major sets of law reports, and at least five loose-leaf services'. More surprisingly still, the authors directly question the potential for abuse of power by the executive, asserting that bureaucrats are 'inveterate rule-obeyers whose characteristic sin is more likely to be ritualistic insistence on obedience to rules than attempts to defy them'.⁵¹

Thus presented, administrative law would seem to be of interest only to lawyers and law schools. Its tools are portrayed as being of limited utility since bureaucrats rarely break rules, and its scope as very narrow, addressing only minor 'bureaucratic excesses' rather than important decisions with far-reaching social and political consequences.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

B *A Different Approach*

Students presented with material of this kind are unlikely to appreciate ‘the professional responsibilities of lawyers in promoting justice’ or the social utility of the law and of lawyers.⁵² The ad hoc inclusion of more ‘interesting issues of ethical practice’⁵³ or more ‘justice issues’ in the curriculum⁵⁴ will not solve this deficiency. What is needed is a reconceptualisation of the law as a means to power and of lawyers as facilitators of access to power. This will help students to understand why it is important to be critically aware in making decisions about how one applies one’s legal skills.

There are many ways in which to present the relationship of law and lawyers to power. Three strategies are considered here: conceptualising the law as a means to power; discussing the social and economic position of the parties in a case; and discussing the social, political and community consequences of legal decisions. Illustrations of the relationship of law and lawyers to power can be integrated into all elements of the teaching materials in a course.

Firstly, teachers may use language to convey the capacity of law to act as a means to power. Students need adjectives such as ‘powerful’, ‘significant’ and ‘fundamental’. They need nouns such as ‘consequences’, ‘purpose’, ‘rights’, ‘lives’ and ‘effects’. Administrative law scholars McMillan and Williams demonstrate how language can be used in this way: ‘The capacity of the administrative arm of government to affect the human rights of individuals is great.’⁵⁵ Similarly, Michael Head opens his textbook, *Administrative Law: Context and Critique*, with this arresting statement: ‘Administrative law is about challenging government power’.⁵⁶ The use of the word ‘challenge’ contrasts starkly with the language of ‘regulation’ and conveys a very different conception of the law and its power.

Richard Abel’s account of ‘cause lawyering’ uses language to similar effect. Abel presents administrative law, and law in general, as a means by which to ‘reconfigure state power’⁵⁷ and ‘constrai[n]’ the state.⁵⁸ He describes how, ‘[c]ause lawyers can use administrative law to discipline executive action’.⁵⁹ In contrast to the extracts, these authors emphasise the potential for abuse of power by the state, and the role of administrative law in controlling it. Michael Head’s opening passage continues:

It is vital never to assume that a government or official agency has the legal authority to do what it has purported to do. Decision-making needs

⁵² ALTC, above n 1, 14.

⁵³ Dickson, above n 8, 20.

⁵⁴ Walsh, above n 6, 133.

⁵⁵ McMillan and Williams, above n 45, 63.

⁵⁶ Head, above n 44, 1.

⁵⁷ Abel, above n 35, 69 (emphasis added).

⁵⁸ *Ibid* (emphasis added).

⁵⁹ *Ibid*, 86 (emphasis added).

to be approached with a critical eye; this book is about equipping and encouraging the reader in this endeavour.⁶⁰

McMillan and Williams likewise describe administrative law as 'one of the chief methods adopted in a liberal democratic society to check the exercise of governmental powers.'⁶¹

Secondly, teachers can discuss with students the social and economic *position* of the parties in a case. To make active, ethical choices as lawyers, students need to appreciate that '[t]he powerful, like the powerless, ... can mobilize administrative law arguments.'⁶² Teachers can discuss with students the potential for governments and corporations, individuals and organisations, to use administrative law to maintain their political and economic dominance.⁶³ They can highlight examples of administrative law challenges that have upheld the rights of disadvantaged and marginalised groups in society, including the rights of juvenile prisoners,⁶⁴ people at risk of homelessness,⁶⁵ people who are unemployed,⁶⁶ and non-citizens.⁶⁷ Administrative law actions have also been used to protect the basic rights of all people to procedural fairness,⁶⁸ electoral rights,⁶⁹ and civil liberties.⁷⁰ The potential to use administrative law actions to bring claims of human rights violations has been further expanded by the recent introduction of human rights instruments in Victoria⁷¹ and the Australian Capital Territory.⁷²

Discussion questions can ask students to consider whether the plaintiff in a case is a wealthy individual,⁷³ a client represented

⁶⁰ Head, above n 44, 1.

