

STUDENT ASSESSMENT AND “QUALITY” IN LEGAL EDUCATION

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[M]any students aimed to plan their study with the primary goal of performing well on course examinations and other evaluation tasks. Unfortunately, the students often saw this goal as conflicting with the more fundamental goal of gaining a deep and enduring grasp of the subject ... while ... the formal curriculum emphasized a problem-oriented approach, originality and independence of thought, the evaluation (... the hidden curriculum) tended to emphasize an answer-oriented approach and rote learning ... the majority [of students in the sample] were happy to focus mainly on the demands of the evaluation system.²

According to the student learning research, assessment gives messages about the kind of teaching required.³

Student Assessment⁴ and Learning Law

The strongest single factor affecting the way students learn any subject at University is the way they are assessed.⁵ Student assessment is therefore relevant to the quality of education.

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² T Crooks, “The Impact of Classroom Evaluation Practices on Students”, (1988) *55 Review of Educational Research*, 4 at 438, 445.

³ Ramsden “Improving Quality in Higher Education: Lessons from Research on Student Learning and Educational Leadership” (1995) *6 Legal Education Review* 3 at 12.

⁴ The distinction between “evaluation” and “assessment” is considered in more detail at n. 18. Some US literature refers to “student evaluation” but I shall use the term “student assessment”: the term “evaluation” is used in the context of a review of institutions and processes, rather than a determination of whether or not learning objectives have been attained or not.

⁵ Crooks, n 2. See also L Elton, “Assessment for Learning” in D Blish (ed), *Professionalism and Flexibility in Learning*, Guildford, SRHE, 1982; D Rowntree, *Assessing Students: How shall we know them?*, Kogan Page, London, Rev (ed), 1987.

Some law students view their studies as an opportunity to read widely, encounter and participate in new activities and reflect on new ideas and perspectives, and to grow emotionally and intellectually, but only the most idealistic will disregard totally the assessment tasks: essays, practical exercises and examinations. At best, these provide feedback and present new and different learning experiences, and, at worst, constitute the obstacles he or she must pass before gaining a degree. It is important that such assessment tasks accord with the learning outcomes which the course or subject in question (and its teaching method) seeks to achieve. Achievement of learning objectives is an important component of "quality" in education.

Pressure on Universities and "Quality" in Education

With increasing prosperity in the world, there has been a significant increase in the demand for tertiary education, coupled with growing "credentialism" - a requirement that practitioners in many fields possess a relevant degree before becoming eligible to work. According to figures from the 1965 *Yearbook Australia* (for 1963) and *Selected Higher Education Statistics* 1993, the number of students in Australian universities increased from 69 074 to 449 425 between 1963 and 1993. The increase is of the order of 6.5 times in 30 years. At the same time, the number of academic staff has grown at a much slower rate (from 4 289 to 21 723 - an increase of slightly less than 5 times). The number of law schools has increased from 7 in 1963, to 12 in 1980 and 28 in 1995.

In Australia, as elsewhere where university education is publicly funded, Governments have responded to the demand by opening a few more institutions, but more commonly by forcing existing institutions to admit more students with no, or very small increases in additional staff, buildings libraries, equipment, or other resources.

If the quality of learning (and of assessment) is to be maintained, something must yield. Most academics assert that research goes first, but the quality of learning has also suffered, and will continue to do so. The pressure of student numbers means that law teachers cannot develop or use imaginative or innovative methods of assessment which are unduly labour and time intensive. That pressure of numbers has decreased the degree of interaction and individually-tailored learning (tutorials, individual projects) that was supposed to characterise university-level education.

With moves by governments to make educational institutions "accountable", the rhetoric in universities increasingly includes "quality". Its precise meaning in such contexts is not clear. The intention may have been to import into education from the commercial world high standards of product design, inputs and customer satisfaction. Undoubtedly educational institutions have been free from systematic processes of evaluation similar to those operating in business and government institutions, but processes of peer review and attitudes of professionalism among academics have in fact produced a consciousness of some of the attributes that make up "quality" in higher education and specifically in law schools. It has been relatively easy for astute academics to adapt things they already do to comply with the requirements of the bodies set up by government and central university administrations to police "quality processes" within universities. "Quality" reviews in law schools may provide an incentive for law teachers to review their assessment practices and improve them.

There is probably no better measure of quality in legal scholarship than peer evaluation, or, in legal education, than the capacities of graduates 5, 10, or even more years after they complete formal studies. These measures are difficult to express numerically, and therefore do not satisfy the quantitative fantasies of the economic rationalist zealots now controlling educational policy. As a survival technique, academic institutions have had to adopt some measures of quality improvement.⁶

Like Ramsden,⁷ I have found that some of the practices of business can be valuable when applied in a University context, though Universities are definitely not businesses and not all business management techniques are appropriate in Universities.⁸ There are many unanswered questions about what quality may comprise. The answer varies according to the context of the question. This paper outlines one sense in which student assessment techniques can be related to the concept of "quality", in the context of "quality planning".

Quality planning in a law school seeks to improve the quality of the law school's activities. It follows that quality planning in teaching and learning is about conscious direction of teaching and learning activities to improve them.

⁶ S Marginson, *Higher Education and Public Policy*, Melbourne, Cambridge UP, 1993.

⁷ n 3 at 13.

⁸ B Bessant, "Corporate management and its penetration of university administration and government" (1995) 38 *Australian Universities Review* 59.

