

INCREMENTAL AND INEVITABLE: CONTEXTUALISING THE THRESHOLD LEARNING OUTCOMES FOR LAW

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I INTRODUCTION

In 2010, six Threshold Learning Outcomes ('TLOs') for law were developed as part of the Australian Learning and Teaching Council's 2010 project on Learning and Teaching Academic Standards.¹ The final TLOs articulated for the Bachelor of Laws ('LLB') degree are described in the *Standards Statement* for the Bachelor of Laws under six headings: (1) knowledge; (2) ethics and professional responsibility; (3) thinking skills; (4) research skills; (5) communication and collaboration; and (6) self-management.² The *Standards Statement* articulates minimum threshold standards for the LLB degree, which law schools are 'expected to meet or exceed',³ and includes *Notes on the TLOs* to provide further guidance on their interpretation and implementation. A modified version of these learning outcomes for the Juris Doctor ('JD') has also been adopted.⁴ The discussion that follows situates the development of the TLOs with reference to relevant national and international trends in legal education and higher education. By contextualising the TLOs in relation to broader trends in the discipline of law and higher education regulation, this article addresses a notable gap in the Australian legal education literature.

The TLOs have received widespread support from key stakeholders. Significantly, the TLOs constitute a reference point for Australian education

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1 Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement December 2010' (Report, Australian Learning and Teaching Council, 11 February 2011) <www.olt.gov.au/system/files/.../altc_standards.LAW_110211_rv2.pdf>.

2 Ibid 10.

3 Ibid 9.

4 JD TLO Sub-Committee of the Law Associate Deans' Network, 'Juris Doctor Threshold Learning Outcomes' (2012) <[http://disciplinestandards.pbworks.com/w/file/etch/57628366/JD%20TLOs%20\(March%202012\).pdf](http://disciplinestandards.pbworks.com/w/file/etch/57628366/JD%20TLOs%20(March%202012).pdf)>.

providers in accrediting their law degrees under the Tertiary Education Quality and Standards Agency ('TEQSA') regime.⁵ The TLOs have also been approved by the Council of Australian Law Deans ('CALD'): in November 2010, CALD endorsed the *Standards Statement* as 'an appropriate statement of the Threshold Learning Outcomes that are required of Bachelor of Laws graduates from any Australian university',⁶ and the JD TLOs were endorsed by CALD in March 2012.⁷ In addition, the TLOs have received 'broad support from members of the judiciary and practising profession, representative bodies of the legal profession, law students and recent graduates, [and] Legal Services Commissioners'.⁸ The Law Admissions Consultative Committee ('LACC') considered adopting the TLOs as requirements for admission to legal practice, but has opted to retain the 'Priestley 11' core subjects⁹ as admission requirements at this stage.¹⁰ Importantly, although extensive changes to the regulatory environment for Australian higher education providers are imminent,¹¹ it appears that the current role of the TLOs will remain essentially intact,¹² underscoring the TLOs' continuing relevance to Australian law schools.

This article argues that the development of the TLOs reflects a number of important trends in Australian legal education, and in national and international higher education more broadly. These trends include: a multiplicity of reports advocating Australian legal curricula reform;¹³ tension between privileging

5 *Higher Education Standards Framework (Threshold Standards) 2011* (Cth) ('*Threshold Standards Instrument*'). In ch 3, the *Threshold Standards Instrument* outlines the requirements for higher education 'Provider Course Accreditation Standards' pursuant to s 58(1)(c) of the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ('*TEQSA Act*'). Relevantly, as part of these accreditation standards, the *Threshold Standards Instrument* specifies that a higher education provider must have 'robust internal processes for design and approval of [a] course of study', which includes 'tak[ing] account of external standards and requirements, eg, published discipline standards, professional accreditation, input from relevant external stakeholders, and comparable standards at other higher education providers': *Threshold Standards Instrument* ch 3 s 1.2. See further discussion in Part III below.

6 Kift, Israel and Field, above n 1, 7.

7 JD TLO Sub-Committee of the Law Associate Deans' Network, above n 4.

8 Anna Huggins, Sally Kift and Rachael Field, 'Implementing the Self-Management Threshold Learning Outcome for Law: Some Intentional Design Strategies from the Current Curriculum Toolbox' (2011) 21 *Legal Education Review* 183, 183.

9 See further discussion in Part II(B). Throughout this article, 'subjects' will refer to the individual units of study within a degree program. In line with the terminology used by TEQSA, 'course' will refer to the degree program (eg, LLB/JD) as a whole.

10 Law Admissions Consultative Committee, 'Reconciling Academic Requirements and Threshold Learning Outcomes' (Discussion Paper, Law Admissions Consultative Committee, June 2011) <<http://www1.lawcouncil.asn.au/LACC/images/pdfs/20110624-ReconcilingAcademicRequirementsandThresholdLearningOutcomes-DiscussionPaper.pdf>>.

11 See, eg, Christopher Pyne, 'Upholding Standards and Quality in Higher Education' (Media Release, 22 April 2014) <<http://ministers.education.gov.au/pyne/upholding-standards-and-quality-higher-education>>.

12 Higher Education Standards Panel, 'Proposed Higher Education Standards Framework: Consultation Draft April 2014' (2014) 8 [1.5] <<http://www.hestandards.gov.au/sites/default/files/ProposedHESFrameworkConsultationDraft-April2014.pdf>>.

13 For an overview, see, eg, Sally Kift, '21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law' (2008) 18 *Legal Education Review* 1, 6–11.

prescribed areas of knowledge versus generic skills development;¹⁴ the proliferation of law schools in a context of chronic funding shortages for legal education and a strong emphasis on research outputs;¹⁵ a national and international shift towards standards-focused and outcomes-focused curricula emphasising graduate outputs rather than teacher inputs;¹⁶ and the growing salience of whole-of-curriculum approaches to developing key learning outcomes.¹⁷ An understanding of the contextual background to the TLOs elucidates their meaning and purposes, which may valuably inform ongoing curricular reform initiatives in Australian law schools.¹⁸

When situated in the context of national and international trends in higher education, it is arguable that the development of the TLOs was largely inevitable. They have, nonetheless, attracted strong criticism from some quarters, with detractors drawing into question their broad generality, measurability, and whether they constitute an appropriate focus for legal education and assessment.¹⁹ Moreover, the TEQSA regime, for which the TLOs serve as a reference point for accreditation activities, has come under fire from diverse pockets of the higher education sector for its ‘over-regulation’ and onerous reporting requirements,²⁰ and for adopting a narrow and anachronistic view of regulation, which is out of step with the complexities and previous successes of the higher education sector.²¹ In part spurred by such critiques, the current

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- 14 See, eg, Australian Law Reform Commission (‘ALRC’), *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 126 <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC89.pdf>>; David Weisbrot, ‘What Lawyers Need to Know, What Lawyers Need to Be Able to Do: An Australian Experience’ (2002) 1 *Journal of the Association of Legal Writing Directors* 21, 23; Huggins, Kift and Field, above n 8, 192–3.
- 15 See, eg, Mary Keyes and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality, and Prospects for the Future’ (2004) 26 *Sydney Law Review* 537, 548–56.
- 16 See, eg, Denise Bradley et al, ‘Review of Australian Higher Education: Final Report’ (Report, December 2008) <http://gellen.org.au/wp-content/uploads/2011/04/Higher_Educatio_Review.pdf>; Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007) 45–7.
- 17 See, eg, Kift, above n 13, 16–20.
- 18 Indicative examples of these curriculum renewal processes, which anecdotal evidence suggests are widespread, are discussed in the legal education literature. See, eg, Alex Steel, ‘The Law School and the Assessment Project’ in Richard Henry, Stephen Marshall and Prem Ramburuth (eds), *Improving Assessment in Higher Education: A Whole-of-Institution Approach* (UNSW Press, 2013) 189, 190–1, 198–203; Gabrielle Appleby, Peter Burdon and Alexander Reilly, ‘Critical Thinking in Legal Education: Our Journey’ (2013) 23 *Legal Education Review* 345, 358.
- 19 See the comments of Justice Slattery in Law Admissions Consultative Committee, above n 10, 2. See also Joachim Dietrich, ‘Law Threshold Lowers the Bar’, *The Australian* (online), 30 March 2011 <<http://www.theaustralian.com.au/higher-education/opinion/law-threshold-lowers-the-bar/story-e6frgcko-1226030258554>>.
- 20 See, eg, Fred Hilmer, ‘Too Much Regulation Stifles Innovation’, *Australian Financial Review* (online), 4 March 2013 <http://www.afr.com/p/national/education/over_regulation_of_universities_WuzRBujhz7gc9rNtdV3gZM>. At the time of writing his opinion piece, Professor Hilmer was the President and Vice Chancellor of UNSW and the Chairman of the Group of Eight Universities.
- 21 See, eg, Kwong Lee Dow and Valerie Braithwaite, ‘Review of Higher Education Regulation’ (Department of Education and Training, 2013) <<http://education.gov.au/review-higher-education-regulation-1>>.

