A DIALOGUE CONCERNNG THE MERITS OF THE 100% FINAL EXAMINATION IN THE ASSESSMENT OF LAW STUDENTS

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ABSTRACT

Law schools in Australia and elsewhere traditionally made extensive use of the '100% final examination' as a summative assessment method. Since the late 1980s, law schools have moved away from this traditional assessment method in favour of the greater use of interim assessment and of alternative forms of assessment. This has been partly the result of a more considered approach to teaching by individual law teachers, and partly the result of school and university assessment policies imposing ceilings upon the weighting that can be given to any single piece of assessment.

Recent claims that increasing class sizes and marking loads have lead to the over-burdening of academics and that many students are now time-poor and over-assessed have prompted this consideration of whether the use of the 100% final examination should re-evaluated. In this paper, two fictional law teachers conduct a dialogue about the merits of the 100% final examination for legal education. They explore the arguments in favour of and opposed to the use of final examinations, and draw upon the results of a recent pilot study conducted at the University of Queensland that examined the impact upon law students and academics of the use of 100% final examinations in conjunction with optional assessment items.

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Two law teachers - one, GORMSBY, dressed conservatively and the other, KEATING, dressed casually - are having morning tea together in the staff common room.[1]

KEATING:
Have you seen the latest teaching survey results for the law school?

GORMSBY:
I must have accidentally deleted that particular email. Why? Is there anything of note?

KEATING:
There are the usual complaints about the lack of lecture recording, inflexibility in timetabling, and too much reading, but I do find it interesting that the most common complaint by the students – as usual – is about not being given enough feedback.

GORMSBY:
What is so interesting about that?

KEATING:
Well, one of the more frequently voiced complaints by our *colleagues* is the amount of marking we are doing these days: long gone are the days when all of our marking was done over a couple of weeks at the end of each year.[2] Now, it seems that we are marking something every week or so. But isn't assessment a way of providing students with feedback? If today's students are being given so much more assessment, shouldn't they at least be saying that they get enough feedback?

GORMSBY:
Actually, that is rather interesting. After all, feedback involves telling the student where they went wrong, which is what we do when we assess their work.

KEATING:
Actually, when I talk about feedback I mean what I tell my students about the quality of their learning and whether or not they are making appropriate progress towards achieving the learning objectives I have set for my subject. It's more than simply identifying errors when I am marking my students' work; it's about diagnosing problems with their understanding and ability.[3][4] I see feedback as an absolutely essential element of the learning process.[5] It's only by receiving feedback about their

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[1] Gormsby is named after the character of the same name in the television series *Seven Periods with Mr Gormsby* (Television New Zealand, 2005-2006) and Keating is named after the character of the same name in the movie *Dead Poets' Society* (Touchstone Pictures, 1989).
[2] See Susan J Lea and Lynne Callaghan, 'Lecturers on Teaching within the 'Supercomplexity' of Higher Education' (2008) 55(2) *Higher Education* 171.

[4] This is sometimes referred to as the 'forensic' role of feedback: D Royce Sadler, 'Formative Assessment and the Design of Instructional Systems' (1989) 18(2) *Instructional Science* 119.
[5] Terri LeClercq, 'Principle 4: Good Practice Gives Prompt Feedback' (1999) 49 *Journal of Legal Education* 418, 418. LeClercq insists that "[k]nowing what you know and don't know focuses

progress that my students can identify the concepts that they do not understand correctly or the skills that they have not yet fully developed.[6]

That feedback often takes the form of assessment but, of course, I don't believe that feedback must necessarily be in the form of assessment. Any time I tell my students, individually or collectively, about the quality of their work and their progress towards achieving the learning objectives, I am providing them with feedback. Feedback can be in the form of a student's results for a class test, or it can be in the form of my verbal comments about the quality of a student's response to a question I have asked them in class.[7] I may be commenting about the written work of a particular student, or about the overall quality of learning by the entire class: it's all feedback.

GORMSBY:
Well, that may be what you understand by 'feedback', but I suspect that what our students often understand by 'feedback' is a satisfactory explanation of why they received a mark with which they do not agree. Many of our law students are accustomed to being high achievers and they have a very high opinion of their abilities. Accordingly, they are not always receptive of what we would regard as *bona fide* explanation of the shortcomings of their work. They remain convinced that they should have received a mark higher than the one they in fact received, so they are, of course, going to complain about a lack of 'satisfactory' (i.e. convincing) feedback.[8]

KEATING:
I think you may be right, which suggests that we need to do more to communicate to students what we mean by 'feedback'. We should explain to our students the various forms that feedback can take: not only marks and written comments on the work they submit, but also general feedback about the quality of student performance as a whole, verbal feedback provided to individual students about their work in tutorials, and so on. Perhaps if students understood better what *we* mean by feedback, they might realise that they actually receive more feedback from us than they think.

While assessment and feedback are not the same thing, feedback is an essential part of the assessment process. The education scholars tell us that 'assessment is not an end

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learning" and that "[w]ithout feedback, none of us could know whether we clearly understood what we thought we understood".

[6] This is a function of feedback sometimes referred to as 'mirroring': Kristin B Gerdy, 'Teacher, Coach, Cheerleader, and Judge: Promoting Learning through Learner-Centered Assessment' (2002) 94 *Law Library Journal* 59, 79.

[7] John Hattie and Helen Timperley, 'The Power of Feedback' (2007) 77(1) *Review of Educational Research* 81.

[8] Regarding student use of feedback generally, see Berry O'Donovan, Margaret Price and Chris Rust, 'The Student Experience of Criterion-Referenced Assessment (through the Introduction of a Common Criteria Assessment Grid)' (2001) 38(1) *Innovations in Education and Teaching International* 74; Margaret Price et al, 'Feedback: All That Effort, but What Is the Effect?' (2010) 35(3) *Assessment and Evaluation in Higher Education* 277.

in itself but a vehicle for educational improvement',[9] and students will find it difficult to use assessment to improve their understanding if we don't give them effective feedback.

GORMSBY:
But assessment is not just about the student. It's often the case that when we assess our students and mark their work our goal is not to provide them with feedback about their progress but simply to give them a mark. I agree that we use assessment to determine whether students are learning what we intend them to learn,[10] but in my opinion this is done not to benefit the student but to satisfy our institutional obligation to rank our students and to determine whether or not they have achieved the requisite standard to be awarded with a particular grade.

KEATING:
You are not alone in holding that view. Kissam, for example, insists that

> the immediate function of law school grading practices is to establish a highly disaggregated class ranking system. This system is an efficient device, or at least a rational one, for sorting students in ways that serve the hiring purposes of many law firms.'[11]

GORMSBY:
That's right. We assess our students to create an accurate record of our students' progress.

KEATING:
But when we treat assessment as an end in itself, and the determination of final grades as the ultimate goal of a subject, we overlook the potential for our assessment to provide our students with useful feedback and contribute to their learning.

When students receive a bare mark for a particular item of assessment, that mark doesn't by itself provide students with feedback about what they understand correctly and what they misunderstand. Even when the mark is accompanied by comments, those comments are frequently insufficiently detailed for feedback purposes, or they are unclear and themselves misunderstood by the students.[12] And even when the students take the time to meet with the marker to try to obtain clearer or more detailed feedback, they often leave unsatisfied, partly due to their ignorance of the appropriate

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[9] Alexander W Astin et al, '9 Principles of Good Practice for Assessing Student Learning' (1996) http://www.aahe.org/assessment/principl.htm.
[10] Paul E Newton, 'Clarifying the Purposes of Educational Assessment' (2007) 14(2) *Assessment in Education: Principles, Policy and Practice* 149; Roy Stuckey, *Best Practices for Legal Education: A Vision and a Roadmap* (Clinical Legal Education Association, 2007) 235.
[11] Philip C Kissam, 'Law School Examinations' (1989) 42(2) *Vanderbilt Law Review* 433, 435.
[12] Graham Gibbs and Claire Simpson, 'Conditions under Which Assessment Supports Students' Learning' (2004) (1) *Learning and Teaching in Higher Education* 3.

questions to ask,[13] but also due to the marker's frequent unwillingness or inability to take the time to provide feedback in the desired level of detail. We have to take the time to give useful feedback, focussing upon improving our students' understanding.