It involves:

- devising a map of what is being done
- ascertaining the objectives of specific activities and general overall goals⁹
- establishing criteria and standards for quality
- developing procedures assessing quality by reference to the stated criteria, and
- developing procedures for encouraging quality improvement.

and making judgements about

- appropriateness of goals or objectives
- suitability of criteria and standards
- effectiveness of procedures for achieving good quality
- how well the assessment process tells us what we need to know.¹⁰

That means looking at student assessment in a different light.

There are already comprehensive accounts of student assessment in North American¹¹ and Australian law schools.¹² This article will not repeat Barnes' work more than is necessary to relate the material more closely to ways in which re-examination of student assessment practices may affect and improve the quality of legal education. In this paper there is a short summary of the purposes, functions and methods of student assessment, followed by an account of some ways in which assessment methods in the University of Wollongong Faculty of Law have been selected because of the way they related to desired outcomes. This, it is suggested, indicates that careful thought about assessment can improve the quality of legal education.

⁹ In this context, "objectives" are used to refer to standards of achievement that are capable of measurement; "goals" or "aims" are statements of aspired ends of activity, less capable of measurement, but for many educational purposes equally as, if not more important than, measurable objectives.

¹⁰ D Warren Piper, *Quality Management in Universities*, Canberra, AGPS 1993 at 13.

¹¹ PC Kissam, "Law School Examinations", (1989) 42 *Vanderbilt Law Review* 433.

¹² JW Barnes, "The Functions of Assessment: A Re-Examination", (1990) 2 *Legal Education Review* 177.

Aims and Objectives of Law Schools in Relation to Quality

Law Schools have goals, though quite often these are implicit or assumed. Goals are also established, either explicitly or implicitly, for each course and subject. If law schools are to measure whether they are meeting their own goals - generally accepted as an important part of quality management - they must first identify their goals and the educational outcomes they want to achieve.

This article uses examples drawn from my experience at the new¹³ University of Wollongong, whose aims had to be compatible with the University's published 'Attributes of a Wollongong Graduate'. The Law Faculty's stated aims and objectives take a broad view of legal education, and are based on two major assumptions,

- i. that law is not something exclusive to practising lawyers; and
- ii. that learning law, even for professional lawyers, is a life-long process,

that have a number of implications for its teaching methods and the desired outcomes for itself and its students. Those aims are:

The aims of the Faculty of Law are

- '(a) to provide legal education at undergraduate level which is:
 - a broad general education;
 - the foundation for a career in a broad range of legal work; and
 - the study in depth of an academic discipline;
- (b) to conduct pure and applied research and scholarship of outstanding quality in law and related fields; and
- (c) to contribute to legal education and understanding of the law in the legal profession and the wider community and sections of the University.'

¹³ The University of Wollongong dates from the 1960s, but its law faculty was established in 1990: it is thus one of the first of the "new wave" of law schools established since the "Dawkins reforms" of Australian Tertiary Education in 1987.

The objectives of the LLB degree course are:

'Those who complete the requirements for the LLB degree will be:

- broadly educated;
- inquiring and critical;
- skilled in oral and written communication, advocacy, legal research, listening, and negotiating;
- familiar with the general operation of the Australian legal order and its place in Australian society;
- knowledgeable in depth about particular areas of law; and
- well fitted for a career in a broad range of legal work.'

The "Attributes of a Wollongong Graduate" are:

ATTRIBUTES OF A WOLLONGONG GRADUATE COMPETENCIES

- Is equipped for continued learning, intellectual development, critical analysis and creativity.
- Has coherent and extensive knowledge in a discipline.
- Communicates clearly and fluently in writing.
- Has capacity for teamwork.
- Has ability to solve problems and make decisions.
- Is self-confident and orally articulate.
- Reasons logically and distinguishes fact from opinion.
- Is computer literate.
- Is statistically literate.

ATTITUDES

- Has the desire for continuing intellectual development and creativity.
- Willing to initiate and participate in change.
- Values truth, accuracy, honesty and ethical standards in personal and professional life.
- Accepts responsibilities and obligations and asserts rights.
- Appreciates his or her own and other cultures and customs.

This statement represents those attributes which the University is aspiring to develop in its graduates. Exploration of the best ways to foster these desired attributes and to monitor progress made towards them will continue across all faculties.

Unlike most North American law schools (and more like those in the United Kingdom), the Faculty accepted that it was not a narrowly professional school, and that a significant number of its graduates would not enter the traditional practice of law after graduation.¹⁴ Whatever students learn at University, the highest priority must be the development of a capacity for life-long learning.¹⁵ The desired outcomes of a more narrowly professional school might influence the process of teaching and learning differently.

A statement of aims and objectives, in the context of quality planning for student assessment, provides a checklist of what an institution might do to establish and maintain quality.

Student Approaches to Learning – The Effects of Assessment Procedures on Learning

In many law schools, the educational objectives of each subject must

- be stated formally,
- be specifically related to the assessment tasks that the student will be asked to perform and
- indicate which of the desired attributes of a graduate they are designed to foster.

Law teachers may make a virtue out of necessity by assessing in ways that improve the environment for learning. It is implicit in many law schools

¹⁴ J Goldring, "Babies and Bathwater: Tradition and Progress in Legal Education and Legal Scholarship", (1987) 17 *University of Western Australia Law Review* 216-256; M Chesterman and D Weisbrot, 1987, 'Legal Scholarship in Australia' 50 *Mod L Rev* 709; D Weisbrot, *Australian Lawyers*, Melbourne, Longman Cheshire 1990.