⁶¹ McMillan and Williams, above n 45, 63.

⁶² Abel, above n 35, 79.

⁶³ Commercial entities, for example, utilise administrative law actions to gain rights in decision-making processes regarding public projects, government contracts and the granting of licences and permits. See, eg, *FIA Insurance Ltd* (1981) 151 CLR 342 9 (concerning the renewal of a contract with the company to provide workers' compensation insurance to the state); *Minister for Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325 (concerning the power of a Minister to make by-laws that would affect the duty imposed on goods that the company wanted to import).

⁶⁴ *ID, PF and DV v Director General, Department of Juvenile Justice and Anor* [2008] NSWSC 966. See Reg Graycar and Joe Tan, 'Juvenile Detainees in Adult Prisons: Restraints on Involuntary Transfer' (2009) 47 *Law Society Journal* 49.

⁶⁵ *Director of Housing v Sudi* [2010] VCAT 328 (31 March 2010).

⁶⁶ *Green v Daniels* (1977) 51 ALJR 463.

⁶⁷ *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41, *Tampa Case* (2001) 110 FCR 491.

⁶⁸ *Kioa* (1985) 159 CLR 550.

⁶⁹ *Thorpe v Minister for Aboriginal Affairs* (1990) 26 FCR 325.

⁷⁰ *Golden-Brown v Hunt* (1972) 19 FLR 438.

⁷¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38, 39.

⁷² *Human Rights Act 2004* (ACT).

⁷³ *Edelsten v Health Insurance Commission* (1990) 27 FCR 56.

by *pro bono* legal counsel,⁷⁴ a large corporation,⁷⁵ a community group,⁷⁶ or a media outlet.⁷⁷ Students could also be asked to reflect on the type of power or interest being exercised or asserted by the plaintiff in the case. For example: does the plaintiff seek certainty in its business operations?⁷⁸ Does the plaintiff want to be informed of damaging allegations before a decision to deport is made?⁷⁹ The aim of such discussions is not to dictate to students the *type* of client they should represent. On the contrary, the aim is demonstrate that all applications of legal skills have ethical implications and that all lawyers must make personal, ethical choices about how to use them. As June Chapman states: ‘[i]t is not *what* students think about ethical dilemmas that matters but *that* they think’.⁸⁰

Thirdly, teachers can discuss with students the social and political consequences of legal decisions. Discussion questions provide an ideal opportunity for promoting this awareness. Questions could include: what are the consequences for public accountability if the powers of the privately owned Australian Wheat Board under legislation are not subject to administrative review?⁸¹ How will members of an Aboriginal community react to a decision that demands that a male Minister personally deal with submissions relating to ‘secret women’s business’?⁸² Students could also reflect more generally on the potential for negative social consequences to flow from the application of legal doctrine. For example: ‘Do you agree with the statement that “[m]ost of the time law reflects, reproduces, and reinforces existing power inequalities”?’⁸³

The power of administrative law — and its capacity to produce far-reaching negative and positive social consequences — can only be properly appreciated if students know who is bringing the action in question, their social and economic position and what interests they are attempting to protect. Armed with this knowledge, students

⁷⁴ See, eg, the involvement of *pro bono* solicitors and counsel in the high-profile challenge to the Federal Government’s refusal to allow a boat of asylum-seekers to enter Australian territorial waters in *Tampa Case* (2001) 110 FCR 491 and the recent successful challenge to the Federal Government’s offshore refugee status assessment process in *Plaintiff M61/2010E v Commonwealth of Australia*; *Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41.

⁷⁵ *FIA Insurance Ltd v Winneke* (1981) 151 CLR 342 (*FIA Insurance Ltd*); *Minister for Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325.

⁷⁶ *Australian Conservation Foundation Inc v Minister for Resources* (1989) 20 FCR 377; *North Coast Environment Council Inc v Minister for Resources* (1994) 127 ALR 617.

⁷⁷ The plaintiff in *McKinnon* [2006] HCA 45 was the editor of *The Australian Newspaper*.

⁷⁸ *FIA Insurance Ltd* (1981) 151 CLR 342.

⁷⁹ *Kioa* (1985) 159 CLR 550.

⁸⁰ Chapman, above n 11, 68 (emphasis in original).

⁸¹ *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

⁸² *Chapman v Tickner* (1995) 55 FCR 316 (*Hindmarsh Island Bridge Case*’).