GORMSBY:
I hardly think we can be blamed for any such lack of 'useful' feedback. Leaving aside the fact that many students don't even bother reading the feedback we do provide,[14] there are many reasons why we cannot always give as much feedback as we would perhaps like to. Like many law schools, we have an appallingly low staff-student ratio, and it is getting worse as enrolment numbers increase.[15] Many of our subjects – particularly the compulsory ones – now have hundreds of students enrolled. Meeting with students individually or writing detailed comments on every student's work takes up an awful lot of time. It is simply not practical, or even possible, for us to provide every student with as much individual feedback as they want. And we are under a lot of pressure from the University to publish research in good quality journals and apply for research grants.[16] Marking large quantities of assessment and providing detailed individualised feedback can distract us from our research for weeks at a time.

Perhaps if we set fewer items of assessment in our subjects, we would be able to do a better job of providing useful feedback.[17]

KEATING:
Well, as I'm sure you recall, it wasn't that long ago that most law students were only required to complete a single item of assessment in each law subject: the dreaded '100% final exam'. That was the standard for law school assessment in Australia – and in fact in most law schools around the world – for decades.[18] But it hasn't been the standard for some time now.

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[13] Heather Zuber, 'Furthering Law Schools' Progress on Improving Students' Academic Experience: Providing Students with Meaningful Feedback and Ways to Implement the Feedback to Improve Their Skills' (2010) <http://ssrn.com/abstract=1584879>.
[14] Dai Hounsell (ed), *Essay Writing and the Quality of Feedback*, Student Learning: Research in Education and Cognitive Psychology (Open University Press and Society for Research into Higher Education, 1987).
[15] Graeme Hugo, 'Some Emerging Demographic Issues on Australia's Teaching Academic Workforce' (2011) 18(3) *Higher Education Policy* 207; Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (Australian Universities Teaching Committee, 2003) 328-331.
[16] James Allan, 'Down under Exceptionalism' (2010) 29(1) *University of Queensland Law Journal* 143; Christopher Arup, 'Research Assessment and Legal Scholarship' (2008) 18(1/2) *Legal Education Review* 31.
[17] For support for the view that academics can afford to mark often or give feedback often but cannot afford to do both, see Graham Gibbs and Harriet Dunbat-Goddet, 'The Effects of Programme Assessment Environments on Student Learning' (Oxford Learning Institute, 2007) <http://hca.ltsn.ac.uk/assets/documents/research/gibbs_0506.pdf>.
[18] Kissam, above n 10; Johnstone and Vignaendra, above n 3, 364.

In Australia, law schools began to move away from 100% final examinations in the late 1980s,[19] some voluntarily as a result of conscientious revision of their teaching practices and many as a result of changes in school and university assessment policies.[20] It was increasingly recognised that in order to be pedagogically effective, assessment should be 'multiple, varied and fair':[21] 'multiple' in that there should be more than one assessment item per subject per semester, 'varied' in that there should be different types of assessment, and 'fair' in that the assessment should measure whether the learning goals are reached, students should be provided with clear grading criteria before the assessment, and students should be provided with feedback and practice before they complete the assessment.[22]

Johnstone and Vignaendra note that it is now well accepted within Australian legal education that assessment is one of the most important elements of subject design, and that very few law schools still offer subjects with 100% final examinations.[23] In fact, many universities now prohibit the setting of 100% final exams. At the University of Queensland, for example, university policy dictates that at least two forms of assessment be set for each subject, and that no single piece of assessment be worth more than 70% of the total assessment.[24] It is therefore no longer possible to set a single item of assessment worth 100%. Other law schools around Australia have adopted similar assessment polices that oblige academics to set some form of interim assessment, or at least two assessment tasks per subject.[25] This is entirely consistent with good teaching practice, and is, in my view at least, a good thing.[26]

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[19] Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Publishing Service, 1994) 167.

[20] Johnstone and Vignaendra, above n 14, 364-367. Barnes, writing in 1990 about approaches to assessment at the time in Australian law schools, claimed that 'as is commonly observed, law teachers tend to repeat the methods of instruction that are familiar to them from their assessment days', and referenced studies showing that many academics at the time saw assessment in terms of an incentive to make students work and enable their intellectual abilities to be measured: Jeffrey W Barnes, 'The Functions of Assessment: A Re-Examination' (1990-1991) 2(2) *Legal Education Review* 177, 179. Possible explanations offered by Barnes for academic ignorance of the educational possibilities of assessment included the influence of the legal profession on teaching, teacher apathy, lack of incentives, external constraints such as scarce resources, and a lack of training in and knowledge of educational theory: Ibid.

[21] Gerald F Hess and Steven Friedland, *Techniques for Teaching Law* (Carolina Academic Press, 1999), 289.

[22] Ibid 289-290.

[23] Johnstone and Vignaendra, above n 14, 363-367.

[24] University of Queensland, *Policy and Procedures Library – 3.10.02 Assessment* (2011) https://ppl.app.uq.edu.au/content/3.10.02-assessment, - 5.3 Forms of Assessment.

[25] See e.g. University of New England, *Assessment Policy* (2008) <www.une.edu.au/secretariat/Academic_Board/policies/assessmentpolicy.pdf>, 8.4, in which it is stated that a single assessment task for a unit 'would place undue emphasis on a single event in time and therefore increase the risk of assessment inadequately reflecting the totality of a student's accomplishments in this unit'. See generally Johnstone and Vignaendra, above n 14, 364-367.

[26] Regarding the pedagogical benefits of multiple items of assessment see e.g. Gibbs and Simpson, above n 11; Royce D Sadler, 'Formative Assessment: Revisiting the Territory' (1998) 5(1) *Assessment in Education* 77; Sadler, above n 3; Arthur W Chickering, and Zelda F Gamson, *Seven Principles to Good Practice in Undergraduate Education* (Johnson Foundation Inc, 1987).

GORMSBY:
Well I think that it has gone too far. All this extra assessment means more marking for academics, and with class sizes getting bigger and staff-student ratios getting smaller, something has to change.

It is a problem for the students as well: in my view they are now given *too much* assessment. These days my students seem to be on 'a constant treadmill of assessment' from around the third week of each semester.[27] There is no longer sufficient time for students to reflect deeply about what they are studying. Law students should be spending a lot of their time reading cases and thinking about what they are reading, but few of them have time to read anything other than what they absolutely need to read to complete the assessment. They spend so much time working on assessment that they no longer have time to learn for the sake of learning during the semester.[28] They are rarely prepared for tutorials (unless such preparation is assessed as well) and tutorial attendance drops off when assignments are due.[29] I am sure that if students had the time to do the prescribed reading and prepare for tutorials, they would soon work out what they understand and what they don't understand, and they wouldn't complain about receiving insufficient feedback.

Perhaps it is time to return to the 'good old days' of the 100% final examination.[30] When I was at law school we all sat for 100% final examinations and it certainly didn't do us any harm.

KEATING:
Well, I don't know about that. And while I acknowledge your concerns about student and academic workloads, I don't think returning to a single item of assessment is the answer. There are many good reasons why we moved away from 100% final examinations. Improved learning outcomes for the students for a start ...

GORMSBY:
But does compelling law teachers to set multiple items rather than a single item of assessment necessarily lead to better learning outcomes for the students? Variation in assessment should not be valued for its own sake.

KEATING:
Ideally, an assessment program should be consistent and cohesive. The various items of assessment should be aligned not only with the subject objectives and the subject

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[27] Johnstone and Vignaendra, above n 14, 367.
[28] Elena Marchetti, 'The Influence of Assessment in a Law Program on the Adoption of a Deep Approach to Learning' (1997) 15(2) *Journal of Professional Legal Education* 203.
[29] See the finding that students focus upon subjects with assessment due at the expense of other subjects in Gibbs and Dunbat-Goddet, above n 16.
[30] Johnstone and Vignaendra, above n 14, 367.

content,[31] but also with each other: students should be able to act on the feedback they receive for assessment items submitted earlier in the semester ('interim assessment'), remedy any misunderstandings and mistakes, and apply what they have learned in completing the assessment at the end of the semester ('final assessment').[32]

GORMSBY:
Well, it seems to me that many academics in seeking to comply with university policy choose to set completely different items of assessment covering separate parts of the subject. And where different assessment methods are used at interim and final stages of a subject, the feedback provided on the interim assessment will be irrelevant to preparing for the final assessment. Students are not given any sense of building their capabilities, so the feedback on interim assessment is a wasted exercise.[33]

KEATING:
I don't agree: some feedback is better than no feedback at all. Even if they can't use feedback on interim assessment in preparing for the final assessment, that feedback is still an important element of learning about that part of the subject to which the interim assessment relates.