¹⁵ P Candy et al, 1994, *Developing Lifelong Learners Through Undergraduate Education*, Canberra, (Commissioned Report (No 29) for the National Board of Employment, Education and Training), AGPS.

that educational goals include the encouragement of students to take a “deeper”, rather than a “surface” approach to learning.¹⁶

Understanding legal material, both from a perspective of internal consistency and structure, and of law's relations to the social context, is essential to the making of sound professional judgments and evaluations. Much traditional legal education, which was little more than training to pass final examinations, meant that much of what was learned was forgotten, let alone understood. Students did not participate in the learning process. Their learning objective was to pass examinations, rather than to understand the subject matter. It was possible to satisfy the examiners by regurgitating lecture notes, or applying reasoning skills to the problems presented. If law students developed a deep approach to learning, it was in spite of, rather than because of their education.¹⁷

Many students do neither more nor less than they need to obtain a pass grade in the subject. Even if students think they are doing what is required to pass (or get a Distinction), the work that is subject to assessment can, and, it is suggested, should, be an important and valuable part of the learning process.¹⁸ By doing what they are required to do as part of the assessment process, students can be involved actively in the process of learning: gaining skills, acquiring interests and knowledge that they may not call on immediately, but will be valuable to them later. The more assessment can be part of an active process of learning, the more valuable for students, and the better the quality of their experience it may be.

¹⁶ F Marton and R Säljö, “Approaches to learning” in F Marton et al, (eds), *The Experience of Learning*, Edinburgh, Scottish Academic Press 1984 identified a distinction between “surface” and “deep” approaches to learning. Students taking a surface approach tend to learn by rote, not to question the assumptions that underpin the material nor to relate it to context. Students with a deep approach examine the arguments critically, question the assumptions on which they are based and relate them to previous knowledge and understanding. University level education should foster a ‘deep’ approach to learning: the development of understanding which is not superficial or easily forgotten. See also F Marton and R Säljö, “On qualitative differences in learning - II. Outcomes as a function of the learner's conception of the risk” (1976) 46 *British Journal of Educational Psychology*, 115.

¹⁷ This was certainly my own experience as a law student at the University of Sydney 30 years ago. My reactions are reinforced by younger authors who have drawn on empirical studies, rather than anecdotes: P Ramsden, *Learning to Teach in Higher Education*, Routledge, London 1992; M LeBrun and R Johnstone, *The Quiet Revolution: Improving Student Learning in Law*, Law Book Co, Sydney, 1994.

¹⁸ A current study on law students' approaches to learning is being carried out by Marlene LeBrun, Les McCrimmon and Carol Bond in a number of Queensland Law Schools. The results of their studies, including videotapes produced by them, reinforce this conclusion.

Assessment Theory and Quality of Learning

Different writers about assessment (and evaluation, to which it is closely related) emphasise different aspects: the extent to which goals are achieved; rigorous experimental designs and quantitative methods; the comparative aspects of the process; the making of judgments; the generation of data and the provision of feedback.¹⁹

In an educational context, assessment is often divided between **formative** (or 'diagnostic') and **summative** (or 'final') assessment. The former applies to an examination of an activity to see how it needs to be changed in order to make it viable or better. Formative assessment usually leads to **corrective** and to **preventive** action. Corrective action remedies a perceived deficiency in the subject of the assessment; preventive action builds resistance against some possible change which is thought undesirable. Some assessment of this type is at times described as 'self-referenced'. Summative assessment tends to be used as a factor in determining the allocation of some kind of resource. Often the two kinds of assessment cannot be separated, and in law schools, both play roles. However, in traditional assessment, the summative aspect dominates.

Student assessment tasks, in theory, are designed

- to assist in attaining learning objectives;
- to measure whether the learning objectives have been achieved;
- or
- to do both.

Formative assessment generally relates to the process of learning, and is normally carried out in relation to whether or not the student satisfies certain criteria. The literature describes this as **criterion-referenced** assessment. Summative assessment, which focuses more on the final product of the learning process, may also be criterion-referenced. For example, most competency-based assessment, which assesses whether or not a person can perform specified tasks, is by definition of this type. However, it may also be **norm-referenced** assessment — that is, assessment of a student relative to a group of other students, usually those in the same class at the same time. Many types of assessment found in the University combine attributes of several of these models.

¹⁹ eg MQ Patton, *Practical Evaluation*, Sage Publications, Beverley Hills 1982, Ch 2.

What educational studies have revealed about the process of assessment is of little use unless it is put into practice.²⁰ To achieve this, it may be desirable for teachers to submit all assessment schemes to a Dean or Assessment Committee for approval at the beginning of each academic term. Ideally this process should isolate the purposes of each assessment task and evaluate whether or not it is likely to achieve the desired outcome. If it is not, the form of the assessment should be changed.

Student assessment *is* a process of evaluation, and much that has been written about evaluation is relevant. Assessment or evaluation often involves little more than the sorts of questions intelligent people ask when they consider whether or not a process or institution is working. Suchman wrote "Evaluation is the process by which we judge the worth or value of something",²¹ and Hawe and others have written, in an Australian context,

Notice the word 'value' in the word 'evaluation'. Evaluation is a judgment about something. How you judge it depends on expectations, past experience, what you think is important, what you think is not important. This affects how the evaluation is conducted, whose interests it serves and what methods you use. Different groups may evaluate ... differently with different outcomes and conclusions...²²

The form, content, structure and methodology of an evaluation depends very much on the purposes for which it is required. It is almost impossible to provide a standard, precise, definition of either the process or the content of evaluation, though both are vital.

Final evaluations should not be the product of a simple rule, but rather contingent upon a host of other decisions ... An evaluation is the product of decisions that (a) the evaluation is needed in the first place, (b) the evaluation will serve a particular purpose, (c) a good evaluative question is being asked, and (d) the method is the best technology for answering that question, given available technology and existing resources and constraints.²³

²⁰ Ramsden, n 3, above.