⁸³ Abel, above n 35, 69.

can make active, ethical choices about how to use their own power as law graduates.

IV COMMUNICATING THE NORMATIVE QUALITY OF THE LAW

It is a requirement of the *Standards for Australian Law Schools* (2009) that law graduates understand the 'sources of the law and how it is made and developed', 'the dynamics of legal change' and 'the broader context within which legal issues arise, including, for example, the political, social, historical, philosophical, and economic context'.⁸⁴

'Critical awareness' in this respect depends on an appreciation of the second of the two propositions: that the law is a normative instrument, designed by human law-makers to achieve certain objectives which are in turn influenced by a wide range of political, social, historical, philosophical and economic considerations.

The normative and socially constructed nature of the law was first exposed by the realist school of legal theory in the 1930s and 40s.⁸⁵ The central tenet of the realist critique is that the 'law is not static, but is an ever-changing instrumentality to be used in solving social and economic problems'.⁸⁶ The law is normative in the sense that it prescribes standards of conduct.⁸⁷ The norms contained in the law may 'enshrine certain ideals, such as equality, freedom, and justice'.⁸⁸ The critical legal studies (CLS) movement in the late 1970s and 80s further exposed the social, political and economic context in which law operates.⁸⁹ Members of the CLS movement argued that the 'legal text' must be viewed as 'always historically embedded and politically motivated, so that it is no longer possible to take the law simply as the product of reason and argument'.⁹⁰ The law is simply 'one of many competing normative disciplinary discourses' and, as such, reflects particular social and political objectives.⁹¹

Since the development of legal realism, scholars have also emphasised that the daily work of judges involves the exercise of

⁸⁴ CALD, above n 1, para 2.3.3 (a).

⁸⁵ Wizner, above n 8, 1931.

⁸⁶ *Ibid.*

⁸⁷ Margaret Davies, *Asking the Law Question* (Law Book Company, 2nd ed, 2002) 6. Davies proposes that '[a] minimal, and reasonably non-controversial, definition of law is that it is something which orders society. Law regulates human behaviour, and the relationships between members of society.'

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, 173.

⁹⁰ Gerald L Bruns, 'Law and Language: A Hermeneutics of the Legal Text' in Gregory Leyh (ed), *Legal hermeneutics: history, theory and practice* (University of California Press, 1992) 23.

⁹¹ Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (John Wiley & Sons, 1986) 20.

discretion and the determination of contentious moral questions.⁹² The ‘very diversity of judicial opinion about the outcome of a particular case’ is a ‘constant reminder of the indeterminate nature of much judicial decision-making.’⁹³

In order to become effective lawyers — whether as practitioners, law reformers, bureaucrats or policy-makers — students need to understand the normative and political nature of the law. Michael Head argues that, ‘[u]nless one knows the political controversies, policy arguments, judicial trends and constitutional tensions that lie behind nearly all the major cases, one simply cannot understand how and why the courts have reached their decisions.’⁹⁴ Michael Coper, Dean of Australian National University Law School, takes a similar approach:

The best and most effective lawyers, in any form of practice ... are those with a deep understanding of the law and the legal system. A deep understanding embraces not just the rules, but their context, their dynamics ... an understanding, in particular, of where the law has come from, as well as an intuition about where it might go.⁹⁵

Once again, whether law students develop critical awareness is directly affected by the terms in which legal doctrine is presented to them. Two approaches will be compared. Section A examines extracts selected from the reading guide. The language in these extracts presents the law as an apolitical, neutral entity; it does not actively highlight how law changes over time or the broad range of factors that affect its development. Section B presents an alternative approach which seeks to be explicit about the normative and political nature of the law. On this approach, materials discussing the normative and political nature of the law would be integrated consistently throughout the course.

A ‘Freedom of Information Legislation’: Obscuring the Normative Quality of the Law

Legal education has long been criticised for presenting the law as ‘natural and neutral’.⁹⁶ Many scholars have argued that legal education fails to engage students with the normative and value-laden

⁹² Davies, above n 87, 140.

⁹³ Justice Michael Kirby, “‘Judicial Activism’ Authority, Principle and Policy in the Judicial Method’ (Speech delivered at the First Hamlyn Lecture Series, University of Exeter, UK, 19 November 2003) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_19nov.html> at 20 October 2010.

⁹⁴ Head, above n 44, 1–2.

⁹⁵ Coper, above n 8, 237.

