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**Good Practice Guide (Bachelor of Laws)**

**LAW IN BROADER CONTEXTS**

**Alex Steel**



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## Introduction

This Good Practice Guide was commissioned by the Law Associate Deans Network to support the implementation of Threshold Learning Outcome 1: Knowledge.

The Threshold Learning Outcomes (TLOs) for the Bachelor of Laws were developed in 2010 as part of the Learning and Teaching Academic Standards (LTAS) Project, led by Professors Sally Kift and Mark Israel.<sup>1</sup> TLO 1: Knowledge is one of the six TLOs developed for the Bachelor of Laws. All six TLOs are:

TLO 1: Knowledge

TLO 2: Ethics and professional responsibility

TLO 3: Thinking skills

TLO 4: Research skills

TLO 5: Communication and collaboration

TLO 6: Self-management

The TLOs were developed having reference to national and international statements on the competencies, skills and knowledge that graduates of a degree in law should have, as well as to the emerging descriptors of the Australian Qualifications Framework (AQF) for Bachelor Degrees (Level 7) and Bachelor Honours Degrees (Level 8).<sup>2</sup>

### TLO 1: Knowledge

Graduates of the Bachelor of Laws will demonstrate an understanding of a coherent body of knowledge that includes:

(a) the fundamental areas of legal knowledge, the Australian legal system, and underlying principles and concepts, including international and comparative contexts,

**(b) the broader contexts within which legal issues arise, and**

(c) the principles and values of justice and of ethical practice in lawyers' roles.

The Notes to the TLO state:

**Broader contexts:** The CALD Standards refer to the 'political, social, historical, philosophical, and economic context as examples of the broader, pluralist context within which legal issues arise. This list can easily be extended to encompass contexts that reflect, for example: social justice; gender-related issues; Indigenous perspectives; cultural and linguistic diversity; the commercial or business environment; globalisation; public policy; moral contexts; and issues of sustainability. The United Kingdom QAA Subject Benchmark Statement for Law refers to 'social, economic, political, historical, philosophical, ethical, cultural and environmental contexts', while the Scottish Accreditation Guidelines consider the 'social, economic, moral and ethical contexts'.

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<sup>1</sup> Sally Kift, Mark Israel and Rachael Field, Learning and Teaching Academic Standards Project: Bachelor of Laws Learning & Teaching Academic Standards Statement December 2010, Australian Learning & Teaching Council (December 2010)  
<[http://www.altc.edu.au/system/files/altc\\_standards\\_LAW\\_110211.pdf](http://www.altc.edu.au/system/files/altc_standards_LAW_110211.pdf)>.

## Authors

This Good Practice Guide was written by Associate Professor Alex Steel, Faculty of Law, University of New South Wales with research assistance by Peta MacGillivray, and input from Law School colleagues.

## Part 1: Literature review

While other Good Practice Guides concentrate on a specific area of legal knowledge or skills, this Guide addresses a broader whole of curriculum approach to teaching law. This Guide does not seek to set out any single correct contextual approach to the teaching of law, and so there are no 'how to' suggestions or schematic frameworks which are appropriate for other guides in this series.

Rather, the aim of this Guide is to provide an introduction to the role broader contexts can play in the teaching of law and to provide some resources that indicate how law might be taught in those contexts. The approach taken by each individual teacher will itself be governed by the contexts in which the teaching takes place. Those contexts will include the extent to which a contextual approach underlies the whole curriculum, the range of learning outcomes that the individual subject is expected to achieve in the broader curriculum, the forms of other contexts that are most appropriate to include with the particular legal subject matter, and extent to which the approach in a particular subject should complement other subjects. Individual teachers should take time to understand the range of approaches possible and be sensitive to the insights from approaches that differ to their own.

### What is meant by 'a coherent body of knowledge that includes ... the broader contexts in which legal issues arise'?

The commentary on TLO 1 provides some indicative lists of the types of contexts that might be relevant, but provides no guidance on what relationship those contexts should have to legal studies. The requirement for a coherent body of knowledge implies that there should be some rationale for why students are required to study particular contexts.

At a minimum, TLO 1 assumes that there are contexts beyond case-law doctrinal reasoning and statutory interpretation that are relevant to legal study. In doing so it distinguishes contemporary Australian legal education from the extreme forms of Austinian legal positivism and formalism of the earlier 20<sup>th</sup> century (discussed below).

Beyond this TLO 1 leaves it to law schools and teachers to determine the appropriate approach to determining those contexts and their relationship to legal issues. In doing so, teachers and schools can choose from a spectrum of approaches to contextuality. At one end is the use of a fully formed theoretical framework based on one contextual area or perspective as a prism through which all legal issues are assessed. At the other end is the use of brief references to surrounding contexts to more fully explain a legal issue.

This Guide provides some overview of both theoretical and topical contexts that may be relevant to legal issues.