²¹ EA Suchman, *Evaluative Research*, New York, Russell Sage Foundation, 1967.

²² P Hawe, D Degeling and J Hall, *Evaluating Health Promotion: A Health Worker's Guide*, Sydney, MacLennan & Petty, 1990 at 6.

²³ W R Shadish Jr, "Sources of Evaluation Practice: Needs, Purposes, Questions and Technology" in L Bickman and D Leatherford, (eds), *Evaluating Early Intervention Programs for Severely Handicapped Children and their Families*, PRO-ED, Cambridge, USA 1986 at 149-150.

Why Do We Assess Students?

Rowntree, in the leading work on student assessment, says that assessment is about getting to know students and about the quality of their learning.²⁴ It is often about more. Assessment in the law school usually has at least 3 or 4, and sometimes more, functions. Different staff, and different students, will give more or less weight to these purposes depending on the particular circumstances.

- **MOTIVATING STUDENTS:** most students, and a surprising number of staff, assume that if some aspect of the course is not the subject of assessment, students will learn nothing about it. Some students only develop an interest, no matter what the subject-matter, only when they have an incentive to enter that area, such as knowledge that the area will be the subject of an essay or an examination question. Where (as in some law courses) an explicit objective of the course is to develop listening and oral communication skills, students may prepare for and participate in seminars and tutorials only if class participation is assessed.
- **ASCERTAINING WHETHER STUDENTS HAVE ACHIEVED THE DESIRED LEARNING OUTCOMES:** sometimes teachers see assessment as primarily summative, but most wish to provide formative assessment to both themselves and their students; if the students are not doing as well as expected, the teachers may have to re-think their teaching strategies and techniques.
- **PROVIDING FEEDBACK TO STUDENTS ON THEIR LEARNING ACHIEVEMENTS**
- **CERTIFYING COMPETENCIES:** Because university law degrees are often also the whole or part of the qualification for a licence to practice law, as part of the certification process, students may be required to demonstrate mastery of certain skills or competencies, such as the ability to characterise a fact situation, to carry out library research or to use a computer for specified purposes.²⁵ The performance aspect differentiates

²⁴ Rowntree D, *Assessing Students: How shall we know them?*, Kogan Page, London, (Rev. ed) 1987.

²⁵ Competency may mean more than the ability to apply motor skills: it may also consist in the ability to memorise and apply certain norms or principles, and of the ability to integrate a number of learning outcomes in performance. See, eg, N Gold, K Mackie and W Twining, *Learning Lawyers' Skills*, London, Butterworths and Commonwealth Legal Education Association, 1989; J Goldring, "Skills-Based Training For Lawyers - A Neglected Aspect Of Legal Education", *Papers Delivered at 10th Commonwealth Law Conference*, Nicosia, Cyprus 1993.

competency-based assessment from more traditional academic assessment. Where mastery of the skill or knowledge is required before a student may progress to a different type of learning activity, some summative assessment may be required.²⁶

- PROVIDING CREDENTIALS FOR EMPLOYERS AND GRADUATE SCHOOLS: this may lead to extremes of competitiveness among students, that may defeat other educational objectives, such as the development of the ability to work cooperatively in groups. Employers do look for a system of publication of results which not only certifies basic levels of ability or competence in a particular field, but which also differentiates between students on terms of perceived academic ability.²⁷
- ASCERTAINING WHETHER OR NOT TEACHERS AND STUDENTS ARE PERFORMING TO APPROPRIATE STANDARDS: performance of students in assessment tasks may assist teachers to evaluate their own effectiveness.²⁸

²⁶ A Gonczy et al, *Establishing Competency-based Standards in the Professions*, National Office of Overseas Skills Recognition, Commonwealth Department of Employment, Education and Training, Research Paper No 1, Canberra, AGPS 1990. More generally on principles and practice of student assessment, see, for example Rowntree, n 5; J Heron, "Assessment Revisited" in D Boud, (ed), *Developing Student Autonomy in Learning*, Kogan Page, London, 1981; Elton, "Assessment for Learning" in D Bligh, (ed), *Professionalism and Flexibility in Learning*, Guildford, SRHE 1982; G Gibbs, S Habeshaw and T Habeshaw, *53 Ways to Assess your Students*, Bristol, Technical and Educational Services Ltd. 1988; T Crooks, *Assessing Student Performance*, Kensington, HERDSA (HERDSA Green Guide No 8.), 1988; TD Erwin, *Assessing Student Learning And Development: A Guide To The Principles, Goals And Methods Of Determining College Outcomes*, San Francisco, Jossey-Bass, 1991; G Gibbs, "Assessment" in *Higher Education by Open Learning*, Oxford, Oxford Centre for Staff Development, 1992; AW Astin, *Assessment for Excellence: The Philosophy and Practice of Assessment and Evaluation in Higher Education*, Oryx, Phoenix AZ, 1993; S Brown and P Knight, *Assessing Learners in Higher Education*, Kogan Page, London, 1994; M Lally and M Myhill, *Teaching Quality, The Development of Valid Instruments of Assessment*, AGPS Canberra, 1994.

²⁷ As teachers of undergraduates, University staff may think this is not an important function of assessment, but as recruiters of new students, at undergraduate and especially at postgraduate level, the credentialling function is vital. Postgraduate students are often selected on the basis of their performance in assessment tasks at undergraduate level; indeed, prospective recruiters tend to look at transcripts before they decide whether or not to call for academic references, and those references themselves are very likely to reflect the student's performance in assessed tasks. Many academics are very keen to award prizes for proficiency, honours at graduation and orders of merit, because they see this as a measure of academic excellence, and academic excellence, at least in some sense, is part of the desired outcome of most University activities.