If you do as you suggest and return to 100% final examinations, your students won't even get that feedback. If there is only a single item of summative assessment at the end of the subject, there will be no opportunity for your students to obtain feedback on their progress. You will not be giving your students 'help in figuring out what they don't know'.[34] Law students need to be given opportunities to practise writing about issues before the final examination.[35] With a 100% final examination, they would be effectively going into their single assessment task unprepared.[36]

GORMSBY:
Not necessarily. You have already made the point that assessment and feedback are not the same thing. There are many ways of providing my students with feedback that do not necessarily involve summative assessment. I could provide my students with opportunities to submit purely formative assessment such as an essay or a solution to a legal problem and receive written personalised feedback, without the mark for the

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[31] John Biggs and Catherine Tang, *Teaching for Quality Learning at University* (Open University Press, 2007).
[32] Cooper refers to such an approach as a 'two-stage assignment': students take what they learn in the first stage and apply it in completing the second stage. Cooper claims that such a system can improve the performance of nearly all students, particularly the performance of weaker students: Neil J Cooper, 'Facilitating Learning from Formative Feedback in Level 3 Assessment' (2000) 25(3) *Assessment and Evaluation in Higher Education* 279.
[33] Allan Collins and John R Frederickson, 'A Systems Approach to Educational Testing' (1989) 18(9) *Educational Researcher* 27, 31.
[34] Deborah Maranville, 'Infusing Passion and Context into the Traditional Law Curriculum through Experiential Learning' (2001) 51 *Journal of Legal Education* 51, 52
[35] Sophie Sparrow, 'Measuring Student Learning Outcomes: Assessing Core Knowledge of Torts' (2007) *Best Practices for Legal Eduction* <www.bestpracticeslegaled.albanylawblogs.org>.
[36] Kissam, above n 10.

assessment contributing to the student's final grade. Or I could provide my students with personalised feedback about their understanding and progress by encouraging them to ask me questions about their understanding of the subject material or show me their written work in class, or by email, or on a discussion board.

KEATING:
So you're saying that you would like to replace multiple items of unrelated summative assessment with a single item of summative assessment combined with integrated purely formative assessment?

GORMSBY:
I am.

KEATING:
Well, there would certainly be a number of benefits associated with such purely formative assessment. Treating an exercise as purely formative would focus the student's attention upon what they can learn from the exercise. It would remove the anxiety associated with having to produce the best possible outcome while being unsure about the best way to approach the exercise. Students would have the freedom to make mistakes and learn from the experience without the concern that this may affect their final grade.[37] And there may be exercises that might provide a useful learning experience for students but for which individual student performance is not readily susceptible to objective assessment, such as where students are required to work in groups.[38]

But how does this address the workload issue? Many of the more personalised forms of formative assessment you describe would be just as time consuming – for you, if not for your students – as the interim summative assessment. If you are teaching a subject with large numbers of students it will be difficult if not impossible for you to provide students with detailed individualised feedback on their performance.

GORMSBY:
Not necessarily. I think there would be time savings in not having to reduce each student's work to a mark or grade. In any event, there are other ways I could provide my students with access to feedback that would not be as time consuming as the provision of personalised feedback. I could, for example, encourage students to show their written work to peers and seek written or verbal feedback from them. And there are more 'collective' forms of feedback such as classes on how to answer practice problems and past examination questions; exemplar answers to practice problems and past examination questions and examiners' comments and marking guides for past examination questions.

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[37] J N Hudson and D R Bristow, 'Formative Assessment Can Be Fun as Well as Educational' (2006) 30(1) *Advances in Physiology Education* 33.
[38] Mary Keyes and Kylie Burns, 'Group Learning in Law' (2008) 17(1) *Griffith Law Review* 357. Regarding the benefits of formative assessment generally, see Sadler, above n 3; Sadler, above n 25.

KEATING:
Another way that you could provide feedback to your students that would not involve the provision of time-consuming personalised feedback to each student involves having students perform certain tasks during class time while you provide instantaneous on-the-spot feedback as the students progress through the tasks. Maranville describes how experiential learning exercises in class can incorporate the provision of instant feedback. She notes that 'for information to be useable in practice, our students must not only remember the concepts and rules we teach them; they must also be able to recognize the relevance of the information when faced with a real-life problem'.[39] The way that law is taught should aim to give students what Maranville calls 'anchor points in memory'.[40] Maranville suggests that a Contract subject would be enhanced by learning exercises that involve students in the process of forming a contract, exposing students to examples of written contracts and requiring them to interpret contractual terms. In this way, students would be given 'familiarity with the legal tasks lawyers perform, and the ways in which knowledge of legal doctrine is integral to those tasks'.[41] Learning to be a lawyer may never be quite like learning to play the piano or to kick a football, but experiential learning is similar in providing the immediate feedback of succeeding (or not succeeding) in performing a task. Immediate reflection upon why they succeed or do not succeed is surely the best sort of feedback. Requiring your students to perform such experiential learning exercises in class would also assist you with 'finding out what [your] students are actually learning',[42] so that timely correction can be given in respect of misconceptions. It is a way of revealing whether there is widespread confusion or miscomprehension among the students, and providing them with useful feedback.[43]

GORMSBY:
That would be much less time consuming than providing written personalised comments on hundreds of assignments.

These classroom exercises – and the other forms of written work I described earlier – would replace the interim summative assessment I use now, and not be assessed. They may be marked but any marks awarded to the students would be purely for feedback purposes; they would not count towards the students' final grades.

KEATING:
The problem with your proposal is that most students are 'assessment driven'.[44] They are not motivated to put a great deal of effort into a task unless they are rewarded with

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[39] Maranville, above n 33, 57.
[40] Ibid.
[41] Ibid 56.
[42] Ibid 72.
[43] Ibid.
[44] Benson R Snyder, *The Hidden Curriculum* (MIT Press, 1971).

marks or a grade.[45] Do you not think that if your students are asked to submit a practice answer but there is no 'penalty' for failing to do so, many will not bother?

GORMSBY:
I suspect that you are correct, but I tend to think that students should get used to the idea of doing something purely for the sake of what they can learn from it. I also believe that I should let my students decide for themselves how much effort to put into their learning. We are told that maximising law student autonomy is a good thing, after all.[46] And – speaking pragmatically – the greater the number of students who choose not to submit the purely formative assessment, the less marking there will be for me to do.

KEATING:
I think that you would have to take responsibility for 'selling' the formative assessment exercises to your students. You would have to make the benefits of completing these exercises – even though doing so does not contribute to the final grade – apparent to your students. You could do this by, for example, providing to your students data about student performance from previous years and the relationship between completing the formative assessment and final results.

GORMSBY:
So you would agree that setting a 100% final examination and leaving the rest of the semester free for various forms of integrated purely formative feedback is a good idea?

KEATING:
Certainly not. I still think it would be an enormous backwards step. I can perhaps see the benefits of replacing multiple items of summative assessment with a single item of summative assessment and various forms of formative assessment, at least in some law subjects, but why a final examination? Why not an essay or an assignment or a portfolio of work?

GORMSBY:
Well I can think of a number of reasons why, if I were to limit the assessment to a single item, I would choose to set an examination. One reason is that, in my experience, an examination is the most efficient use of my time – especially where I have to assess classes with hundreds of students.[47]

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[45] Sally Brown and Peter Knight, *Assessing Learners in Higher Education* (Kogan Page, 1994), 12; Gibbs and Simpson, above n 11.
[46] Massimiliano Tani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and Profession?' (2009) 19(1) *Legal Education Review* 3.
[47] Johnstone and Vignaendra report that rising student-staff ratios in Australian law schools and the impact upon academic workloads have driven a trend towards the greater use of examinations: Johnstone and Vignaendra, above n 14, 328.