Coalition Government is committed to reducing regulation and ‘red tape’ for the Australian higher education sector generally, including TEQSA as the sector’s regulator.²² The implications of these developments for the current and future implementation of the TLOs are canvassed.

This article proceeds as follows. Part II explores how the development of the TLOs relates to a confluence of factors shaping Australian legal education. Part III then situates the development of the TLOs with reference to salient issues that affect all disciplines in the Australian higher education sector, including the creation of, and proposed changes to, the TEQSA regulatory regime. In Part IV, the development of the TLOs is contextualised as part of a broader international trend towards outcomes-focused education, which is premised on a scaffolded whole-of-curriculum approach to embedding learning outcomes. Part V concludes this discussion, and suggests that despite the current state of flux in the Australian higher education regulatory regime, the influence of the TLOs will continue, underscoring the importance of law schools’ ongoing efforts to embed these learning outcomes within their curricula.

II RELEVANT DEVELOPMENTS IN AUSTRALIAN LEGAL EDUCATION

A A Long Standing Australian Legal Education Reform Agenda

Since the 1970s, many changes to legal education in Australia and elsewhere have been advocated,²³ with varying levels of implementation and success.²⁴ This Part first provides an overview of a number of influential reports that have acted as catalysts for Australian legal education reform. Secondly, it discusses the continuing influence of the Priestley 11 core content areas as part of a wider, ongoing debate about the appropriate focus on content and skills in legal curricula. Thirdly, it canvasses the significance of other factors, including the growing number of law schools, funding shortages, and the prevailing research culture, for legal education reform, particularly in relation to implementing the TLOs.

Traditionally, law in Australia has been taught using the lecture-tutorial model, the focus of learning was on the transmission of doctrinal legal knowledge from the law teacher to students, and assessment of student learning

22 Pyne, above n 11.

23 For an overview of these reports produced in the United States of America, United Kingdom and Australia prior to 2003, see Richard Johnstone and Sumitra Vignaendra, ‘Learning Outcomes and Curriculum Development in Law’ (Report, Australian Universities Teaching Committee, January 2003) 6–15 <http://www.cald.asn.au/docs/AUTC_2003_Johnstone-Vignaendra.pdf>. Two recent US reports from 2007 – the *Carnegie Report* and the *Best Practices for Legal Education* report – also deserve special mention here as they are frequently cited and highly influential in recent US legal education literature: see William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007); Stuckey et al, above n 16.

24 Sally Kift, ‘For Better or for Worse?: 21st Century Legal Education’ (Paper presented at LAWASIA Downunder 2005, Gold Coast, 20–24 March 2005) 7 <<http://eprints.qut.edu.au/7439/>>.

typically involved a single, high-stakes examination based on applying legal rules to hypothetical fact scenarios.²⁵ The first major report critiquing traditional legal education practices was the *Pearce Report* in 1987,²⁶ which 10 years later was hailed as the ‘most comprehensive and significant investigation undertaken of Australian legal education’.²⁷ The impact of this report was described by McInnis and Marginson in 1994 as follows:

Perhaps most important, the *Pearce Report* generated a climate of debate, discussion, critical thinking, self-evaluation and continuous improvement which has served law schools well since 1987 – especially given that such an approach has become mandatory throughout higher education.²⁸

Overall, McInnis and Marginson concluded that, although the reforms catalysed by the publication of the *Pearce Report* were significant, they were no more so than the broader changes to higher education that were attributable to the incumbent Labor Government’s higher education reforms.²⁹ Thus, the McInnis and Marginson report was, in itself, another important publication charting the various influences on the changing landscape of Australian legal education.

The next significant review of legal education was the *Managing Justice* report,³⁰ published by the Australian Law Reform Commission in 1990. As is elaborated below, a chief recommendation of this report was placing greater emphasis on students’ acquisition of high level generic skills, including professional and ethical values, ‘[i]n addition to the study of core areas of substantive law’.³¹ Another recommendation in the *Managing Justice* report was that there should be a further national discipline review of Australian legal education, along the lines of the *Pearce Report*, but narrower in scope and with a focus on emerging issues. These issues included: the implications of an unprecedented expansion in the number of law schools and students on the quality and diversity of legal education; the appropriate balance between liberal and professional education in legal curricula; the teaching of professional skills and the role of clinical programs; and evaluating the resource base for law schools.³²

Accordingly, in 2003, Richard Johnstone and Sumitra Vignaendra published the *Learning Outcomes and Curriculum Development in Law* report,³³ which, as

25 Dennis Pearce, Enid Campbell and Don Harding, ‘Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission’ (Australian Government Publishing Service, 1987) (*Pearce Report*); Keyes and Johnstone, above n 15, 539–41.

26 Pearce, Campbell and Harding, above n 25.

27 Eugene Clark, ‘Australian Legal Education a Decade after the *Pearce Report*: A Review of McInnis, C and Marginson, S, Australian Law Schools After the 1987 *Pearce Report*’ (1997) 8 *Legal Education Review* 213, 214.

28 Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Publishing Service, 1994) viii.

29 *Ibid* vii.

30 Australian Law Reform Commission, above n 14.

31 *Ibid* 29.

32 *Ibid* 157.

33 Johnstone and Vignaendra, above n 23.

stated in its front matter, was intended to be a ‘stocktake’ rather than a ‘review’ of Australian legal education.³⁴ The authors commented on a number of trends evidenced across Australian law schools, particularly in relation to the LLB program:

[A]t most law schools, there has been a significant trend towards teaching legal skills, and at a growing number of law schools, there has been either a formal or informal infiltration of professional legal training. Most law schools now give greater weight to legal theory and ethics teaching and a growing number of law schools have a strong commercial law focus, and increasingly ‘an international focus’. Many law schools also express a greater commitment to reducing class sizes; however, funding constraints have frustrated some law schools’ efforts in this area ...³⁵

The *Pearce*, McInnis and Marginson, *Managing Justice*, and *Learning Outcomes and Curriculum Development in Law* reports played significant roles in both mapping the terrain of legal education in Australia, and providing important catalysts for reform. The development of the TLOs for law can thus be viewed as a further recent development in a decades’ long trend towards modernising Australian legal curricula, including by placing a greater emphasis on the development of generic skills.

B The Continuing Influence of the Priestley 11

Legal education’s preoccupation with substantive content areas constitutes one of a number of significant obstacles to the full realisation of the reform agendas detailed above. Since 1992, the content of Australian law subjects has been shaped by the adoption of uniform national academic requirements for admission to legal practice, commonly known as the ‘Priestley 11’.³⁶ This refers to eleven prescribed ‘areas of knowledge’ – criminal law and procedure, torts, contracts, property, equity, company law, administrative law, federal and state constitutional law, civil procedure, evidence, and ethics and professional responsibility³⁷ – that the Consultative Committee of State and Territory Law Admitting Authorities agreed that students are required to study before admission to legal practice. According to Keyes and Johnstone, the Priestley 11 requirements are one indication of the legal academy’s subservience to the legal profession, which continues despite the fact that approximately half of all law graduates do not go on to practise law.³⁸

34 Ibid 3.

35 Ibid 455.

36 Keyes and Johnstone, above n 15, 544.

37 Law Admissions Consultative Committee, *Uniform Admission Rules 2008* (Law Council of Australia, 2008) sch 1 <http://www1.lawcouncil.asn.au/LACC/images/pdfs/212390818_1_LACCUniformAdmissionRules2008.pdf>.