²⁸ If they control or influence the means of assessment, that assessment will indicate whether the students have fulfilled the objectives; and if it is clear that significant numbers have not, there is a sign to the teacher that something about the approach to teaching or other aspects of the learning environment and process may need to change. Conversely, if a significant number of students perform well in the assessment tasks, this may reinforce teaching practice.

How Do We Assess?

Educational experts agree that summative assessment for the purpose of assigning an academic grade normally requires several different forms of assessment.²⁹ Formative assessment occurs in many ways, and may not be formal. All academic staff assess students both formally and informally, though it is usually only the results of a formal assessment process that find their way into a transcript or grade.

Whether or not we are aware of, or articulate it, law schools do establish criteria for assessing, however they assess. Whether or not those criteria are appropriate, or are the preferable criteria, is crucial to good assessment, and especially assessment for quality. Appropriateness depends entirely upon how well the assessment methods relate to, and measure attainment of, the desired outcomes.

The Appendix lists some common methods of assessment and comments on them. The list is not exhaustive.

Assessment Patterns in Australian Law Schools

When preparing this paper, I sought information from the (then) 26 Australian law schools about their assessment procedures. The request was made to Deans in general terms, for any statements of policy or practice, and failing that, for a description of the practices of the several schools. The responses were in general terms. At the time, Deans (of whom I was then one) had been obliged to devote considerable time and resources to responses for requests for information from government and others, and I did not expect or insist on systematic answers. The responses are therefore anecdotal and less than comprehensive. There were very few comprehensive statements. It would be impossible to conduct a full survey without obtaining details of each subject, and the resources were not available for this.

While assessment in some subjects is restricted to a 100% terminal closed-book examination, this is now uncommon. Most law schools at least include research or problem essays as well. Virtually all law schools reported an undifferentiated mixture of essays, assignments and examinations, with pressure for the latter because of resource constraints.

²⁹ Ramsden, *op. cit.* See the sources referred to at n 25.

Formal, terminal examination is still the only or dominant method used in some law courses. Some Universities or Law Schools require that a specified proportion of the total assessment be based on marks gained in a final examination; others require a component of continuous assessment, or more than one mode. Some stipulate that where there is a final examination, students are permitted to take material into the examination room without major restriction. "Take home" and open-book examinations are used increasingly. There are some cases of computer-assisted and other forms of "mastery learning".³⁰

Some Universities and Law Schools emphasise norm-referenced assessment by requiring marks and grades to be scaled or distributed according to a pre-determined pattern. How this is done varies widely. The effect of this means that a grade of "High Distinction" at the University of Sydney, which requires the top percentage of students to be given this grade in certain subjects may signify something different from the same grade given at the University of New South Wales, which awards these grades on the basis of raw marks. Macquarie University requires academic units to explain distributions of grades where these vary from a statistically determined pattern. In certain "skills" subjects, for example those offered at Melbourne and Wollongong Universities, "pass/fail" grading is used to recognise competencies.

This information does not permit any broad conclusions to be drawn or generalisations to be made about the way in which law students in Australia are assessed, except to say that virtually all the methods referred to in the literature on student assessment are used somewhere for some purposes.

³⁰ A Tyree and S Rawson, "Fred Keller goes to Law School", paper delivered at ALTA Conference, Perth (1991) reported that they used (and still use) "mastery testing" in connection with some subjects they offer with computer assistance, but they had problems with the grading system. Because they required students to resubmit themselves for testing until they demonstrated "mastery" of each module, as shown by achieving a mark of 85% or thereabouts, students' recorded marks were all at this level, which required "High Distinction" grades to be given to all! Neither the students nor some of their academic colleagues were impressed. They have reported on other aspects of their use of the "keller plan" in "The Keller Plan at Law School" (1991) 29 *Law Society Journal* (2) 50 and "Cost-effective Computer Assisted Learning" [1993] *Journal of Law and Information Science* 155.

Does the *Way We Assess Conform To The Purposes For Which We Assess?*

PURPOSES: HAVE DESIRED LEARNING OUTCOMES BEEN ACHIEVED?

Most assessment should be related to the desired outcomes, stated goals or learning objectives, but if we examine how we at Wollongong attempt to assess attainment of the attributes, we are likely to find that virtually all traditional assessment methods measure and focus on one or two attributes only. The following paragraphs look at the desired learning outcomes in the Wollongong law school and suggest some assessment techniques which might be appropriate.

If we examine a number of characteristics which a law graduate from a school with learning outcomes in terms similar to those of the Law Faculty at Wollongong should have acquired in the course of his or her education, we can make a judgment about whether the assessment techniques used either measure or assist in the attainment of those outcomes.

Graduates should be "broadly educated"

This objective is stated in very broad terms, and is not easy to measure. It suggests that a graduate should be able to place "legal" issues and principles in wider social and intellectual contexts, should, at least to a moderate extent, be knowledgeable about the cultural and intellectual traditions of which he or she has become a part. This attribute is probably measured little, if at all, by most 3-hour final examinations that require the student to apply laws to hypothetical fact situations. Essays and research papers, and assessed contribution to class discussion probably lend themselves more readily to measuring this type of outcome.

EXAMPLE

An essay question which said "describe the defence of contributory negligence and the ways in which it has been modified by statute" would test a student's knowledge of the rules of tort law. If the question also included the words "and relate the statutory modification of the rule to social and political change" it would also test the student's awareness of the cultural and moral context in which the common law rule arose and his or her ability to evaluate or make a judgement about the effect of the changes in the rule have wrought on society.