Another reason is the integrity of examinations. As you are well aware, plagiarism is a growing concern within higher education in Australia and elsewhere,[48] and the use of the supervised examination as a form of assessment is a practical way of addressing this concern. With most other forms of assessment there is a risk that the work is done by someone other than the student.[49] A research assignment or essay may test the ability of students to work autonomously and conduct research, but '[t]he danger is that they simply submit something written by others'.[50] Supervised examinations have the advantage of providing an assurance that any particular student's work is that student's *own work*.[51] The student has to devise a solution on her or his own feet (so to speak) and does not have opportunities to collaborate with others. This may not reflect the realities of professional practice, where students will often collaborate with colleagues, but the fact is that we award grades in our subjects on an individual basis and need to be confident that that individual grade reflects a student's individual ability.

A third reason is that law school examinations test for certain important abilities and attributes in a way that is not possible with other forms of assessment. These include the ability to internalise legal doctrine; the possession of an extensive legal vocabulary; 'legal productivity' in the form of a quickness and effectiveness at issue spotting, the specification of rules, and the application of rules to complex situations; and the capacity for self-study and an appreciation of the broader terrain of legal principle, so that they can devise solutions to situations which they have not previously encountered. These attributes are clearly important to the practice of law.[52]

After all, the final examination has been the dominant mode of assessment in law schools for so long for good reason. Why are you so opposed to final examinations?

KEATING:
Where to start? Reliance upon final examinations as the sole method of assessment has been widely criticised by teaching and learning scholars.[53] I happen to agree with the view that assessment should be 'multiple, varied and fair'.[54] Different students have different learning styles, and examinations do not give some students the

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[48] Vincent R Johnson, 'Corruption in Education: A Global Legal Challenge' (2008) 48(1) *Santa Clara Law Review* 1.
[49] See Ed Dante, 'The Shadow Scholar', *The Chronicle of Higher Education* 12 November 2010 http://chronicle.com/article/The-Shadow-Scholar/125329/.
[50] András Jakab, 'Dilemmas of Legal Education: A Comparative Overview' (2007) 57 *Journal of Legal Education* 253.
[51] Phil Race, *Making Learning Happen: A Guide for Post-Compulsory Education* (Sage Publications, 2005).
[52] Kissam, above n 10, 435.
[53] See e.g. Gibbs and Simpson, above n 11; Lorrie A Shepard, 'The Role of Assessment in a Learning Culture' (2000) 29(7) *Educational Researcher* 4; Angela Glasner Brown, *Assessment Matters in Higher Education: Choosing and Using Diverse Approaches* (Open University Press, 1999). For criticisms of overreliance upon examinations in law, see Barnes, above n 19; Stuckey, above n 9, 236-239, 255-260; William M Sullivan et al, 'Educating Lawyers: Preparation for the Profession of Law' (Carnegie Foundation for the Advancement of Teaching, 2007), 164-170.
[54] Hess and Friedland, above n 20, 289.

opportunity to demonstrate their understanding and skills.[55] Other criticisms of the 100% final examination include the temptation for students to postpone their learning until the end of the course, the enormous pressure placed upon students as a result of having a single opportunity to demonstrate their learning and pass the subject,[56] and the likelihood that most students will fail to retain knowledge acquired in preparing for the examination for any extended period.[57]

Leaving aside the problems associated with making an examination the sole form of assessment, the examination as an assessment method has serious flaws. For example, most examinations don't effectively measure understanding; they only measure the student's ability to memorise and recall information.[58] If a student is able to study for an examination by memorising key information – by 'cramming' – they are unlikely to retain much of what they have learned after the examination. How can you claim to have contributed to student learning if your students forget what you teach them almost immediately?

GORMSBY:
I concede that 100% final exams might tempt many students to postpone their learning until the end of semester, but that is not the only factor in play. One might ask whether any such lack of student engagement during the semester is in fact the product of the way that we teach; we may, for example, be failing to engage students in a process of dialogue that is a rewarding learning experience in itself. Surely, if we can make the process of class discussion rewarding, so that students come out of class believing that their command of the subject-matter has improved, that would motivate students not to postpone their learning.

Anyway, it is not true that one cannot assess understanding by way of an examination. If the examination is a traditional closed-book short-answer style examination that requires students merely to recall and declare information presented in class or in the subject materials, then perhaps we are testing nothing more than memory. The reality is that examinations, particularly law examinations, can be – and usually are – designed to test different types of knowledge.

KEATING:

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[55] Paula Lustbader, 'Principle 7: Good Practice Respects Diverse Talents and Ways of Learning' (1999) 49(3) *Journal of Legal Education* 448. See generally David Kolb, *Learning Style Inventory* (McBer and Company, 1985).
[56] This point is considered in more detail below.
[57] Jeremy B Williams, 'The Place of the Closed Book, Invigilated Final Examination in a Knowledge Economy' (2006) 43(2) *Educational Media International* 107. See also Leonard L Baird, 'Do Grades and Tests Predict Adult Accomplishment?' (1985) 23(1) *Research in Higher Education* 3; Paivi Tynjala, 'Traditional Studying for Examination Vs Constructivist Learning Tasks: Do Learning Outcomes Differ?' (2006) 23(2) *Studies in Higher Education* 173.
[58] Kissam, for example, claims that examinations produce a mentality that 'can help to generate many correct answers on law school exams, but [which] misrepresents the more complex processes of description, interpretation, evaluation, and prescription that characterize legal practice'. Kissam, above n 10, 437.

Actually, there are many scholars who would agree with you. Jakab distinguishes between 'declarative and decontextualized knowledge' ('how much students know') and 'functioning knowledge' ('how well students think'). Case-reading exercises and problem-solving questions test functioning knowledge, whereas short answer questions only test declarative knowledge.[59] Similarly, Wegner explains:

> Law school essay questions typically present complex scenarios that provide students with a platform they can use to demonstrate their expertise as emerging professionals with growing ability to think like lawyers. They must read carefully, comprehend the implications of what they read, analyze the issues, apply relevant doctrine, synthesize insights from a wide range of cases and statutes previously studied, and evaluate alternative approaches to uncertain and difficult areas. Well-crafted essay questions provide an effective setting in which levels of expertise relating to critical thinking can be assessed. Expertise itself reflects extensive knowledge and sophisticated organization of that knowledge, an ability to recognize and retrieve patterns, a capacity to tie knowledge to context, a fluid ability to recall and use strategies, and capacity to respond flexibly and in an adaptive way to novel problems.[60]

And according to Race:

> The picture painted above of the links between traditional exams and the factors underpinning successful learning is very bleak. It does not *have to be* so bleak, however. With care, for example, exams can be designed which are much better at measuring 'making sense' than suggested above. Problem-solving exams and case-study exams are much better at *not* rewarding reproductive learning.[61]

GORMSBY:
That's right. Well-crafted problem-solving examination questions are able to test both the student's 'declarative knowledge' and their 'functioning knowledge'. Problem-solving questions are used extensively in legal education as both teaching and assessment exercises.[62] They are frequently used in 'black-letter' law subjects such as Contract, Torts, Equity and Trusts, and Property Law.

KEATING:
The key term there is 'well crafted': the suitability and efficacy of the examination as an assessment tool depend primarily upon the design of the examination questions.

GORMSBY:
Of course. For example, it would not be good to base the examination questions too heavily upon factual scenarios in cases studied in the subject or discussed in class. I

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[59] Jakab, above n 49, 262.
[60] Judith Welch Wegner, 'Reframing Legal Education's 'Wicked Problems'' (2009) 61(4) *Rutgers Law Review* 867, 1002-1003.
[61] Race, above n 50.
[62] According to Conley and O'Barr: 'Almost every law school exam question presents the students with an original (and often bizarre) fact pattern and demands that they predict the likely legal response. The theory of this kind of testing is that this is just what lawyers do when clients appear in their offices and tell them about their problems': John M Conley and William M O'Barr, *Just Words: Law, Language and Power* (University of Chicago Press, 1998) 133.

suspect that many students would simply memorise what was said in class and recite it in their answer. Instead the question should confront the students with new factual scenarios and oblige them to think for themselves.

Furthermore, the grading scheme should clearly distinguish between declarative knowledge and functioning knowledge, and reward the students capable of demonstrating the latter in addition to the former. Such a grading scheme would not reward students merely on the basis of how much correct information they can recite on the examination. It would also aim to assess the student's ability to process and apply that information so as to fashion arguments for use in a hypothetical but realistic legal dispute.