38 Keyes and Johnstone, above n 15, 557; Jane Lee, ‘Graduates Shun Legal Profession’, *The Age* (online), 20 May 2012 <<http://www.theage.com.au/victoria/graduates-shun-legal-profession-20120519-1yxt0.html>>.

In 2000, the Australian Law Reform Commission's *Managing Justice* report criticised, and advocated a shift away from, the Priestley Committee's 'solitary preoccupation with the detailed content of numerous bodies of substantive law',³⁹ noting the increasing relevance of internationalisation, processes and teamwork in contemporary legal practice. The Commission recommended a greater emphasis on the development of high order professional and problem-solving skills as part of a suite of reforms recommended to promote a healthy legal culture:⁴⁰

[P]roperly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility.⁴¹

In a similar vein, a 2014 Productivity Commission Report recommended reviewing the need for the Priestley 11 core subjects in light of advancements in information and communication technologies, which have meant that the 'art of the professional' lies in accessing, analysing and contextualising information, rather than memorising it.⁴² With their emphasis on skills development, the TLOs thus respond to a long standing and ongoing Australian legal education reform agenda predicated on the notion that legal education should be re-oriented around '*what lawyers need to be able to do*', rather than exclusively and anachronistically on '*what lawyers need to know*'.⁴³

One recently debated option for reconsidering the role of the Priestley 11 in legal education entailed embedding the TLOs in admission requirements. As foreshadowed in Part I, in 2011, the Law Admissions Consultative Committee considered a proposal for adopting the TLOs as describing the requisite attributes of a law graduate, and integrating the present eleven academic requirements in shorter or alternative forms as 'compulsory elements of the "fundamental areas of legal knowledge" required by ... TLO 1'.⁴⁴ One of the rationales behind this proposed course of action was streamlining the criteria for evaluation, assessment or accreditation of law schools, particularly in light of the TLOs' relevance to TEQSA's 'evaluation, assessment or accreditation' requirements.⁴⁵ Ultimately, however, the Committee recommended against the adoption of the TLOs as part of the requirements for admission to legal practice, stating:

While there is lingering doubt about whether and what TLOs will be deployed for the purpose of evaluation, assessment or accreditation by Government agencies or

39 Australian Law Reform Commission, above n 14, 149–50.

40 Ibid 151; Huggins, Kift and Field, above n 8, 193.

41 Australian Law Reform Commission, above n 14, 151 (citations omitted).

42 Australian Productivity Commission, 'Access to Justice Arrangements' (Productivity Commission Inquiry Report No 72, 5 September 2014) 249–50 <http://www.pc.gov.au/__data/assets/pdf_file/0018/145404/access-justice-volume1.pdf>.

43 Australian Law Reform Commission, above n 14, 126, quoting Australian Law Reform Commission, 'Review of the Federal Civil Justice System' (Discussion Paper No 62, 1999) 45–6 [3.23] (emphasis in original); Weisbrot, above n 14, 23; Huggins, Kift and Field, above n 8, 192–3.

44 Law Admissions Consultative Committee, above n 10, 2.

45 Ibid 1. See further discussion in Part III.

universities, it certainly seems premature to adopt the TLOs set out in Schedule 1 as additions to, or substitutes for, the present academic requirements for admission.⁴⁶

This suggests that the Committee has not unequivocally foreclosed the possibility of revisiting this issue. More strident opposition to the proposal was expressed by the New South Wales Legal Profession Admission Board, which claimed that the TLOs would require new skills, which have hitherto not been expected of law graduates, to be admission requirements.⁴⁷ This would mean that many competent and successful members of the profession would probably fail to satisfy aspects of the TLO requirements, such as the ability to ‘collaborate effectively’ under TLO 5.⁴⁸ However, if some practising members of the profession are unlikely to meet the minimum threshold-level outcomes described in the TLOs, this arguably strengthens the case for explicitly addressing the development of such skills and competencies in legal education.

C The Proliferation of Law Schools, Funding Shortages, and the Prevailing Research Culture

A range of other recent developments in Australian legal education, including the sharp increases in the number of law schools and students, chronic underfunding of law schools, and a strong and increasing emphasis on measuring and ranking the research outputs of individuals, faculties and institutions, are also relevant to the ease with which curricular reform can be achieved. Since the late 1980s, there has been a marked growth in the number of Australian law schools in alignment with the massification of Australian higher education⁴⁹ and widening participation⁵⁰ agendas, which are important contextual factors when considering legal education reforms such as the implementation of the TLOs. Whilst there were six law schools in 1960, by 1975 there were 12, and in late 2014 there were 37 Australian law schools.⁵¹ Ensuring the continuing quality of education across an increasing range of higher education providers is one of the aims of the new TEQSA regime detailed below.⁵²

As a result of the growth in the number of law schools in recent decades, there is now a diversity of legal education contexts in Australia.⁵³ There are four main groupings of Australian Universities and, correspondingly, four main groups of Australian law schools.⁵⁴ The Group of Eight (‘Go8’) is a coalition of

46 Ibid 2.

47 Ibid 2–3.

48 Ibid.

49 J S Dawkins, *Higher Education: A Policy Statement* (Australian Government Publishing Service, 1988) 13–16.

50 Bradley et al, above n 16, xi–xiv.

51 Keyes and Johnstone, above n 15, 548; Council of Australian Law Deans, *Deans & Law Schools* (2014) <<http://www.cald.asn.au/deans--law-schools>>.

52 See Part III below.

53 David Barker, ‘An Avalanche of Law Schools: 1989–2013’ (2013) 6 *Journal of the Australasian Law Teachers Association* 153, 153.

54 Australian Education Network, *Groupings of Australian Universities* <<http://www.australianuniversities.com.au/directory/australian-university-groupings/>>.

eight research-intensive universities (namely, the University of Adelaide, the Australian National University, the University of Melbourne, Monash University, the University of New South Wales, the University of Queensland, the University of Sydney, and the University of Western Australia), which markets itself as the group of 'Australia's Leading Universities'.⁵⁵ The Australian University Technology Network ('ATN') is a group of five Australian universities (Curtin University of Technology, the University of South Australia, RMIT University, the University of Technology, Sydney, and Queensland University of Technology), which focus on practical, 'real world' research and teaching approaches.⁵⁶ The group of Australian Innovative Research Universities ('IRU'), which consists of Flinders University, Griffith University, La Trobe University, Murdoch University, the University of Newcastle, James Cook University, and Charles Darwin University, were all founded as research universities during the 1960s and 1970s, and have formed a coalition to promote research concentrations, knowledge-sharing, and investment across these universities.⁵⁷ Finally, the Regional Universities Network, consisting of Central Queensland University, Southern Cross University, the University of Ballarat, the University of New England, the University of Southern Queensland, and the University of the Sunshine Coast, was formed in 2011 to raise the profile of the requirements and contributions of Australia's regional universities.⁵⁸ A number of other Australian law schools are unaligned with these four main groups.

Law degrees are offered at all of these types of universities, which vary in terms of, inter alia, geographical locations, student demographics, mission statements and relative emphasis on research and teaching. Further, there is a growing range of types of law degrees on offer in Australian law schools. Some universities offer Bachelor of Laws degrees, Bachelor of Laws combined degrees, Juris Doctor degrees, combined Bachelor of Laws and Practical Legal Training degrees, or a combination thereof.⁵⁹ This diversity of course offerings underscores the desirability of facilitating the adoption of tailored strategies to implementing the TLOs that are an appropriate fit for disparate institutions, students and delivery modes.

An additional and related factor that has high salience in terms of prospects for curricular reform is ongoing funding shortages, which have been a feature of Australian legal education since the introduction of the Australian Government's Relative Funding Model in 1990.⁶⁰ Under this model, the discipline of law is

55 Australian Education Network, *Australian University* [sic] *Go8*

<<http://www.australianuniversities.com.au/directory/group-of-eight/>>.