⁹⁶ Robert Granfield, ‘The Politics of Decontextualised Knowledge: Bringing Context into Ethics Instruction in Law School’ in Kim Economides (ed) *Ethical challenges to legal education and conduct* (Hart Publishing, 1998) 303, citing Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 805.

nature of the law, conveying instead the misleading view that 'legal reasoning accounts for legal results' without the need for 'political or ethical choice'.⁹⁷ Michael Coper, for example, has argued that legal education often focuses on teaching 'the law as it is',⁹⁸ rather than encouraging students to consider 'where the law has come from' and 'where it might go'.⁹⁹

The current literature, however, contains very few examples of actual teaching practices. The aim of this section is to use extracts from the reading guide to illustrate how the language of legal education can downplay the political and value-laden nature of the law.

The enactment of the *Freedom of Information Act 1982* (Cth) ('the Act') marked a significant departure from traditional notions of government accountability under the Westminster system.¹⁰⁰ Government information was no longer the exclusive property of the Crown. Any interested individual could seek access to government information and use it to scrutinise government processes. That the law could be changed to achieve such dramatically new objectives is a prime example of law functioning as a political instrument.

The extract from the reading guide on Freedom of Information (FOI) legislation misses an opportunity to discuss the political objectives sought to be achieved by the FOI regime. Rather than creating the impression that the law is a dynamic, normative instrument, the language used suggests that the law (as currently expressed) is static and unchanging. This is how freedom of information law is described:

The concept of open government is fundamental to any notion of control over government activity. In this class we look at the right to reasons, then go on to an introduction to the practical operation of FOI, and also its political significance in the light of its use by politicians and journalists to gather information. Finally, a brief overview of privacy protection and its impact on government information rounds out the picture.

[Discussion of the right to reasons] ... Like *the opportunity for obtaining information under freedom of information legislation*, the right to obtain reasons is important for scrutiny and review of government decisions. It also *contributes to open government and to the relationship between the government and the individual.*

This account of FOI legislation creates the impression that FOI legislation, and the goal of 'open government', are timeless and uncontroversial. In fact, as Roger Douglas makes clear, 'any concession to open government is a relatively recent phenomenon.'¹⁰¹

⁹⁷ Klare, above n 12, 340.

⁹⁸ Coper, above n 8, 241.

⁹⁹ *Ibid.*, 237.

¹⁰⁰ See Anne Ardagh, 'Freedom of Information in Australia: a Comparative and Critical Assessment' in Douglas, above n 9, 97–103.

¹⁰¹ Douglas, above n 9, 93.

The extract does not use the language of ‘shift’, ‘change’, ‘design’, ‘purpose’ and ‘objective’. It does not indicate that ‘open government’ was a radical objective of FOI law — or that it was even an objective at all. Rather, it is said that freedom of information ‘contributes to open government and to the relationship between the government and the individual’.¹⁰² Without the language of ‘change’ or ‘objective’, there is no suggestion that the law was ever different, or could ever change. Such language is crucial to enable students to appreciate the dynamics of legal change and the broader context in which law operates.

An individual’s right of access to documents under FOI law is restricted by a series of exemptions and limitations¹⁰³ which are designed to balance the competing goals of government accountability and transparency with the need for frankness and confidentiality within government.¹⁰⁴ The nature and scope of the exemptions reflect value-judgements made by law-makers.¹⁰⁵ It is unsurprising that the exemptions have been highly controversial, prompting criticism that they negate the Act’s promise of ‘open government’.¹⁰⁶

The reading guide misses an opportunity to highlight the controversy surrounding FOI legislation. It states:

The basic principle of FOI legislation, at State and Commonwealth level, is that all individuals have a general right to government documents, but this sweeping principle is qualified by powerful exemptions and restrictions.

The neutral language closes off discussion of the powerful judgments about the public interest that underpin FOI exemptions, and the fact that the existence and scope of the exemptions are contestable issues. The guide’s Discussion Questions on FOI similarly do not probe ‘the socially constructed and contestable nature of law’.¹⁰⁷ Below is a sample of the discussion questions:

Discussion Points

- What is the rationale(s) for having Freedom of Information Acts?
- What is the special position of cabinet documents under FOI legislation, and exactly what documents come into this category? What are the justifications for this, and what problems might there be with this aspect of FOI legislation?
- What are the ‘Howard factors’? Are these appropriate factors to take into consideration when considering the public interest?
- Are there some circumstances in which freedom of information might interfere in good decision-making?

¹⁰² Ibid (emphasis added).