KEATING:
Educationalists have been insisting for some time now that learning objectives, learning activities and assessment should be 'constructively aligned',[63] and critics of examinations often emphasise the disconnection between the examination process and what happens in the classroom.[64] The way we teach law in our lectures and tutorials often does very little to prepare students for what they are called upon to do on the final examination.[65]

GORMSBY:
The 'discontinuities between classroom work and examination work'[66] can be alleviated by ensuring that what is done in class involves similar thought processes to those required for the examination. For example, past examination questions could be used as tutorial problems.

KEATING:
Critics of examinations also point out the disconnection between examination questions and the realities of professional practice.[67] For example, you referred earlier to examination questions describing a 'realistic' legal dispute. In my experience examination questions are either unrealistically fictionalised, involving bizarre and unlikely characters, coincidences and events, or unrealistically simple, when in real life the problems tend to be complicated. At the very least, examination questions can be criticised as presenting an undisputed set of facts when in reality legal practitioners are rarely certain of the facts of a dispute, let alone the relevant law.

GORMSBY:
There are certainly artificialities in an exercise of this sort. In legal practice, the facts with which a practitioner has to deal are rarely set out finitely and definitively in the way that they usually are in an examination question. That said, all university assessment exercises are artificial to some extent. The examination problem question

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[63] Biggs and Tang, above n 30.
[64] Shepard, above n 52.
[65] Kissam, above n 10, 438-440.
[66] Ibid.
[67] Shepard, above n 52.

is an attempt to simulate, as far as it is possible to do so, the type of exercise that legal practitioners have to deal with in their daily work, without ever being completely realistic. Personally, I try to build some factual ambiguity into my examination questions. My theory is that the better students should be able to use their knowledge of the law to work out what – in terms of findings of fact – the outcome depends upon.

KEATING:
Nevertheless, in teaching law to our students, we seek to achieve a wide range of learning outcomes and develop a wide range of graduate attributes. Certainly knowledge and understanding of the law (both functional and declarative), and the ability to solve legal problems, deal with factual ambiguity and engage in critical thinking are some of the more important learning outcomes. But there are others – such as oral communication skills, collaboration skills, and advanced legal research skills – in relation to which an examination is not a suitable method of assessment.

It would be a shame if after years of gradually moving towards the use of a wider variety of approaches to assessment and feedback,[68] Australian law schools were to regress to the 100% final examination.

GORMSBY:
I am certainly not suggesting that all law schools adopt the final examination as the sole method of summative assessment. I am merely exploring the possibility of the 100% examination being reconsidered as a viable assessment regime for *some* subjects. Even if this regime were available to all academics, I cannot imagine that everyone would adopt it.

KEATING:
I suppose if we were permitted to set a single item of assessment worth 100%, some academics would choose to set a research paper or some other form of non-examination assessment ... although it is likely that most academics would choose to set a final examination for the reasons you have identified.

How do you respond to the claim that 100% examinations put far too much pressure on students? For many students the awareness that the assessment of everything they have been doing in the subject for the entire semester comes down to how well they perform on a single examination is unbearably stressful. In fact, I believe the Australian Law Students' Association has called for 100% law examinations to be banned.[69] The stress associated with 100% examinations not only has consequences for the students' wellbeing, it also compromises the validity of the assessment. It is well established that students perform better in subjects that have forms of assessment

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[68] Johnstone and Vignaendra, above n 14, 359-392.
[69] Lawyers Weekly, '24 Hour and 100% Exams Should Be Axed', *Lawyers Weekly* August 3 2010 <http://www.lawyersweekly.com.au/blogs/top_stories/archive/2010/08/03/24-hour-and-100-exams-should-be-axed.aspx>.

other than a 100% examination.[70] It seems to me that the poorer performance by students on 100% examinations can be largely attributed to the enormous stress involved: students under that much stress are unlikely to perform as well as they would under more favourable conditions, since they are less able to articulate their understanding and exercise their skills. Some students are better able to cope with this stress than others, so is it not possible that the final examination in many ways comes down to a measure of how well a student can manage anxiety rather than their achievement of the subject objectives? And if so, is that fair?

GORMSBY:
And what is wrong with measuring a student's ability to perform tasks under stress? Professional practice will be stressful, and graduates will be called upon to articulate understanding and demonstrate skills in stressful circumstances. A barrister asked a difficult question in court does not have the option of complaining about the stress and asking for a few days to think about the answer!

In any event, a 100% final examination might create a lot of stress for students at the end of the semester, but it seems to me that, with assessment during the semester, the stress is spread across the entire semester. Many students would experience the same amount of stress whether the examination is worth 70% or 100%, but with a 70% examination they also have stressful periods during the semester, which of course interferes with their other learning activities: I have already referred to the drop-off in tutorial attendance in weeks when assignments are due, and how those who do attend do not seem to be prepared for the tutorial.

KEATING:
They would be true for most students, but not all of them. I think for me this is the deciding factor. Regardless of what you say, there are some students for whom a 100% final examination would be more than simply difficult or challenging, it would possibly be a serious threat to their mental health and wellbeing.[71]

GORMSBY:
What if I gave my students a choice? I could let them decide for themselves whether to complete a single assessment item or multiple assessment items.[72] Those unable to

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[70] Regarding the performance of students on 100% examinations as compared with performance when students complete other forms of assessment see Paul Bridges et al, 'Coursework Marks High, Examination Marks Low: Discuss' (2002) 27(1) *Assessment and Evaluation in Higher Education* 36; B A Chansarkar and U Raut-Roy, 'Student Performance under Different Assessment Situations' (1987) 12(2) *Assessment and Evaluation in Higher Education* 115; Graham Gibbs and Lisa Lucas, 'Coursework Assessment, Class Size and Student Performance: 1984-94' (1987) 21(2) *Journal of Further and Higher Education* 183.

[71] See Rachael Field and Sally Kift, 'Addressing the High Levels of Psychological Distress in Law Students through Intentional Assessment and Feedback Design in the First Year Law Curriculum' (2010) 1(1) *International Journal of the First Year in Higher Education* 65.

[72] Optional assessment is already used at a number of Australian law schools including the University of Queensland, Victoria University, the University of New England, the Australian National

cope with a 100% final examination would have the option to submit interim assessment and sit a final examination worth less than 100%.

KEATING:
Giving students the choice whether or not to complete particular items of assessment certainly seems to have pedagogical merit. Students learn more effectively when they are able to guide their own learning, develop their own interests, and pace themselves.[73] And the offering of optional assessment is apparently a way to maintain relatively high levels of student motivation.[74] Has anyone looked closely at the use of optional assessment within legal education?

GORMSBY:
Between Semester 2 2008 and Semester 1 2010, the Law School at the University of Queensland (UQ) conducted an assessment pilot program in which a number of compulsory subjects in the Bachelor of Laws program were exempted from the University requirement that all subjects include more than one item of assessment and that no single items of assessment be worth more than 70% of the total mark. Across the four semesters of the pilot program, a total of twenty subjects were exempted from the University requirement.

KEATING:
And how did the academics respond to this liberation from the constraints of policy?

GORMSBY:
Broadly speaking there were three types of response (See Table 1). Some academics chose to continue with the use of compulsory interim assessment. Most academics used the pilot program as an opportunity to experiment with optional interim assessment, offering students the choice between (a) sitting a final examination worth 100% and (b) submitting a second assessment item and sitting a final examination worth less than 100%. The remaining academics required or encouraged their students to complete purely formative assessment tasks and then sit a 'compulsory' 100% final examination.

University, Griffith University, the University of Western Australia, and Murdoch University (based upon the results of an online search of Australian law school websites using the search term 'optional assessment'). See also Tony Martin, 'Maximising Student Participation in Optional Assessment' (Paper presented at the Evaluations and Assessment Conference, 'Enhancing Student Learning', Curtin University of Technology WA, 2006).

[73] Michael Jackson, 'But Learners Learn More' (1997) 16(1) *Higher Education Research and Development* 101.

[74] Sandy Millar, 'Optional Assessments in Business Programmes' (Paper presented at the HERDSA Annual International Conference, Melbourne, 12-15 July 2009).