Graduates should be “inquiring and critical”

This connotes that the graduate is able to argue rationally and be able to make critical judgments about important contemporary issues. If a student is “inquiring”, he or she will have a capacity for independent learning, an attribute that can probably only be assessed several years after graduation. However, if a graduate is competent for continued learning, he or she will have developed research and information retrieval skills and study techniques that can be tested. Critical analysis can be tested, and, provided that creativity can be defined, it can be assessed, albeit in crude terms. Research and essay assignments are probably common assessment techniques that are appropriate here. Are they used sufficiently to measure these characteristics?

EXAMPLE

A student in Family Law is asked to advise a client on aspects of family law. The question requires the student to outline not only the legal principles involved, but also the pros and cons of a range of ways in which the client might react - and their consequences. The student's attention is thus directed specifically beyond formal legal rules. The legal answer may be clear, but the solution that client really wants may lie not in finding a legal solution, but in negotiating financial arrangements, possibly negotiating an issue of immigration law and policy to arrange family reunions, counselling, social work, or welfare law. Unless the student is able to think laterally and adopt a critical stance to the law, the client's wishes may be frustrated.

Graduates should be “skilled in oral and written communication, advocacy, legal research, listening, and negotiating”

This statement rolls a number of attributes or “competencies” into one. These skills are not simply “motor” skills, as they combine ability to perform physical tasks with knowledge and the ability to make professional judgments. Skills can be taught³¹ and can be assessed. Many of these attributes may be best measured by a form of “mastery-testing”, where the student is required to perform a range of tasks to a previously established and announced standard, but is allowed to resubmit for the test until he or she meets the required standard. Confidence in oral expression can be

³¹ see text at n 15.

fostered by encouraging - and assessing - contributions to seminars and tutorials, presentation of papers, participation in debates, moots, mock trials, and hypotheticals, etc. Research exercises, process diaries, and bibliographical exercises are all forms of "learning by doing" that are useful and may be assessed.

However, both teachers and students must be clear on the criteria for assessing oral presentations, and often they are not.

EXAMPLE

In a course on evidence, students are required to take part in a simulated *voir dire* [a hearing where a judge sitting without a jury determines whether or not evidence is admissible]. This tests their knowledge of the relevant area of law, but also their ability to argue orally, to listen, and possibly other relevant attributes such as legal research and teamwork.

Graduates should be "familiar with the general operation of the Australian legal order and its place in Australian society"

This statement refers to a number of attributes relating to the student's knowledge, ability to analyse and synthesise and possibly also ability to evaluate. The knowledge elements could be tested in short-answer or essay and problem examinations, but those forms of assessment are probably not as well suited to measuring the other attributes.

EXAMPLE

Students in a contract law course are asked in an essay to examine the rules relating to the doctrines of unconscionability, undue influence and duress and to assess whether they are "adequate and appropriate for the needs of modern society" [These words are commonly used by the Attorney-General when referring matters to the Law Reform Commission]. This type of exercise requires students to know the rules and appreciate the situations in which they are applied, but also to assess them critically about what the student knows about the society.

Graduates should be "knowledgeable in depth about particular areas of law"

Traditional forms of examination test the student's knowledge, often to the exclusion of any other attributes. What they test is as much the

student's ability to learn rules by rote, though some may also test some ability to analyse hypothetical facts solutions and apply relevant principles to achieve a solution. The difficulty about this is that in the real world, knowledge in depth of the law is but one of a range of tools a student needs in order to perform. It is equally important that the student be able to apply communication skills to elicit information, research skills to determine both the applicable detailed rules of law and also relevant contextual material, cultural awareness to be able to assess the impact of facts or the application of rules and so on. Only when these elements are clear is the practising lawyer confronted with the type of hypothetical that appears so often in law school examinations. What may seem to be knowledge in depth of law may in fact be misleading and superficial.

EXAMPLE

In commercial law subjects, students' knowledge of law in depth **and in context** is tested by giving them a copied set of correspondence obtained from a practising lawyer, removing any indicators that will identify the real clients, and telling the students what outcome the client wants. The students are then forced to identify relevant facts, conduct research into the law, and apply the relevant rules. This process is more likely to give them a deeper understanding of the law as well as developing other relevant attributes.

Graduates should be "well fitted for a career in a broad range of legal work"

Capacity for professional work requires far more than knowledge and academic ability. Employers (whose views are regularly surveyed by the University of Wollongong) report that while they place some emphasis on attributes such as discipline-based knowledge, they also place high values on attributes that Universities, and Law Schools in particular, do not teach. What is more, some of the traditional forms of assessment actually militate against the development of attributes such as capacity to take initiative, ability to work in teams, and communication skills.

Knowledge of the discipline is at the root of the function of the law school, of course, but to be useful and valuable it must be knowledge which is not abstracted from the context in which law operates.

DO ANY FORMS OF ASSESSMENT WE USE MEASURE RELEVANT OUTCOMES?

Clearly, some existing techniques of assessment measure some of the outcomes expressed in the "Attributes" document, and measure some better than others. Except for "knowledge of a discipline", the methods academics have used traditionally have not sought expressly, in many cases, to measure any of the other attributes. The question we face now is whether or not we should change our assessment practices to reflect these desired outcomes.

Do these forms of assessment measure attainment of any other objectives?

Undoubtedly our assessment techniques motivate students, and provide a highly differentiated grading scale for the benefit of employers and graduate schools. But given what we know, might we encourage students to do other tasks which might lead more directly to the educational outcomes we desire – and work out ways of assessing them? If we did, we might better be able to encourage them to develop capacities and interests which current patterns of assessment might actually discourage. This would improve the quality of the learning process.