56 Australian Education Network, *Australian University Technology Network (ATN)*

<<http://www.australianuniversities.com.au/directory/australian-technology-network/>>.

57 Australian Education Network, *Australian Innovative Research Universities (IRU)*

<<http://www.australianuniversities.com.au/directory/innovative-research-universities/>>.

58 Australian Education Network, *Regional Universities Network*

<<http://www.australianuniversities.com.au/directory/regional-universities-network/>>.

59 Kift, Israel and Field, above n 1, 8.

60 Council of Australian Law Deans, Submission No 54 to Expert Panel, *Review of Higher Education Base Funding*, 2011, 3.

uniquely placed at the very bottom end of a scale of Commonwealth contribution, with student contributions towards their education at the highest percentage end.⁶¹ As noted by CALD in a submission to the Australian Government's Review of Higher Education Base Funding in 2011, '[l]aw students alone of all classes of student are asked to pay more than is spent to educate them'.⁶² This context is critical to understanding the obstacles faced in implementing the TLOs, like other important reforms, in legal education. In an environment in which law schools are chronically under-resourced, the pressures associated with maintaining appropriate class sizes, limited teacher time and resources, and increasing reliance on sessional teaching staff pose significant challenges to embedding integrated and incremental approaches to teaching and assessing TLOs throughout legal curricula. Indeed, as Keyes and Johnstone note, '[o]f all the factors ... impeding reforms to legal education, [lack of resourcing] is the most severe and the most difficult to overcome'.⁶³

The relative priority given to research and teaching also has significant implications for legal education reform. The *Pearce Report* has been recognised for stimulating interest in teaching in legal education,⁶⁴ and there has been growing interest in, and faculty support for, legal education research and scholarship in recent years.⁶⁵ However, a competing force has been the inexorable push towards 'quality, accountability and standards' in Australian higher education institutions,⁶⁶ particularly with regard to research outputs. Recent government initiatives including the Research Quality Framework ('RQF'), which was superseded by the Excellence in Research for Australia ('ERA') Initiative,⁶⁷ have contributed to a greater emphasis on research outputs, measurements and rankings, with the ostensible aims of increasing '[p]roductivity, excellence and relevance' across all university disciplines.⁶⁸ Such initiatives are arguably part of a broader trend in which 'universities have been drawn into the public sector management revolution'.⁶⁹ Underpinned by principles from neoliberal economics, accounting and human resources management, this research management system 'pursues goals, applies incentives, makes measurements, encourages competition and requires accountability'.⁷⁰ Although the ERA's journal ranking system has been disbanded, its legacy persists in the pressures on academic staff to consistently

61 Ibid 1.

62 Ibid.

63 Keyes and Johnstone, above n 15, 556.

64 See, eg, McLinnis and Marginson, above n 28, 163.

65 Keyes and Johnstone, above n 15, 553–4.

66 Sally Kift et al, 'Preface' in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, 1st ed, 2011) xxxv, xxxviii.

67 Australian Research Council, Excellence in Research for Australia (3 July 2014) <<http://www.arc.gov.au/era/>>.

68 Christopher Arup, 'Research Assessment and Legal Scholarship' (2008) 18 *Legal Education Review* 31, 33.

69 Ibid.

70 Ibid; Margaret Thornton, 'Legal Education in the Corporate University' (2014) 10 *Annual Review of Law and Social Science* 19, 27–8.

publish in top tier journals, and to compete for and attract highly competitive research funding, success in which is given strong weight in law school hiring and promotion practices.⁷¹

In this context, legal education research and reform initiatives, which have historically been marginalised, if not actively disparaged, by segments of the legal academy,⁷² have again been sidelined by some law schools and law academics as they do not strongly align with the prevailing research and ranking imperatives.⁷³ Accordingly, one of the challenges to effective implementation of the TLOs is achieving sufficient staff ‘buy-in’ in the current ‘challenging’ climate.⁷⁴ Thus, the proliferation of law schools in a context of chronic funding shortages and highly prescriptive research imperatives for law academics present real, but not insurmountable, challenges to achieving the types of curricular reform that may be required to comprehensively and systematically ensure that Australian law students acquire the minimum competencies reflected in the TLOs by the end of their law degrees.

III THE TLOS FOR LAW AND TRENDS IN AUSTRALIAN HIGHER EDUCATION

Whilst the discussion in the preceding Part focused on trends in Australian legal education, the development of the TLOs for the discipline of law also reflects broader changes occurring for all disciplines in the Australian higher education sector. The following discussion examines the increasing emphasis on standards- and outcomes-based education in Australia, and the establishment of TEQSA, which provide the immediate context for the Australian Learning and Teaching Council (‘ALTC’) project leading to the articulation of the TLOs. Two drivers for reform are particularly pertinent to understanding the development and significance of the TLOs for law: a shift towards universities demonstrating standards-based outputs rather than inputs; and the establishment of an independent quality and assurance agency for the Australian higher education sector. Both of these developments were recommended as part of a broad suite of reforms to the Australian higher education sector to promote its continuing national and international relevance, standing and competitiveness in the 2008 *Bradley Review* of higher education.⁷⁵

71 Kathy Bowrey, ‘Audit Culture: Why Law Journals Are Ranked and What Impact this Has on the Discipline of Law Today’ (2013) 23 *Legal Education Review* 291. On the issue of the arguably disproportionate emphasis on research grants in Australian law schools, see Jeffrey Goldsworthy, ‘Research Grant Mania’ (2008) 50(2) *Australian Universities Review* 17.

72 Keyes and Johnstone, above n 15, 552.

73 Thornton, above n 70, 24.

74 Judith Marychurch, ‘Good Practice Guide: Threshold Learning Outcome 6: Self-Management’ (Australian Learning and Teaching Council, 30 September 2011) 21 <http://www.tjmf.org.au/wp-content/uploads/2011/10/Marychurch_Good_Practice_Guide_TLO6.pdf>.

75 Bradley et al, above n 16.

A number of years before the release of the *Bradley Review*, the trend towards skills- and outcomes-focused education in Australia was already becoming evident through a heightened emphasis on employability skills and graduate attributes. In 2002, the Australian Chamber of Commerce and Industry and the Business Council of Australia collaborated to develop an ‘Employability Skills Framework’, which identified eight key employability skills.⁷⁶ Employability skills are defined as ‘skills required not only to gain employment, but also to progress within an enterprise so as to achieve one’s potential and contribute successfully to enterprise strategic directions’.⁷⁷ Most Australian universities have adopted statements of graduate attributes that substantively replicate the Employability Skills Framework.⁷⁸ This Framework was thus an early manifestation of a growing trend towards promoting skills and outcomes in Australian higher education.⁷⁹

Almost a decade later, the Australian Government acted upon the recommendations of the *Bradley Review* and developed a new Higher Education Quality and Regulatory Framework, which includes TEQSA.⁸⁰ The *TEQSA Act*, which commenced operation on 29 July 2011, outlines the functions and roles of TEQSA. As described in section 3(b)(i) of the *TEQSA Act*, one of TEQSA’s roles is to oversee a new standards-based quality assurance framework for Australian higher education providers. This standards-based approach reflects the *Bradley Review*’s recommendations that the higher education sector shift away from a predominant focus on ‘inputs and processes’ towards a framework oriented to ‘assuring and demonstrating outcomes and standards’.⁸¹ As is demonstrated in Part IV, this emphasis reflects a broader, international trend towards outcomes-focused education.

What, then, are the key components of an educational system premised on ‘outcomes and standards’? The difference between inputs and outcomes is aptly described by Fisher:

76 Department of Education, Science and Training, ‘Employability Skills for the Future’ (Final Report, March 2002) <<http://www.voced.edu.au/content/ngv12484>>.

77 Ibid 3.

78 Kift, above n 13, 6.

79 Australian Law Reform Commission, above n 14; Sharon Christensen and Sally Kift, ‘Graduate Attributes and Legal Skills: Integration or Disintegration?’ (2000) 11 *Legal Education Review* 207; Bradley et al, above n 16.