Table 1 - Responses to assessment pilot program

Year	Semester	Subject	Compulsory interim assessment	Optional interim assessment	Compulsory 100% final examination
2008	2	LAWS1114 Law of Torts B		✓	
2008	2	LAWS1116 Constitutional Law		✓	
2008	2	LAWS2112 Contract Law B	✓		
2008	2	LAWS2114 Criminal Law and Procedure B		✓	
2008	2	LAWS3112 Law of Property B		✓	
2008	2	LAWS3114 Law of Trusts B			✓
2009	1	LAWS1113 Law of Torts A			✓
2009	1	LAWS2111 Law of Contract A	✓		
2009	1	LAWS2113 Criminal Law and Procedure A	✓		
2009	1	LAWS2115 Administrative Law		✓	
2009	1	LAWS3111 Law of Property A	✓		
2009	1	LAWS3113 Law of Trusts A		✓	
2009	2	LAWS1114 Law of Torts B		✓	

2009	2	LAWS1116 Constitutional Law		✓	
2009	2	LAWS2112 Law of Contract B	✓		
2009	2	LAWS2114 Criminal Law and Procedure B		✓	
2009	2	LAWS3112 Law of Property B	✓		
2009	2	LAWS3114 Law of Trusts B			✓
2010	1	LAWS1113 Law of Torts A		✓	
2010	1	LAWS2111 Law of Contract A		✓	
Total		20 subjects	6	11	3

The variety of academic responses to the program demonstrates that even if 100% final examinations are permitted under university policy, not all academics will choose to set them. And since different academics responded to the loosening of University regulations in different ways, the pilot program provides some useful data about how different assessment regimes affect student performance.

KEATING:
Where students were given the choice, did many students choose to sit a 100% final examination?

GORMSBY:
The proportion of students who chose to sit a 100% final examination varied across the subjects participating in the pilot program (See Table 2). As a general rule, however, most of the students in any given subject chose not to do the optional assessment, and so sat a 100% final examination.

Table 2 - Proportion of students choosing to do optional interim assessment

Subject	Optional interim assessment	Total enrolment	Students who chose to do interim assessment	Students who chose to do 100% final examination
LAWS1114	Essay (33%)	341	206 (60%)	135 (40%)

Sem 2 2008				
LAWS2114 **Sem 2 2008**	**Essay (40%)**	**339**	**153 (45%)**	**186 (55%)**
LAWS2115 **Sem 1 2009**	**Essay (35%)**	**365**	**147 (40%)**	**218 (60%)**
LAWS1114 **Sem 2 2009**	**Essay (33.3%)**	**443**	**55 (12%)**	**388 (88%)**
LAWS1113 **Sem 1 2010**	**Essay (33.3%)**	**377**	**38 (10%)**	**339 (90%)**
LAWS2111 **Sem 1 2010**	**Essay (30%)**	**408**	**109 (27%)**	**299 (73%)**

KEATING:
How do you account for these different rates between subjects?

GORMSBY:
The proportion of students choosing to do optional interim assessment will depend upon a range of different factors, including the precise nature of the optional assessment activity, perceived levels of difficulty, the timing of the optional assessment, and so on.

Consider, for example, *LAWS1114 Law of Torts B*. In 2008, 60% of the students elected to complete the optional essay. In 2009, however, only 12% of the students elected to complete the optional essay, the remainder choosing to sit a 100% final examination. The academic in question offered two possible explanations for the lower participation rate in 2009. The first is the timing of the due date for the optional essay: in 2009, students did not have the benefit of the mid-semester break in order to complete the essay. The second relates to the perceived difficulty of the topic of the essay in 2009.

KEATING:
Did the students offer any reasons for their choices?

GORMSBY:
In Semester 2, 2009, feedback was sought from the students in the assessment pilot subjects for that semester by way of online survey. Three of the subjects had adopted the optional interim assessment model. Students in those subjects were asked to identify the main reason why they chose to do, or not to do, the optional assessment.

The most common reasons for doing the optional assessment were 'I wanted to avoid the pressure of a 100% final exam' (50%), 'I believe that I generally perform better

on assignments/essays than on exams' (28%), and 'I thought that I would get a higher mark by doing the optional assessment and the exam than by doing the exam alone' (10%). Student comments included the following:

> [I chose to do the optional essay] to avoid the risk of doing badly in a 100% exam. Performance in written exams is more unpredictable than assignments.
>
> I feel in a better position to engage with the complex and theoretical subject matter in the context and timeframe of an essay and come out with a better understanding of it than in an exam.

I think there are two overlapping themes here, namely avoiding the pressure of a 100% final exam and achieving a higher grade. The common denominator is a belief among these students that they will maximise their performance in the subject by doing the optional assessment. Whether you look at this as maximising the chance of good outcomes or minimising the risk of bad outcomes, most of the students who chose to do optional assessment did so because they perceived that it would produce a better outcome for them.

A disappointing aspect of the results is that few students seemed to be motivated primarily by intellectual considerations. No student, in any of these subjects, claimed to have done the optional assessment in order to 'get personal feedback on my understanding of the course material'. A solitary student in LAWS1116 *Constitutional Law* claimed to have completed the optional assessment by reason of being 'interested in the topic or topics of the optional assessment'.

KEATING:
And what about the students who chose to sit a 100% final examination?

GORMSBY:
The most common reasons for not doing the optional essay, and instead sitting a 100% final examination, were 'I would have preferred to do the optional assessment but I did not have enough time' (25%), 'I wanted to distribute my workload to better fit with other courses and/or paid employment' (23%), 'I thought that I would get a higher mark by doing the exam alone than by doing the optional assessment and the exam' (19%), and 'I believe that I generally perform better on exams than on assignments/essays' (14%). Once again, these responses do not represent mutually exclusive grounds for students' choices. We can see that approximately one third of those who sat for a 100% exam confessed to a belief that, on this occasion (if not always), doing so would be a grade-maximising strategy. However, students who lacked time or preferred to devote their time to other matters were not necessarily unconcerned about their grades: it is unlikely that those who had insufficient time to do the optional assessment would have been blind to the consequences of submitting hastily prepared work. Efficient use of time – in the sense of getting the best possible outcome from the least expenditure of time – seems to have been an important consideration for many students. This is borne out in some of the student comments:

> I would have spent as much time on the optional assignment as studying for the exam (because I'm not too good at time management) and so I thought it wasn't worth it because the assignment was only worth 30%.
>
> There was not two different papers for the exam just the same paper weighted differently, this meant that if you do the assignment, not only do you have to put in the time for that - you have to work just as hard for 70% as you do for 100%.

Students in the subjects with optional assessment were more likely than those in subjects with compulsory 100% (or close to 100%) exams to agree with the statement that 'the assessment in this course was fairly weighted'. The percentages agreeing with the statement ranged from 42% in *Law of Torts B* to 66% in *Constitutional Law*. By contrast, only 20% of students in *Law of Trusts B* (compulsory 100% exam with formative assessment) and 14% of students in *Law of Property B* (compulsory 90% exam with 10% tutorial-based assessment) agreed with the statement.

Specific comments about the optional interim assessment regime were very positive:

> I think an optional assessment idea was great - should be more like it.
>
> I very strongly support the optional assessment, as I think it is an appropriate way for students to tailor their assessment so as to enable them to give their best performance.

In Semester 2, 2009, the law student society at UQ conducted its own survey of law students, and the students were asked: 'Do you feel 100% final exams are an appropriate means of assessment?' Of the 449 respondents, 278 or 61.9% stated that they were either 'inappropriate' or 'very inappropriate'. However, in response to the question 'If some of your assessment has been optional, do you like this style of assessment?', only 117 of the 432 respondents (27%) replied with either 'Not at all' or 'Not much'.

My interpretation of these results is that most students do not like being *compelled* to do 100% exams, but they like to have the option not to do interim assessment. It is *having that option* which seems to have found favour with students. This reconciles the finding that few students object to the idea of optional interim assessment with the finding that only a minority of them elect to do that assessment.

KEATING:
What about the academics teaching the subject? They must surely favour the use of optional assessment: it would certainly reduce the amount of time they spend marking student work.

GORMSBY:
It seems that if many students elect not to complete the optional assessment, it has favourable consequences for the academics' workload. According to one of the academics involved in the assessment pilot:

> The use of an optional essay involved a "saving" of staff time compared to the staff time that would have been required if the optional essay had been compulsory. With 40% of

> students electing to do the essay, this would normally translate roughly into a saving of 85 hours of marking time …

My own experience is that, apart from final examination marking, I would spend the equivalent of three normal working weeks each teaching semester marking and giving feedback. Even if I were to halve this time by the use of optional interim assessment, that would be a saving of roughly 60 hours. Of course, we cannot assume that *all* of the time saved by using optional interim assessment would translate into the provision of more formative assessment to students (as discussed earlier) or productive research time for the academic, but there would be a significant increase in the amount of time that is *available* to academics.