On the other hand, should we not also examine the way we assess students to see whether or not the assessment gives messages we would rather not give? Closed-book final examinations may suggest to students that ability to memorise material and pick salient features of hypothetical fact situations are desirable characteristics in legal practice, when, in fact what is required is the ability to conduct careful legal and factual research without undue reliance on memory, the ability to elicit all relevant facts from witnesses - including facts which witnesses may not immediately see as relevant, and then to apply and communicate the application of law to facts which are the product of both legal and factual research.³² Moots are another example. Many law schools encourage or require students to take part in moots, and they can be an extremely valuable learning experience. Without some explanation, however, students who take part in moots might gain an impression that the skills of research, analysis and advocacy required to succeed in an appellate court might be the typical or only skills needed by the majority of law graduates.

³² See also D Kennedy, "Legal Education as Training for Hierarchy", in D Kairys, (ed), *The Politics of Law*, Pantheon, New York, 1982.

If Not, What Are We Doing About It?

WHAT FORMS OF ASSESSMENT MIGHT BETTER PROVIDE INDICATORS OF WHETHER THE OUTCOMES HAVE BEEN ACHIEVED?

Have we really tried to

- evaluate our present forms of assessment; or
- find out whether other techniques might be better suited to our purposes?

The answer to both these questions is probably “no”. Most University teachers assume that University assessment is simply what they experienced themselves. The “Student Revolution” which began in 1968 and lasted for most of the 1970s, led students to challenge the hegemony of academics and demand forms of assessment which, as they could and did read in the literature, was more appropriate to academic outcomes, and also treated them as human beings, if not as trusted and valued colleagues (or even as adults). Academic staff were forced to concede that students were also responsible members of the University community and deserving of respect. The whole approach to assessment changed, and reasonable academics, though possibly resentful of the time they had to spend on assessment, conceded that techniques other than the three-hour closed book examination were useful. Older academic staff today are products of the 1960s and 1970s. They have seen a variety of techniques. Younger academic staff are used to, and expect, a variety. It is less clear that they have thought about the nature and function of assessment. Still less have they experimented with other techniques. If they did, they would probably find it as difficult to change established practice as did the student radicals and their young academic supporters in the early 1970s. Yet in these days when Universities are called upon to be accountable for quality in teaching and learning, they must be prepared to open themselves to experimentation, and where new techniques improve the quality of learning, to introducing them rapidly and courageously.

HOW DO WE KNOW? EDUCATIONAL BENCHMARKING?

One way of finding new and better ways to assess may be through the process of benchmarking. Academics have often done this, traditionally, without appreciating that they were involved in a trendy management

technique. Benchmarking means looking around to see if other institutions do similar things differently, and finding out which way of doing things appears best. It is a technique that applies best to processes.³³ It does not necessarily follow that any institution which benchmarks necessarily changes its own practices. Academic institutions especially, have their own standards of quality and academic practice (including academic freedom); but if some other form of activity produces better results than what they are doing, it makes no sense not to change.

Benchmarking can occur within institutions as well. Academics in one discipline can learn from what is done elsewhere in the same institution. This does not imply standardisation for its own sake - a dangerous tendency which may already be having a serious and adverse effect on research and scholarship in the humanities and social sciences, because the model for University research seems to be predominantly that of the empirical scientist. Both in research and scholarship and in teaching and learning it is important for Universities to accept and welcome differences between different disciplines and academic traditions - provided each is accountable.

Most legal academics are members of professional or academic societies or discipline-based research or teaching groups, where they encounter academic staff working in other institutions and practitioners with a wide range of experience. These networks have traditionally inspired academics to experiment with new teaching and assessment techniques. Benchmarking can simply be seen as a development of this.

Constraints on Better Assessment

The reality is that Universities are starved of funds by governments whose priority is reduction of public expenditure, regardless of any social, educational or other consequences. Inevitably educational standards must fall. However, they have never been perfect, and the resource constraints, if kept within reasonable bounds, might be an incentive for re-examination of traditional methods in the light of the need to think about issues of quality. However, whatever might be desirable, the traditional teaching

³³ See Robert C Camp, *Benchmarking: The Search for Industry Best Practices that Lead to Superior Performance*, Milwaukee WI, Quality Press, 1989; S Sedgwick, "Benchmarking and best practice: Promise and performance" (1995) 54 *Aust. J of Pub. Admin* 401.

methods of Australian Universities, such as the lecture-and-tutorial system and the 100% final examination, which tend to promote a surface approach to learning, are relatively cheap. For that reason, they may often be the only practical ways of accommodating the number of students with the staffing resources available. The losers will be the law students, the state of legal education, and the legal profession generally.

APPENDIX

Some Common Assessment Methods.³⁴

FINAL EXAMINATIONS.

Traditionally student assessment centred on either the three-hour, closed book examination or the *viva voce* examination. These forms of assessment, especially the former, are still used extensively, though normally in conjunction with other forms of assessment. In some disciplines such as history, and certainly in some law subjects, such as jurisprudence, these forms of assessment are regarded as inappropriate in light of the desired learning outcomes for the subject, and other methods are used where numbers permit. Academics are often wary of forms of assessment that do not offer a high degree of assurance that the work submitted for assessment is the student's own work. This is a result of concentrating on norm-based assessment, and has led them to rely unduly on the formal end-of-term examination. This attitude assumes that if students are allowed to rely on the work of others, they will do so. Unfortunately, experience teaches that occasionally, where the stakes are high and pressures to perform well are great, students may cheat, but if they are treated as responsible people, subjected to a range of different assessment tasks, and examined by a teacher who is familiar with their styles of expression, the need for formal examination can be reduced, and this may have significant educational benefits.