80 See Australian Government Department of Industry, ‘Transforming Australia’s Higher Education System’ (Report, Australian Government Department of Industry, 2009) <http://planipolis.iiep.unesco.org/upload/Australia/Australia_TransformingAusHigherED.pdf>.

81 Bradley et al, above n 16, 115, 137.

Under traditional ‘inputs’ measures, the role of the [teacher] is to deliver information to students by covering [subject] content. This traditional measure does not ‘provide for, warrant, or reward assessing whether student learning has occurred or is improving’. Under ‘outcomes’ measures, the role of the [teacher] is not to deliver information but to design effective learning experiences so that students achieve the [subject] outcomes and to monitor student learning in order to continuously improve their experiences.⁸²

An outcomes approach implies a shift away from the traditional emphasis on inputs in Australian legal education, which has been heavily influenced by the prescribed areas of knowledge represented by the Priestley 11. This agenda also reflects key tenets of educationalist discourses, whereby ‘good’ teaching is informed by, and consistent with, orthodox education scholarship.⁸³ Relevant aspects of this discourse include an emphasis on active and student-centred learning, facilitating learning rather than transmitting knowledge, making learning objectives transparent, and aligning outcomes, assessment and teaching.⁸⁴

In terms of demonstrating standards, all students who meet specified benchmarks should be assessed and graded accordingly, rather than relative to other students in their cohort. Standards-based assessment is facilitated by a criteria-referenced assessment approach, whereby students are assessed based on the extent to which they achieve the pre-disclosed educational objectives of the subject. Standards-based assessments can be distinguished from norm-referenced assessments, by which students are assessed on their performance relative to other students in the subject cohort.⁸⁵ To the extent that some law schools still utilise norm-referenced assessment practices, such as applying a bell curve in differentiating students’ grades,⁸⁶ the TEQSA regime’s emphasis on assuring and demonstrating outcomes and standards encourages revisiting some of the traditional learning, teaching and assessment strategies in legal education.

Against this backdrop, the Australian government commissioned the ALTC to run aspects of the Learning and Teaching Academic Standards (‘LTAS’) Project in 2010 to facilitate the development of discipline-specific academic standards in anticipation of the establishment of the TEQSA regime. Throughout 2010, discipline scholars across a number of broad fields of education engaged in extensive stakeholder consultation and feedback processes, and were assisted by

82 Janet W Fisher, ‘Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students’ (2011) 35 *Southern Illinois University Law Journal* 225, 237 (citations omitted).

83 Nick James, ‘“How Dare You Tell Me How to Teach!”: Resistance to Educationalism within Australian Law Schools’ (2013) 36 *University of New South Wales Law Journal* 779, 785.

84 *Ibid* 785–6. See also, eg, Michael Hunter Schwartz, Sophie Sparrow and Gerald Hess, *Teaching Law by Design: Engaging Students from the Syllabus to the Final Exam* (Carolina Academic Press, 2009); John Biggs and Catherine Tang, *Teaching for Quality Learning at University: What the Student Does* (Open University Press, 4th ed, 2011); Kift, above n 13, 6.

85 Stuckey et al, above n 16, 243–5.

86 See, eg, Kift, above n 13, 22–3.

international experts, to develop these academic standards. Reflecting the preferred focus on graduate outputs rather than inputs,⁸⁷ these academic standards were described in terms of minimum/threshold learning outcomes that all graduates are expected to acquire throughout their degrees.⁸⁸

The ALTC's law Discipline Scholars, Professors Sally Kift (then of Queensland University of Technology (QUT)) and Mark Israel (University of Western Australia), assisted by Project Officer Rachael Field (QUT), led the consultation and drafting processes for the law TLOs. Significantly, the final six TLOs articulated for the LLB and set out in the *Standards Statement* are designed to be read and implemented holistically. In the *Standards Statement*, each TLO is also accompanied by explanatory materials regarding the background and terminology of the TLO, which provide general points that may need to be considered in designing learning, teaching and assessment approaches. The accompanying *Notes on the TLOs* provide further guidance on their interpretation and implementation.⁸⁹ The guidance materials included in the *Standards Statement* and *Notes on the TLOs* are intended to provide broad guidelines only, leaving the design of specific curricular approaches to each law school.⁹⁰ Further guidance is provided by several Good Practice Guides ('GPGs') on the TLOs that have been commissioned under the auspices of the Law Associate Deans' Network,⁹¹ which was also created as part of the LTAS Project in 2010.⁹²

The LTAS Project used the award level descriptors in the Australian Qualifications Framework ('AQF')⁹³ as a starting point for the development of the TLOs.⁹⁴ The AQF, which was first introduced in 1995, provides a 'single comprehensive national qualifications framework' for Australian education and training.⁹⁵ The TLOs for the LLB align with the requirements of the AQF for a Bachelor degree (Level 7).⁹⁶ Many law schools in Australia now offer a JD degree instead of, or in addition to, undergraduate LLB offerings.⁹⁷ The JD is classified as a Masters Degree (Extended) (Level 9) for the purposes of the AQF,

87 Bradley et al, above n 16, 115, 137.

88 The whole suite of standards booklets for each of the Discipline Groups were published in: Australian Learning and Teaching Council, *Published Standards* (Australian Learning and Teaching Council, 2011). See also Australian Learning and Teaching Council, *Learning and Teaching Academic Standards (LTAS) Project: Final Report for the Second-intake Discipline Groups of: Architecture, Building and Construction, Education and Science* (Report, Australian Learning and Teaching Council, September 2011).

89 Kift, Israel and Field, above n 1, 11.

90 Huggins, Kift and Field, above n 8, 187.

91 Since 2013, this group has been known as the Legal Education Association Deans' Network: see <<http://www.lawteachnetwork.org/>>.

92 Australian Learning and Teaching Council, 'Learning and Teaching Academic Standards Project' (Report, December 2010) <http://www.olt.gov.au/system/files/altc_standards_finalreport.pdf>.

93 Australian Qualifications Framework Council, *Australian Qualifications Framework* (2nd ed, 2013) 48 <<http://www.aqf.edu.au/wp-content/uploads/2013/05/AQF-2nd-Edition-January-2013.pdf>>.

94 Kift, Israel and Field, above n 1, 3.

95 Australian Qualifications Framework Council, above n 93, 9.

96 Ibid 47.

97 See, eg, Donna Cooper et al, 'The Emergence of the JD in the Australian Legal Education Marketplace and Its Impact on Academic Standards' (2011) 21 *Legal Education Review* 23.

and in order to better reflect the more sophisticated and higher level knowledge, skills and attitudes required of Level 9 graduates, TLOs for the JD were developed by the JD Sub-Committee of the Law Associate Deans' Network using the same headings as the LLB TLOs. In March 2012, the JD TLOs were endorsed by CALD,⁹⁸ which provides persuasive, but not authoritative, guidance for Australian law schools. It should be reiterated that both the LLB and JD versions of the TLOs are minimum standards, and that law schools are free to exceed the minimum requirements they set.⁹⁹

The discipline standards statements developed under the LTAS Project have been identified as external reference points in a current legislative instrument¹⁰⁰ clarifying aspects of the Higher Education Standards Framework under the *TEQSA Act*. Under the Act, TEQSA is tasked with, inter alia, overseeing a standards-based quality assurance framework for higher education providers in Australia.¹⁰¹ In chapter 3, the *Threshold Standards Instrument* outlines the higher education Provider Course Accreditation Standards pursuant to section 58(1)(c) of the *TEQSA Act*. As part of these accreditation standards, a higher education provider must have 'robust internal processes for design and approval of [a] course of study', which includes 'tak[ing] account of external standards and requirements, eg published discipline standards, professional accreditation, input from relevant external stakeholders, and comparable standards at other higher education providers'.¹⁰² In other words, in accrediting a course such as the LLB, a higher education provider must ensure that the processes for course design and approval have taken into account external standards and requirements, the first listed example of which is the published discipline standards – that is, the TLOs.