KEATING:
True. But I wouldn't want student needs to be ignored in favour of giving academics more time to do research. I suppose that this would be one of most serious concerns about the proposal: that any move towards such a regime of optional assessment would be driven primarily by the preferences of academics to spend less time marking and more time doing other things.

GORMSBY:
I agree that the time saved in marking ought not to be the only consideration - or even the dominant consideration – in choosing a particular assessment regime. But, I also think that the University ought to give individual academics greater discretion in choosing the best mix of assessment for testing student achievement of the learning objectives in their subjects. Those who know the subject matter and methodologies of particular disciplines ought to be making the decisions about the best ways of assessing whether students are, in any particular subject, learning what they ought to be learning. This could mean *compulsory* interim assessment in some subjects because that is the best way to assess whether students are meeting the learning objectives for that subject; in other subjects it could mean a 100% examination.

And anyway, I am not opposed to having more time for research. In establishing any assessment regime, the needs of the students must necessarily be balanced with the needs of academics and of the institution itself. We do not have unlimited time or resources, and sometimes concessions have to be made. Academics are teachers, but they are not *only* teachers.

KEATING:
What about something as fundamental as passing or failing the subject? Does the use of 100% final examinations make it easier or harder for students to pass the subject?

GORMSBY:
If we look at the data collected during the UQ study, we can compare the final marks and grades attained by each of the students who completed the optional assessment with the final marks and grades that they would have attained had the examination been the only item of assessment.

KEATING:
Is that a valid comparison? Is it not possible that students would have modified their behaviour in response to the assessment regime? For example, if the final examination had been a compulsory 100% examination, those students would have put more effort into preparing for the examination and therefore received a higher mark than they in fact received having completed the optional interim assessment first.

GORMSBY:
Possibly. But it is also possible that completing the optional interim assessment prepared the students for the final examination and, had the final examination been a compulsory 100% examination, they would not have done as well. Let us assume that those two possibilities more or less cancel each other out.

In *LAWS1114 Law of Torts B* in both 2008 and 2009, basing the final grade upon the examination only instead of upon the optional assessment plus the examination does not affect the final grades of the majority of students (See Table 3).

Table 3 - Effect of weighting final examination at 100% (LAWS1114 Law of Torts B)

	2008		2009	
	Mark	Grade	Mark	Grade
Number of students whose mark or grade would have decreased if they did exam only	125	52 (25.2%)	33	16 (29.1%)
Number of students whose mark or grade would not have changed	25	140 (68%)	7	35 (63.7%)
Number of students whose mark or grade would have increased if they did exam only	56	14 (6.8%)	15	4 (7.2%)
Total number of students who completed optional assessment	206	206	55	55

These results also show that more than a quarter of students who elected to complete the optional assessment received a benefit (in terms of their final grade) in doing so. The overwhelming majority of the increases were, in both years, either students elevated from a grade of 4 (Pass) to a grade of 5 (Credit) or elevated from a grade of 5 (Credit) to a grade of 6 (Distinction), although there was movement between all of the passing grades (See Table 4).

Table 4 - Effect of election to complete optional assessment (LAWS1114 Law of Torts B) – Change in grades

	2008		2009	
	Increased grade	Decreased grade	Increased grade	Decreased grade
Between 6 and 7	5	4	-	2
Between 5 and 6	24	5	9	1
Between 4 and 5	16	5	6	-
Between failure and 4	7	-	1	1
Total number of students	52	14	16	4

The similarity of the pattern in the two consecutive years provides a modest basis for saying that the inclusion of interim assessment in an assessment regime has a levelling effect. By this, I mean that students whose performance would, in an exam-only regime, fall within the 'middle-range' receive a benefit from completing interim assessment. In my view, this is a point in favour of the use of the 100% final examination. It results in a much clearer separation of the exceptional students from the merely competent students – and, if as I suggested earlier, one of the purposes of assessment is to rank our students for the benefit of employers and other stakeholders, this is clearly a desirable consequence of the 100% final examination. If our goal is to rank the students by measuring the extent to which each student has met the learning objectives of the subject – and not merely to comply with university assessment policy or to give every student a chance to get the highest grades – it seems to me that the 100% final examination may, in many subjects, be the more accurate assessment method. This is particularly true for those subjects in which what really matters is whether a student has an adequate understanding of the legal doctrinal terrain so as to come up with, individually and under pressure, a solution to a previously unencountered problem. Of course, in other subjects, that may not be what really matters. As I have already said, the University should give individual academics the discretion to make those judgements.

KEATING:
So the data shows that the use of 100% final examinations is likely to lead to lower marks (if not lower grades) for most students, but this is in your view a *good* thing because it more clearly separates the merely competent students from the excellent students. Do we have similar results in any other subjects?

GORMSBY:
Let us consider the student results in the Trusts subjects taught at UQ in the first semester of each of 2007, 2008 and 2009.[75] In both 2007 and 2008, there was compulsory interim assessment weighted at 30%. In 2007, the interim assessment consisted of a drafting exercise (10%) and a legal research exercise including preparation of a short case note (20%). In 2008, the interim assessment consisted of a compulsory case analysis essay (30%).

As was the case with Torts B, the majority of students would have been unaffected (in terms of their final grade) if the examination was weighted at 100%, although the margin of the majority was, in each year, much narrower than in Torts B (See Table 5).

Table 5 - Effect of weighting final examination at 100% (Trusts)

	2007	2008
Number of students whose grade would have decreased if they did exam only	119 (48.4%)	115 (39.7%)
Number of students whose grade would not have changed	127 (51.6%)	170 (58.6%)
Number of students whose grade would have increased if they did exam only	-	5 (1.7%)
Total number of students	246	290

The large number of students whose grade would have decreased in 2007 may reflect the relative lack of difficulty of the interim assessment. Almost half achieved a higher grade as a result of their better performance on the interim assessment. The 2008 data produces a pattern closer to that of the Torts subjects. The number of students whose grade would have decreased in 2008 was still higher than that in Torts, and this may be explained by the fact that Trusts is a third-level subject and the average level of confidence (and competence) in reading, interpreting and commenting upon case law could be expected to be higher than in a first-level subject.

KEATING:
And did the average students fair better or worse than the superior students?

GORMSBY:
When the pattern of movements between grades is examined, a pattern similar to that in Torts appears (See Table 6).

[75] In Semester 2 2007 (before the curriculum change) the subject was LAWS3012 Law of Trusts. In Semester 1 2008 (after the curriculum change but prior to the assessment pilot program) and Semester 1 2009 (as part of the assessment pilot program) the subject was LAWS3113 Trusts A. The syllabuses for these subjects overlap, but are not identical.

Table 6 - Effect of weighting final examination at 100% (Trusts) – Change in grades

	2007		2008	
	Decrease in grade	Increase in grade	Decrease in grade	Increase in grade
Between 6 and 7	2	-	3	4
Between 5 and 6	33*	-	28	1
Between 4 and 5	54	-	50	-
Between 3 and 4	6	-	11	-
Between 2 and 3	24	-	23	-
Total number of students	119	0	115	5

*Includes one student who would have received only a 4 had the interim assessment not been included.

As was the case with Torts, the data suggests that the inclusion of interim assessment had a levelling effect - the 'middle-range' students received a benefit and the instances of negative effects were concentrated in the 'upper-range' of students. Again, it seems that the abolition of interim assessment – or at least, making it optional rather than compulsory – results in a lower average grade. And, assuming of course that a final examination result is the best measure of a student's ability to engage in independent legal problem solving, it results in a clearer indication of the extent to which each student has met the learning objectives of the subject.

KEATING:
I can't help but wonder whether these outcomes are representative of all, or even a majority, of law subjects. After all, this is based on data from a handful of subjects at a single law school.

GORMSBY:
This survey, being of limited breadth, does not provide a basis for any broad-sweeping conclusions. We can see that the majority of students were neither advantaged nor disadvantaged by changes to the assessment regime, but the effects at the margins were sufficient to produce quite different distributions of grades. Therefore, at the very least, we can say that care should be taken in the choice of assessment regime. We should give particular attention to whether the assessment methods to be used are an appropriate way of testing achievement of the learning objectives.