Terminal examinations are most appropriate where what is being tested is confined to students' knowledge and ability to recall and apply knowledge under time constraints. Some critics of the formal examination have said

³⁴ Barnes, n 12, discusses application of various methods in law schools. The most accessible guide for teachers is probably Gibbs, Gibbs & Habeshaw, n 26. See also LeBrun and Johnstone, n 17.

that what this form of assessment demonstrates best is simply an ability to perform well under examination conditions, something the graduate is rarely, if ever, called upon to do after leaving an educational institution. It is not so well suited where the educational objectives require detailed synthesis or evaluation, or where the objectives relate to changes in students' attitudes. The major disadvantage is that because final examinations occur at the end of a teaching period, there is rarely an opportunity for students who are subjected to final examinations to gain feedback either on their performance or as to why they were assessed in certain ways.

Formal examinations may consist of essay questions, short-answer questions, multiple-choice questions, problems or other tasks, all of which must be answered within a very closely limited time. They may include a number of different elements.

SHORT-ANSWER, "OBJECTIVE" TESTS

These may be used either as part of a final examination or as a test during the teaching session (ie as "formative" or "diagnostic" assessment). There is probably more to be said in favour of the latter use, because here, the tests, while consuming little time, are relatively easy to mark and can provide feedback to students on the strengths and weaknesses of their knowledge very quickly. If short-answer or multiple-choice examinations are used to test some capacities, such as application of principles to solve problems (what Bloom et al describe as "higher order" learning³⁵), even more care than usual is required in constructing the questions. Some would say that they are totally inappropriate in such contexts, though in the United States, where "scientific testing" is highly developed, multiple-choice tests are used widely, even at postgraduate level in courses where one would imagine that students' ability to think laterally, synthesise and evaluate were very important. Another factor that leads to their use in the United States is that Law Schools see that preparation for their graduates to sit State Bar examinations is an explicit function of the Law School. Since a majority of United States jurisdictions use the Multistate Bar Examinations, which are very largely in the form of "objective" tests³⁶ training students in this type

³⁵ B Bloom, *Taxonomy of educational objectives: the classification of educational goals by a committee of college and university examiners*, New York, D. McKay Co, 1964.

³⁶ M Josephson, *Learning & Evaluation in Law School*, Los Angeles, M. Josephson, 1984.

of test is a proper function of the Law School, even though it may be less than suitable in measuring other desired outcomes or as a learning experience for the students.

ESSAYS AND SEMINAR PRESENTATIONS: RESEARCH DISSERTATIONS AND PAPERS

The other major form of assessment work commonly used in Universities is the research paper or seminar presentation. This heading covers everything from the short papers based on library research (or even research based on a text or anthology, where what is sought is often description and ability to generalise from the particular rather than detailed high-order analysis or evaluation) demanded of first-year students to the doctoral thesis. What is being tested here are students' abilities to acquire knowledge, analyse it, synthesises ideas, and possibly make judgments. The subject matter may be totally literary or archival, or it may include accounts of their observations in a laboratory or in the field.

PROBLEM ASSIGNMENTS

Many academic disciplines find it useful to require students to solve hypothetical problems of varying complexity. In law, many essays, examinations and tutorial/seminar discussions take the form of hypothetical problem-solving.³⁷ The nature of the exercise may vary from problem-based learning,³⁸ where the students are faced, as closely as possible, with a real life situation, to very tightly constructed hypothetical problems requiring concentration on a very narrow range of facts.

CLASS PARTICIPATION

In seminar classes, students may be assessed on their participation in, or contribution to the work of the class. Their contribution may be assessed on the basis of oral presentations and reports, ability to answer questions based on assigned readings, ability to demonstrate techniques etc. This form of assessment is found useful by staff because it provides students with an

³⁷ Kissam, n 11. Barnes, n 12.

³⁸ eg, D Boud, *Implementing Student Self-Assessment*, Camperdown NSW, HERDSA (HERDSA Green Guide No 5.) 1991.

incentive to prepare for, participate in and be actively involved in small classes. Students and some staff dislike the form of assessment because it appears to be overly subjective, but in fact, provided there are adequate opportunities for students to contribute and established and transparent criteria, it need be no more subjective than other forms of assessment.

GROUP WORK

Group work is rarely assessed at University level. In part this is due to the difficulty of assigning a single grade to a piece of work submitted by more than one student; many staff feel that their obligation is to grade work on a basis that differentiates sharply between students on the basis of perceived merit:³⁹ often law students do not like it, because they tend to be competitive. However, it may be the best or only way to foster development of capacity for productive teamwork. There are anecdotal accounts of students preparing work for assessment in groups, and submitting it as individuals. They run the risk of being accused of "cheating" but in fact the experience of working in the group may be of far greater value than obtaining a high mark.

SELF AND PEER ASSESSMENT

In the "real world" people do not have academic examiners assessing their abilities - they assess themselves, and they are assessed by their peers. If academic staff attempt to introduce self or peer assessment, they may be accused of abdicating their professional responsibility. In fact, they may be discharging their professional responsibility more than those who use traditional methods of student assessment, because creating an environment in which students learn to assess their own work and that of their fellows may be more valuable for all concerned than the artificial form of assessment by an academic authority figure. It may also assist in enabling students to understand better what indicators teachers use when they assess work.

³⁹ On the concept of "merit" see MR Thornton, *The Liberal Promise*, Melbourne, OUP 1990.