A The Shifting Regulatory Context

Prominent members of the legal academy have expressed strong concern about, and even opposition to, the TEQSA system. For example, Professor David Dixon, the Dean of the University of New South Wales ('UNSW') Faculty of Law, has described TEQSA, and the Act it is designed to implement and enforce, as 'overreaching, excessive and ill-informed'.¹⁰³ Amongst other critiques, Professor Dixon is particularly concerned about the 'burden of compliance' that the *TEQSA Act* and the agency it establishes will create for universities, including

98 JD TLO Sub-Committee of the Law Associate Deans' Network, above n 4.

99 The *Notes on the TLOs* were drafted to assist law schools, seeking to respond to the TLOs within the diversity of their various remits, to interpret and implement the TLOs: Kift, Israel and Field, above n 1, 11.

100 *Threshold Standards Instrument*.

101 *TEQSA Act* s 3(b)(i).

102 *Threshold Standards Instrument* ch 3 s 1.2.

103 Nicola Berkovic, 'Dean Warns Gillard's Regulator Threatens Education of Lawyers', *The Australian* (online) 3 August 2012 <<http://www.theaustralian.com.au/business/legal-affairs/dean-warns-gillards-regulator-threatens-education-of-lawyers/story-e6frg97x-1226441738754>>.

law school staff.¹⁰⁴ The Deans of Monash and Wollongong Law Schools have also expressed similar concerns about the ramifications of some aspects of the TEQSA regime.¹⁰⁵ These critiques are likely compounded by broader trends regarding the ‘bureaucratisation of teaching and learning’¹⁰⁶ and the pervasive ‘audit culture’¹⁰⁷ in increasingly corporatised public universities,¹⁰⁸ which have already expanded academics’ compliance workloads in recent years. It is a legitimate concern that, despite the Australian Government’s aims of *increasing* the quality of national higher education provision through the establishment of TEQSA, processes for administering and enforcing this regime invariably create additional administrative and reporting burdens for academic staff, placing further strain on law academics who ‘are increasingly asked to do more with the same or less resources’.¹⁰⁹

Members of the legal academy are certainly not alone in their concerns about the TEQSA regime. Growing disenchantment from numerous pockets of the sector about the onerous administrative burden on higher education providers prompted then Tertiary Education Minister, Craig Emerson, to commission Professors Kwong Lee Dow AO and Valerie Braithwaite to review TEQSA’s approach to regulation of Australian universities in May 2013. The Lee Dow-Braithwaite *Review of Higher Education Regulation Report* was released to the public on 5 August 2013.¹¹⁰ This report advocates wide-ranging measures for streamlining TEQSA’s functions and reducing the regulatory burden on universities. These measures include a recommendation that TEQSA should focus on provider registration and course accreditation – its ‘core activities as a regulator’ – and that it should be relieved of other functions such as quality assurance, which are best achieved through other means.¹¹¹ The current Coalition Government has indicated its intention to implement all 11 recommendations made in the Lee Dow-Braithwaite report.¹¹²

The Government’s willingness to act upon the Lee Dow-Braithwaite report’s recommendations reflects its broader deregulation agenda for Australian higher education. This agenda includes, *inter alia*, cuts in government funding to

104 Anne Susskind, ‘Law Schools Groan under Burden of Government Compliance’, *Law Society Journal* (online), October 2012, 14 <http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/docs/posts/2012-09-26_1451/dd_on_regulation_in_lsj_oct_2012.pdf>.

105 *Ibid* 16.

106 Paula Baron, ‘A Dangerous Cult: Response to “the Effect of the Market on Legal Education”’ (2013) 23 *Legal Education Review* 273, 285.

107 Thornton, above n 70, 26–30.

108 For a detailed analysis of the implications of neoliberal and corporate paradigms for legal education, see, eg, Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012).

109 Marychurch, above n 74, 21. See also Thornton, above n 70, 24; Paula Baron, ‘Thriving in the Legal Academy’ (2007) 17 *Legal Education Review* 27, 35–44.

110 Lee Dow and Braithwaite, above n 21.

111 *Ibid* 56.

112 Pyne, above n 11. In addition, all 23 recommendations for reducing and streamlining reporting requirements made in the previous PhillipsKPA *Review of Reporting Requirements for Universities* will be implemented.

TEQSA,¹¹³ and proposed changes to the *TEQSA Act* contained in a bill introduced before Parliament in February 2014,¹¹⁴ which was subsequently referred by the Senate to the Senate Education and Employment Legislation Committee. The main changes proposed by the TEQSA Amendment Bill relate to:

[removing TEQSA's responsibility for] quality assessments of higher education providers; [changes to] the delegation of decisions; extending periods of accreditation or registration; the appointment of [TEQSA] commissioners; [changing] the roles and responsibilities of the Chief Commissioner and Chief Executive Officer; notifying providers of decisions; [modifying] the scope of ministerial directions; and ministerial approval being required for legislative instruments which determine fees to be charged.¹¹⁵

On 16 June 2014, the Senate Committee published a report informed by a three-month public consultation process, and recommended that the Senate pass the TEQSA Amendment Bill.¹¹⁶ At the time of writing (November 2014), the Bill remains before the Senate.¹¹⁷

If enacted, these proposed changes will significantly curtail TEQSA's powers and budget, with attendant consequences across all areas of the regulator's operations. Perhaps the changes with the most direct bearing on the TLOs relate to the proposed extensions to accreditation and registration periods. As noted above, the TLOs provide a reference point for Provider Course Accreditation Standards under the *Threshold Standards Instrument*¹¹⁸ pursuant to section 58(1)(c) of the *TEQSA Act*. Currently, the *TEQSA Act* mandates that courses must be accredited at least once every seven years,¹¹⁹ but under the proposed TEQSA Amendment Bill,¹²⁰ a new section 57A will enable TEQSA to extend the period of accreditation of a course beyond seven years, subject to specified conditions. That is, the frequency with which established higher education providers are required to demonstrate they meet course accreditation

113 *The Australian* quotes the Federal budget paper as indicating that funding for TEQSA will be reduced by '\$3.338m in 2014–15, \$7.596m in 2015–16 and \$9.999m in 2016–17': Julie Hare, 'Quality Agency Cuts "Look Nuts" to DVC', *The Australian* (online), 21 May 2014 <<http://www.theaustralian.com.au/higher-education/quality-agency-cuts-look-nuts-to-cq-universitys-hilary-winchester/story-e6frgjcjx-1226924502884#mm-premium>>.

114 Tertiary Education Quality and Standards Agency Amendment Bill 2014 (Cth) ('TEQSA Amendment Bill').

115 Parliament of Australia, *Bills of the Current Parliament: Tertiary Education Quality and Standards Agency Amendment Bill 2014* <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr5175%22>>.

116 Senate Education and Employment Legislation Committee, Parliament of Australia, *Tertiary Education Quality and Standards Agency Amendment Bill 2014* (2014) 16 [2.63] <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/TEQSA/Report/~/_media/Committees/Senate/committee/eet_ctte/TEQSA/report/report.pdf>.

117 Parliament of Australia, above n 115.

118 *Threshold Standards Instrument* ch 3 s 1.2.

119 *TEQSA Act* s 56(4).

120 TEQSA Amendment Bill.

requirements, which include the TLOs as a reference point, appears likely to be reduced if the proposed amendments are passed.

In parallel with the steps to reform the *TEQSA Act*, the Higher Education Standards Panel is also consulting on proposed changes to its Threshold Standards. The Higher Education Standards Panel is an expert advisory body established under the *TEQSA Act* to provide independent advice regarding standard setting to Commonwealth minister(s) responsible for tertiary education and research; these standards are then monitored and enforced by TEQSA.¹²¹ Although the proposed changes to the Threshold Standards are far reaching, it appears that discipline-based ‘learning outcomes statements’, such as the TLOs, will be retained as reference points in relation to accrediting course ‘learning outcomes and assessment’.¹²² Thus, despite significant recent changes to the Australian higher education regulatory landscape, it currently appears that the TLOs will remain a reference point for TEQSA’s course accreditation activities, which may be conducted less frequently than originally envisaged.