KEATING:
I agree that decisions about assessment regimes should not be taken lightly, and not only because of the impact upon pass rates. I am much more interested in the impact upon student learning, which is not necessarily reflected in pass rates.

What happened when the Trusts subject changed over to a compulsory 100% final examination?

GORMSBY:
The second semester Trusts subject, *LAWS3114 Law of Trusts B*, adopted a compulsory 100% final examination in 2008 and continued with this in 2009. (In 2009, the students were also required to complete a formative assessment activity in order to qualify for a passing grade.) Meanwhile the first semester Trusts subject, *LAWS3113 Law of Trusts A*, adopted optional interim assessment in 2009. Comparing the student outcomes with those from Semester 1 2008 again confirms that the overall level of student grades falls under an examination-only (optional or compulsory) regime (See Table 7).

Table 7 - Comparative grade distributions 2008-2009 (Trusts)

	LAWS3113 2008 Sem 1 Final examination + compulsory essay	LAWS3114 2008 Sem 2 100% final exam + optional purely formative assessment	LAWS3113 2009 Sem 1 Final examination + optional essay	LAWS3114 2009 Sem 2 100% final examination + compulsory purely formative assessment
7	14 (4.8%)	-	13 (4.6%)	-
6	91 (31.4%)	9 (3.8%)	60 (21.5%)	20 (8.1%)
5	107 (36.9%)	89 (38%)	109 (39%)	135 (54.4%)
4	67 (23.1%)	135 (57.7%)	81 (28%)	91 (36.7%)
3	-	-	-	1 (0.4%)
2	11 (3.8%)	1 (0.5%)	16 (5%)	1 (0.4%)
1	-	-	-	-
Total Fully Assessed	290	234	279	248

KEATING:
So this data again suggests that students generally do worse (in terms of final grade) when the assessment regime shifts from multiple assessment items to a single assessment item (whether optional or compulsory). I understand your point that this demonstrates the inflationary effect upon final grades of interim assessment, but so far I think your data does more to confirm my opposition to 100% final examinations that it does to confirm your support for them.

I wonder if the data supports one of my other concerns: that law examinations tend to favour male students and disadvantage female students. Kissam, for example, argues that the discourse of law examinations is:

> predominantly a masculine discourse - one that employs values, techniques, and concepts that are more widely shared among men than women. Following Professor Carol Gilligan, we might say that our contemporary Blue Book language is a male code that employs rules, boundaries, game playing, speed, and numbers in order to characterize 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.[76]

If the only assessment method is an examination, it is possible that the assessment regime favours male students over female students.

GORMSBY:
The data from the UQ pilot study does not support that view. For example, in *LAWS1114 Law of Torts B* in 2008, of the 206 students who chose to complete the optional research essay, 64% were female and 36% were male. Of the 66 students whose grades were affected (either positively or negatively) by their election to complete the essay, 67% were female and 33% were male. Of the 52 students whose grades would have decreased if they did a 100% exam, 63% were female and 37% were male, and of the 14 students whose grades would have increased, 79% were female and 21% were male. This indicates, if anything, that female students are slightly more likely than male students to benefit from an examination-only assessment regime.

In *LAWS1114 Law of Torts B* in 2009, of the 55 students who chose to complete the optional research essay, 40% were female and 60% were male. Of the 20 students whose grades were affected, 30% were female and 70% were male. Of the 16 students whose grades would have decreased if they did a 100% exam, 25% were female and 75% were male, and of the 4 students whose grades would have increased, 50% were female and 50% were male, again suggesting that female students are more likely to benefit from an examination-only regime.

The four students who, in 2008, suffered a decrease from a grade of 7 to a grade of 6 by reason of their essay marks were female. In 2009, both students who suffered a decrease in grade from 7 to 6 by reason of their essay marks were female.

I think that the data is at least consistent with the conclusion that female students who sit 100% final examinations are no worse off than male students – even if it does not prove it. The proportion of women who completed the optional assessment and would have been worse off sitting a 100% final examination is no greater than the proportion of men in the same situation, and the proportion of men who completed the optional assessment and would have been better off sitting a 100% final examination is no greater than the proportion of women in the same situation.

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[76] Kissam, above n 10, 456-457, citing Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982) and K C Worden, 'Overshooting the Target: A Feminist Deconstruction of Legal Education' (1984-1985) 34 *American University Law Review* 1141.

Of course, this limited study does not explode the thesis that examination-only regimes create a disadvantage for female students, but it does cast doubt upon whether the thesis represents an invariable and unassailable truth. If these results are to be explained by a suggestion that law students are an atypical group of students – and, in particular, that high-achieving female law students have adapted themselves to a supposedly 'male-oriented' assessment regime – then surely any generalisation that an examination-only assessment regime disadvantages women should not be a decisive consideration in choosing assessment regimes for *law* students. Assessment regimes for law should be selected primarily on the basis of what is the most reliable means of testing whether students have developed the attributes associated with a good foundation in the discipline of law.

KEATING:
Perhaps when you present your students with a choice between doing optional interim assessment and doing a 100% final examination you should also provide them with data about performance by women and men on examinations so that the students make an informed choice. This is, of course, just one of many types of information with which such students should be provided.

GORMSBY:
Perhaps, in so far as there is reliable data that shows that there is a difference between male and female performance, we should do that. We should also consider whether students in the early years of their study can make an informed choice about whether they ought to complete optional assessment. Obviously, students who are trying to decide whether to complete optional assessment of a particular kind will be informed by their previous experience with assessment of that kind.

It would also be good for first year students – and perhaps later year students as well – to be given the opportunity to do different types of tasks such as research essays, answers to problem questions and so on as purely formative assessment. In other words, they should be given the opportunity to learn how to do certain tasks and obtain feedback on their performance before their work 'counts' towards a final grade. As previously noted there was compulsory formative assessment in *Law of Trusts B* in Semester 2, 2009, and the 2009 class, taken as a whole, performed better in the compulsory 100% exam than the 2008 class. (See Table 7)

KEATING:
I remain concerned about the use of final examinations as the sole form of assessment in a subject. However, I suppose it could be an option available to academics as long as:

(1) both the academics and the students are provided with information about the benefits and disadvantages of using 100% final examinations;
(2) all students are provided with formative feedback about the progress of their learning prior to sitting the final examination – ideally this should be

individualised feedback on a piece of work similar to the work the student will be required to complete on the final examination;
(3) all students are given the option of submitting interim assessment and thus avoiding the pressure associated with a 100% final examination; and
(4) safeguards are put in place to ensure that no student can complete the degree and only ever sit final examinations, never being called upon to demonstrate their oral communication, collaboration and research skills.

You would still have the problem that, since you set your assessment to test students' achievement of particular learning outcomes which you consider to be essential for completion of the subject, giving students the option of *not* completing that assessment allows a student to complete the subject without having that learning outcome tested.

GORMSBY:
A fair point. I suppose that if I am serious about setting assessment that determines whether or not the learning objectives have been achieved, I will have to make sure that the final examination provides an adequate indication of whether a student has achieved each of those outcomes.[77] It has always been my argument that the compulsory assessment should be a fair measure of all of the learning objectives for the subject. That can cut both ways – in terms of adding assessment items that are necessary in order to assess particular learning objectives and eliminating assessment items that do not have any clear relationship with learning objectives.

At the end of the day, I think that the person who teaches the subject is in the best position to make a judgement about what mix of assessment (including what mix of compulsory and optional assessment tasks) is best for that subject. Hence my opposition to teaching policies that compel the use of multiple summative assessment items .

KEATING:
In the absence of such policies I am sure you would do what is best for your students. But can our colleagues be trusted to do what is best for their students and not just what is best for themselves and their own workloads?

GORMSBY:
We cannot rule out the possibility that some academics will act in a purely self-interested fashion. The question is who are the 'least worst' people to make these sorts of decisions: the individual academics who know – and hopefully love – their specific areas of expertise … or University committees that are not necessarily aware of or sensitive to the requirements of different disciplines?

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[77] For a critique of the shift within higher education towards outcomes-based education see Kevin Donnelly, 'Australia's Adoption of Outcomes Based Education: A Critique' (2007) 17(2) *Issues in Educational Research* 183.