¹⁰³ *Freedom of Information Act 1982* (Cth) ss 33–47J.

¹⁰⁴ Douglas, above n 9, 99.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Keyes and Johnstone, above n 10, 541.

- How effective have the various FOI Acts in Australia been in fulfilling their objectives? Is further reform needed?

These questions largely present FOI law as (another) body of rules to be identified and learned. The phrasing of the questions is critical. Many of the questions open with the prompt, 'what is...?', 'what are...?' or 'are there...?'. The prompt implies that FOI law supplies an identifiable answer to each question. This construction encourages students to list information — and even opinions — from the prescribed reading, and to 'see the law' (and even policy questions) 'in purely technical terms'.¹⁰⁸ The last question is an exception. It raises the concept of the 'objectives' of legislation, and asks the student to consider the need for reform. Section B will consider how such language can be integrated throughout the presentation of legal principles.

B *A Different Approach*

The lack of discussion of the normative and value-laden nature of the law is often attributed to a failure to engage students with the possibility of law reform. Michael Coper, for example, identifies the deficiency in legal education as the absence of a 'deliberate law reform ethos and focus' in the curriculum.¹⁰⁹ Phoebe Haddon, similarly, characterises it as a failure to 'encourage [students] to view the lawyer's role as reformist.'¹¹⁰ On the basis of this analysis, scholars often propose curriculum changes to increase the focus on law reform issues. Tamara Walsh, a law lecturer at the University of Queensland, identifies 'law reform' as a key means for encouraging students to 'reflect critically on the law'.¹¹¹ Suggestions for curriculum change include: creating a new elective course on law reform;¹¹² expanding clinical legal education opportunities;¹¹³ incorporating a 'law reform focus' into all subjects;¹¹⁴ and using law reform papers or submissions to government as forms of assessment.¹¹⁵

Legal education must certainly engage students with the creative possibilities of the law and the role of lawyers in creating social and legal change. But the curriculum reforms outlined above are inadequate without a clear reconceptualisation of the law as a dynamic, normative and value-laden instrument. This requires changes in the language of legal education.

¹⁰⁸ Cownie, above n 11, 159.

¹⁰⁹ Coper, above n 8, 233.

¹¹⁰ Phoebe A Haddon, 'Education For a Public Calling in the 21st Century' (1994) 69 *Washington Law Review* 573, 578.

¹¹¹ Walsh, above n 6, 141.

¹¹² Coper, above n 8, 244.

¹¹³ *Ibid.* See also above n 30.

¹¹⁴ Coper, above n 8, 244.

¹¹⁵ Walsh, above n 6, 141–142.

Communicating the normative quality of the law can be achieved by highlighting the intention of law-makers and their identity. Words such as ‘design’, ‘purpose’, ‘achieve’ and ‘intended’ communicate the essential truth that the law is an entity moulded by law-makers. Anne Cossins demonstrates this approach to language when she describes FOI law as a ‘a major initiative *designed* to crack the walls of government secrecy’.¹¹⁶ Teachers can also highlight the change or shift in values that a particular legal principle represents. McMillan and Williams do so, in the context of FOI law, by referring to the political values that preceded FOI: ‘The former tradition that government alone will decide what is disclosed has been *firmly replaced* by legislative recognition and official acceptance of a public “right to know”’.¹¹⁷

Another technique for communicating the ‘dynamics of legal change’ is to demystify the process by which law is created. To identify in the course materials the political party which introduced the legislation or to include a Second Reading Speech in the course materials encourages students to ‘think about how the law came to be’, ‘whose ends it served’ and ‘the role of lawyers and judges in changing it’.¹¹⁸ Furthermore, teachers can draw explicit connections between the development of the law and changes in the political environment. This is well illustrated by an extract from a different set of administrative law course materials.¹¹⁹

Administrative Law

Over the last quarter of a century or so various governments around the world have embarked on programs of privatising government assets, outsourcing or contracting-out government services, engaging in complex public-private arrangements in conducting the business of governing the community and so on. These *interesting developments in public administration* have posed difficult questions for administrative lawyers. One theme of the course is the extent to which *administrative law has developed or should develop ways* to regulate forms of governance which extend beyond the formal institutions of the executive government. (Despite the fact that *the ‘global financial crisis’* has sent the pendulum back towards government intervention in, and regulation of, the economy, these questions will be of continuing relevance.) More generally, the course examines how far the jurisdiction of administrative law institutions (such as courts, tribunals and ombudsmen) extend in regulating the exercise of public power.