IV BROADER TRENDS IN OUTCOMES-FOCUSED EDUCATION

In the preceding Parts, the background to the TLOs, both from discipline-specific and wider higher education perspectives, has been canvassed to situate the TLOs in their national context. The Australian developments that culminated in the articulation of the TLOs for law can also be seen as part of a broader international shift towards outcomes-focused education in recent decades.¹²³ This Part also canvasses the potential benefits of a whole-of-curriculum approach to implementing the TLOs, premised on congruence of learning outcomes between individual subjects and the educational goals of the degree program as a whole. This discussion paves the way for an overview of some of the critiques of outcomes-focused education.

A International Trends

The pressure to adopt outcomes-focused educational paradigms in Australian legal education reflects broader global trends. The primary motivation behind this reform agenda is pedagogical, and is premised on the understanding that defining and assessing outcomes improves student learning experiences and enhances employability skills.¹²⁴ Arguably, the growing prominence of these paradigms is also an inevitable corollary of the international ‘public sector management revolution’ which, as previously noted, encompasses universities

121 Australian Government Higher Education Standards, *Welcome to the Higher Education Standards Panel* (2014) <<http://www.hestandards.gov.au/>>.

122 Higher Education Standards Panel, above n 12, 8–9 [1.5].

123 Stuckey et al, above n 16, 45–7.

124 Mary A Lynch, ‘An Evaluation of Ten Concerns about Using Outcomes in Legal Education’ (2011) 38 *William Mitchell Law Review* 976, 983–4.

and requires an emphasis on goals, measurement and accountability.¹²⁵ As Marginson notes, neoliberal and new public management approaches are now pervasive in higher education throughout most of the world.¹²⁶ Concomitantly, quality assurance processes for learning and teaching are overseen by government agencies or private member associations in most countries.¹²⁷

There are numerous examples of international equivalents to the Australian TLOs for law. As Stuckey et al observe, ‘Scotland, Northern Ireland, and England and Wales have made a transition to outcomes-focused systems of legal education, both in law schools and in the graduate programs operated by professional organisations’.¹²⁸ Learning outcomes for law in the United Kingdom that informed the development of the Australian TLOs¹²⁹ include the United Kingdom’s Quality Assurance Agency’s *Subject Benchmark Statement: Law*,¹³⁰ the ‘Joint Statement issued by the Law Society [of England and Wales] and the General Council of the Bar on the Completion of the Initial or Academic Stage of Training by Obtaining an Undergraduate Degree’,¹³¹ and the Law Society of Scotland’s *Accreditation Guidelines for Applicants*.¹³² In addition, the European Union’s Tuning project’s generic competences for all disciplines provided a reference point for the development of the TLOs,¹³³ as did the law-specific competences developed during a Tuning project undertaken in Latin America from 2004–2007.¹³⁴

Similarly in the United States, there is growing momentum towards outcomes-focused education. In the discipline of law, this shift was in part motivated by the advocacy of Stuckey et al for the adoption of outcomes-focused education in their influential *Best Practices for Legal Education* report in 2007.¹³⁵ Like admitting bodies in the United Kingdom, the American Bar Association has moved towards supporting an outcomes-based approach for accredited law schools in its *Standards and Rules of Procedure for Approval of Law Schools*,¹³⁶ a previous version of which was one of the international learning

125 Arup, above n 68, 33; Thornton, above n 70, 26–30.

126 Simon Marginson, ‘Imagining the Global’ in Roger King, Simon Marginson and Rajani Naidoo (eds), *Handbook on Globalization and Higher Education* (Edward Elgar, 2011) 10, 32.

127 Thornton, above n 70, 29.

128 Stuckey et al, above n 16, 45.

129 Kift, Israel and Field, above n 1.

130 Quality Assurance Agency for Higher Education, *Subject Benchmark Statement: Law* (2007) <<http://www.qaa.ac.uk/en/Publications/Documents/Subject-benchmark-satatement-Law-2007.pdf>>.

131 Solicitors Regulation Authority, *Joint Statement on the Academic Stage of Training* <<http://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page>>.

132 The Law Society of Scotland, *Foundation Programme (Scottish Exempting Degree): Accreditation Guidelines for Applicants* (2010) <<https://www.lawscot.org.uk/media/295010/foundation-programme-guidelines.pdf>>.

133 European Tuning, *Generic Tuning Competences* <http://www.enothe.eu/cop/Generic_Tuning_Competences.pdf>.

134 Latin America Tuning, *Subject Specific Competences: Law* (2014) <<http://www.tuningal.org/en/subject-areas/law/competences>>.

135 Stuckey et al, above n 16.

136 American Bar Association, *2013–2014 ABA Standards and Rules of Procedure for Approval of Law Schools* <http://www.americanbar.org/groups/legal_education/resources/standards.html>.

outcomes comparators referred to in the *Standards Statement* for the TLOs.¹³⁷ In 2010, Canadian law societies also endorsed an outcomes-focused approach to competency requirements for admission as recommended in a *Report on the Task Force on the Canadian Common Law Degree*¹³⁸ produced by the Federation of Law Societies of Canada.¹³⁹ When viewed against this backdrop, moves towards outcomes-based approaches in Australian legal education can be seen to align with international trends, which are shaped by both pedagogical rationales and the ubiquity of new public management expectations and pressures.

B A Whole-of-Curriculum Approach to Incorporating the TLOs into Legal Curricula

Applying outcomes-focused educational paradigms, it is considered optimal to adopt a ‘whole-of-curriculum’ approach to learning, teaching and assessing outcomes-based curriculum objectives.¹⁴⁰ The adoption of such an approach is one of the intentions behind the TLOs, which is reflected in the following comment of the drafters of the law TLOs in the *Standards Statement*:

[W]ithin the range of diverse programs developed by the various law schools, graduates’ acquisition of the TLOs will most likely be facilitated in a structured and integrated, whole-of-curriculum approach through learning, teaching and assessment.¹⁴¹

This raises the question of how a ‘structured and integrated, whole-of-curriculum approach’ to implementing the TLOs can best be achieved in practice. Ideally, to facilitate students’ systematic and comprehensive acquisition of threshold learning outcomes throughout an LLB or JD degree, the TLOs or a localised variation of these concepts would be included in law schools’ statements of program-level learning outcomes (‘course learning outcomes’¹⁴²). Law schools’ clear articulation of educational goals as statements of outcomes, which reflect the knowledge, skills and values that graduates of a particular law school are expected to acquire over the course of their law degree, is strongly endorsed in the *Best Practices for Legal Education* report.¹⁴³ It is also advocated in the influential *Carnegie Report*, which calls for ‘greater institutional intentionality’, which occurs when a ‘law school ... become[s] intentional about

137 American Bar Association, *Standards and Rules of Procedure for Approval of Law Schools* (2009–2010) <<http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>>, cited in Kift, Israel and Field, above n 1, 29.

138 Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree: Final Report* (Report, Federation of Law Societies of Canada, 2009) <http://www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf>.

139 Federation of Law Societies of Canada, *National Admission Standards* (2014) <www.flsc.ca/en/national-admission-standards/>.

140 Richard Johnstone, ‘Whole-of-Curriculum Design in Law’ in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, 1st ed, 2011) 1, 2; Kift, above n 13, 16–20; Biggs and Tang, above n 84.

141 Kift, Israel and Field, above n 1, 9.

142 See above n 9.

143 Stuckey et al, above n 16, 40–55.

its own aims, educational processes, and identity'.¹⁴⁴ Although these reports were written in the context of American legal education, the insights into outcomes-focused educational discourses and practices they provide have relevance for other jurisdictions, like Australia, that are moving in similar directions.