Administrative law here is seen as being affected by ‘developments in public administration’ and broader political and economic trends, such as those caused by ‘the global financial crisis’. Students are

¹¹⁶ Douglas, above n 9, 93 (emphasis added).

¹¹⁷ McMillan and Williams, above n 45, 68 (emphasis added).

¹¹⁸ Wizner, above n 8, 1931–2.

¹¹⁹ Full copy of text available from author.

made aware of the need to be attuned to such developments. The reference to how the law 'should develop' is also important. It indicates to students that lawyers are involved in making normative judgements about the development of the law.

Finally, the broader political and philosophical context of the law can be exposed by identifying the specific policy objectives of legislative provisions, and by referring to scholarly debate on the effectiveness of the provisions in securing these objectives. The language of the reading guide extracted above could be reformulated as follows:

Parliament has limited the general right of access in FOI legislation through a number of powerful exemptions and limitations. These exemptions and limitations are *designed* to balance the goals of transparency and accountability with the need to protect national security and promote frank discussion within government. *Many commentators have criticised* the broad scope of the legislative exemption on the basis that they significantly undermine the objectives of greater transparency and accountability.

Discussion questions should challenge the student directly: "Do you think ...?", "Why do you think ...?" Addressing the student directly in this way presents the role of the lawyer as active and ethical, rather than mechanical and depersonalised.¹²⁰ By asking the student for her opinion, the teacher communicates the important message that there is no 'right' answer.¹²¹ Such a simple reformulation would assist students to regard the making of personal value judgements as an *essential part* of the role of lawyers and law-makers.

Thus, the question about Cabinet document exemptions could be reformulated in this way:

What is the special position of cabinet documents under FOI legislation, and exactly what documents come into this category? *Do you think* that maintaining the secrecy of deliberations within Cabinet is in *the public*

¹²⁰ It is interesting to note that the reading guide does directly address the student in other sections, such as those related to assessment and class participation. Examples include: 'Your group will meet for four hours a week, in two two-hour sessions. It is important that you attend the stream that you are enrolled in' and 'The assignment is designed to test your ability to read and interpret legislation and to apply that legislation.'

¹²¹ Although outside the scope of this essay, such an approach is also likely to produce better learning outcomes for students. It is consistent with a teaching practice that encourages 'deep learning'. See Head, above n 44, 163. Head explains that 'deep learning' is a concept developed in contemporary educational research. He explains that educational theorists such as John Biggs and Anne Macduff maintain that students learn best when they engage in 'deep learning'; that is, when they 'actively come to understand topics and ideas in ways that change or re-organise their views'. 'Deep learning' can be contrasted with 'surface learning' in which 'students are regarded as passive recipients of information'. For an account of 'deep' and 'surface' learning, see Biggs, above n 16, 22–29. For specific application of this theory to the teaching of law, see Anne Macduff, 'Deep Learning, Critical Thinking and Teaching for Law Reform' (2005) 15 *Legal Education Review* 125.

interest? Do you agree with those *commentators* who argue that the broad scope of exemptions such as this undermines the objectives of FOI legislation?

The new question emphasises the forming of an opinion. By referring to the criterion of ‘public interest’ as the basis for determining whether the exemption is justified, the question emphasises that FOI law involves political judgements.

V CONCLUSION

The practice of law is as much about power as it is about legal knowledge. Law schools have a responsibility to teach students about their social and professional responsibilities in exercising the power of law.¹²²

A key objective of legal education is to foster students’ understanding that the law is an instrument of power and that political factors and value judgements influence its development. Such an understanding of the law will hopefully contribute to creating ethically aware graduates, effective practitioners and graduates who are agents of change in society.

Developing law students’ critical awareness is no easy task. Realising the objectives prescribed by CALD and the ALTC in relation to critical awareness will require close attention to the manner in which legal doctrine is presented. One strategy is to recast the language used to describe legal principles. Changes to the law curriculum require additional resources and law schools, of course, operate within considerable resource constraints.¹²³ Changing the way legal doctrine is presented, however, can be done simply: by highlighting the social and economic position of parties to a case; by using nouns and adjectives that indicate the power of the law to effect change; by providing information about the identity of law-makers; by highlighting the objectives sought to be achieved by legislation; and by formulating discussion questions which encourage critical inquiry and the formation of personal opinions.

¹²² Wizner, above 8, 1936.

¹²³ See, eg, Keyes and Johnstone, above n 10, 564; Coper, above n 8, 246.