Significantly for Australian law schools, statements of course learning outcomes describing students' 'knowledge, skills, application of knowledge and skills and generic learning outcomes' are now required by TEQSA's *Threshold Standards Instrument* to '[facilitate] comparability with AQF qualifications'.¹⁴⁵ As an illustration of how the TLOs can inform individual law schools' course learning outcomes, self-management was included as one of twelve course¹⁴⁶ learning outcomes, developed through an extensive process of consultation with relevant stakeholders, as part of the UNSW Law's 2011–13 curriculum review process, reflecting an institutional commitment to developing law students' capacities for personal and professional development.¹⁴⁷ As the UNSW Law experience suggests, in order to achieve maximum buy-in and support from faculty staff, the development of statements of outcomes at the course level needs to be based on genuine consultation with staff, alumni, students, and other relevant members of the professional community.¹⁴⁸

The next step in a whole-of-curriculum approach to achieving educational goals is the alignment of statements of outcomes at the course level with the articulation of goals at the individual subject level.¹⁴⁹ Learning outcomes for each individual subject can be derived from the course learning outcomes, but will necessarily be more specific to reflect the focus of each particular subject.¹⁵⁰ Once the subject learning outcomes – that is, the educational outcomes that students will have acquired and be able to demonstrate by the completion of the subject – have been clearly articulated, appropriate assessment approaches that measure the extent to which students are achieving the subject outcomes can be designed.¹⁵¹ Such approaches can be both formative, providing non-assessed feedback to help students improve their performance, and summative, providing 'evaluative feedback' typically in the form of a grade.¹⁵² Somewhat counterintuitively, the final step in a whole-of-curriculum approach is the planning and development of learning and teaching strategies that prepare students to achieve the subject learning outcomes.¹⁵³ Such a process, which necessarily involves commitment from a significant proportion of staff in the

144 Sullivan et al, above n 23, 182.

145 *Threshold Standards Instrument* ch 4 s 1.2.3.

146 UNSW Law used the terminology of 'program learning outcomes', however, for the sake of consistency with TEQSA's nomenclature, 'course learning outcomes' is used in this article.

147 Steel, above n 18, 200.

148 UNSW Law, 'Curriculum Review: Designing an International, Experiential, Research-Focused Curriculum for a C21 Law School' (UNSW Law, 2013) 19–21; see also Stuckey et al, above n 16, 49.

149 Stuckey et al, above n 16, 55–9.

150 Fisher, above n 82, 236–42.

151 *Ibid* 237.

152 *Ibid* 239.

153 *Ibid*.

faculty, promotes congruence between the assessment and outcomes of individual subjects, and the educational goals of the course as a whole.¹⁵⁴

Under an outcomes-focused approach, it is beneficial to have programmatic oversight of the learning, teaching and assessment of learning outcomes so that both staff and students ‘know when, where, and how each desired outcome will be accomplished in the overall program of instruction’.¹⁵⁵ A curriculum map is an effective tool for identifying which learning outcomes are addressed and assessed in each subject, and for providing an overview of any gaps and overlaps in the treatment and development of learning outcomes throughout the degree program. A sophisticated curriculum map reveals the extent of alignment of assessment with both subject and course learning outcomes. It may also reflect a vertical progression or sequence of student learning of the same learning outcome across different subjects, designated by descriptions such as ‘basic, intermediate and advanced’ or ‘introduced, practised and mastered’.¹⁵⁶ The Subject Overview Spreadsheet (SOS) curriculum mapping software developed at the Teaching & Learning Centre of the Faculty of Business at the University of Technology Sydney (UTS)¹⁵⁷ is one example of curriculum mapping software that possesses such functionality and was recently used in curriculum mapping exercises by, inter alia, UNSW and UTS Law Schools.¹⁵⁸ Curriculum mapping provides a process for ensuring that the learning, teaching and assessment of law graduates’ acquisition of the TLOs is appropriately ‘integrated, contextualised, sequential and incremental’ across the law curriculum.¹⁵⁹

C Critiques of Outcomes-Focused Education

Despite the widespread adoption of outcomes-based approaches to legal education internationally, such practices are not without critics. As identified by Lynch,¹⁶⁰ general trends in these critiques include that: an emphasis on student learning outcomes is ‘anti-theoretical and anti-scholarly’;¹⁶¹ identifying and assessing student learning outcomes may undermine academic autonomy and create an uneven workload distribution;¹⁶² a system premised on all students achieving specified outcomes creates perverse incentives to ‘teach to the test’;¹⁶³ and a focus on skills outcomes may compel less emphasis on teaching legal analysis.¹⁶⁴ Whilst there is some merit in such criticisms, the core aims of outcomes-focused education of supporting the development of students’

154 Stuckey et al, above n 16, 93.

155 Ibid.

156 Johnstone, above n 140, 15.

157 *Hunters and Gatherers Project Overview* <<http://www.assuringlearning.com/project-overview>>.

158 I was part of a team responsible for conducting the curriculum mapping exercise at UNSW Law in 2012.

159 Johnstone, above n 140, 15.

160 Lynch, above n 124, 981.

161 Ibid 985–90.

162 Ibid 990–7.

163 Ibid 997–1000.

164 Ibid 1000–4.

knowledge, skills and values, and improving their legal education experiences and opportunities after graduation¹⁶⁵ are at least equally meritorious.

Sturm and Guinier have argued that resistance to change amongst some law academics may both reflect and perpetuate the law school ‘culture of competition and conformity’.¹⁶⁶ In a similar vein, Galloway and Jones have linked some law academics’ predisposition against change in legal education to the very nature of the common law traditions of precedent and ‘thinking like a lawyer’.¹⁶⁷ It is desirable to reflect upon whether such cultural tendencies may be shaping some law academics’ resistance to outcomes-focused pedagogical approaches. As Watson suggests, law academics may need to scrutinise, challenge and shift their traditional ‘mental models’ to achieve organisational change in light of shifting regulatory and educationalist imperatives.¹⁶⁸

V CONCLUSION

The TLOs for law reflect a confluence of discipline-specific and sector-wide forces. The TLOs are a further development in a long standing Australian legal education reform agenda, the progress towards which has been slowed by resource constraints and competing research imperatives. The development of the TLOs can be situated as part of a wider and ongoing debate about the appropriate balance between legal content and generic professional skills in Australian and international legal education, in which an emphasis on skills is gaining traction. At the sector level, the establishment of TEQSA provided the immediate context for the ALTC project leading to the articulation of the TLOs. The development of the TLOs thus reflects an Australian regulatory shift away from a predominant focus on ‘inputs and processes’ towards a framework oriented to ‘assuring and demonstrating outcomes and standards’ that affects all disciplines.¹⁶⁹ Such trends are not limited to Australia; indeed, the privileging of outcomes-focused education, and whole-of-curriculum approaches to promoting students’ acquisition of key learning outcomes, are international trends that appear to reflect pervasive pressures for enhancing the quality of students’ learning experiences and increasing institutional accountability. Thus, although the TLOs are a relatively new development for Australian legal education, when viewed in context, they can be seen as an incremental, and arguably inevitable, development.

165 Ibid 983–4.

166 Susan Sturm and Lani Guinier, ‘The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity’ (2007) 60 *Vanderbilt Law Review* 515, 515.

167 Kate Galloway and Peter Jones, ‘Guarding Our Identities: The Dilemma of Transformation in the Legal Academy’ (2014) 14(1) *QUT Law Review* 15, 21.

168 Penelope Watson, ‘Leading Change in Legal Education: Interesting Ideas for Interesting Times’ (2012) 22 *Legal Education Review* 199, 211–12.

169 Bradley et al, above n 16, 115, 137.

The *Bradley Review's* calls for a strong national regulator were realised with the establishment of TEQSA in 2011; however, the powers and budget of this government agency will likely diminish if current regulatory reform agendas are successful. Despite these changes, current indications suggest that the role played by the TLOs as a reference point in TEQSA's course accreditation activities will remain largely unchanged. Thus, although the TLOs will not be utilised in relation to legal admission requirements at this stage, they will inform TEQSA's periodic auditing of law schools for accreditation purposes. More broadly, due to the national and international trends canvassed in this article, expectations on legal education providers to adopt outcomes-based pedagogical approaches appear likely to continue in the foreseeable future. These factors underscore the salience of law schools' ongoing efforts to achieve integrated, whole-of-curricula approaches to implementing the TLOs.