## Ways to teach law in broader contexts

There are different degrees to which law can be taught in broader contexts. At the most ambitious level, the broader contexts within which law operates can be the basis for the design of an entire curriculum. Thus a law school could use a commercial context, or the experience of minorities as fundamental contexts within which the order and content of all subjects would be arranged.

Law schools could also use particular perspectives as themes running through a curriculum, perhaps culminating in a program-level learning outcome. Examples could be Indigenous perspectives on law, social justice impacts, or commercial relevance. These themes could be integrated across subjects, with students' exposure to the contexts in earlier subjects being built on in later subjects.

A range of contextual perspectives can form the basis for general introductory law subjects, to ensure students grasp the broader environment before later specialisation. Alternatively broader contexts could be emphasised in later year elective or capstone subjects bringing students out of more limited and structured core subjects to a broader sense of law's role in society.

Within individual subjects broader contexts can be introduced as discrete topics within otherwise doctrinal subjects. But most commonly, and arguably most effectively, broader contexts can be taught side by side with doctrinal material, providing alternative perspectives to those highlighted in legal decisions, or illuminating the policy behind legislation.

In many ways theoretical frameworks, such as those outlined below, inform the way in which the relationship between the context and the legal issue is constructed. For example, the implications of social impact caused by a regulatory scheme could be viewed very differently using the lenses of law and economics, feminist, critical race or environmental sustainability theories. Whether or not those underlying theories are made clear to students, they will inform the approach taken by teachers (an example of an extended explanation of this is contained in Brown et al: 2011).

## Some reasons for teaching law in broader contexts

Today's system of legal education is largely based around doctrinal areas taught independently of one another - a legacy of 19th century legal textbook writers. Despite some attempts to overcome this, law schools still primarily teach torts, contracts, property, criminal, corporate law etc as separate subjects. This is reinforced by the admission requirements, the 'Priestley 11,' which are also couched in these separate doctrinal terms. In professional practice, legal matters consistently cross doctrinal boundaries and also involve personal, social or business issues not captured in these lists. While providing students with a strong grounding in these doctrinal areas remains fundamental to legal education, teaching doctrinal matters with a contextual

flavour alerts students to the broader connections between individual areas of law, and the way those areas exist with a web of larger issues.

The importance of teaching law in broader contexts is summarised by Philip Selznick:

[T]he phrase ‘law in context’ points to the many ways legal norms and institutions are conditioned by culture and social organization. We see how legal rules and concepts, such as those affecting property, contract, and conceptions of justice, are animated and transformed by intellectual history; how much the authority and self-confidence of legal institutions depend on underlying realities of class and power; how legal rules fit into broader contexts of custom and morality. In short, we see law as in and of society, adapting to its contours, giving direction to change. We learn that the legal order is far less autonomous, far less self-regulating and self-sufficient, than often portrayed by its leaders and apologists. This perspective encourages us to accept blurred boundaries between law and morality, law and tradition, law and economics, law and politics, law and culture. Accepting the reality of blurred boundaries leads to much puzzlement and controversy. Law loses some of its special dignity, and some jurisprudential questions cannot be avoided.

Blurring boundaries is healthy ... when legal institutions gain relevance, competence, and vitality from other spheres of social life, including education, work, religion, and public opinion, especially attitudes of trust, criticism, and self restraint. ...

The continuities of law and society do not require us to abandon the distinction between positive law – the product of explicit authority – and the social contexts of that law; but the continuities are not thereby erased or ignored. From these continuities or discontinuities we learn what makes for legal stability, autonomy, and responsiveness. ‘Positive’ law is an often intricate tapestry whose main strands are legislation, judicial decisions, and administrative regulations. It is the law that lawyers are trained to recognize and use. But positive law is only part of a larger, more inchoate unity, which we call the ‘legal order’ or, more awkwardly, the ‘socio-legal order’ (Selznick: 2003)

Placing legal content into broader contexts allows students to see the impact of law on various sections of society, and this can enhance their growth as professionals and their sense of justice. It can overcome the narrowing effects of training to think like a lawyer (Sullivan et al: 2007), and remind students that application of legal rules have broader effects and reflect the operation of certain values (Burrige and Webb: 2008).

Seeing law in broader contexts both aids the development of critical thinking skills of students and their professional development. Both are discussed in separate Good Practice Guides: *Good Practice Guide Ethics and Professional Responsibility TLO 2*; *Good Practice Guide Thinking Skills TLO 3*.

The increasing expansion of legislation and case law places constant pressure on law teachers to cover more content in each class. However a student’s long-term retention of this material is likely to be marginal. Placing legal discussion in broader contexts can make the legal issue more authentic – either through being related to student’s own experiences, or alternatively



providing an alternative understanding of the law's impact on others - thus enhancing learning and retention (cf Lustbader: 1998).

## Historical overview of leading contextual theories of law and legal education

It is a truism that all law is contextual in that it describes and regulates relationships. However, which contexts are relevant to the study of law has been a topic much debated. What is currently accepted as relevant may not have been in the past. It is therefore important to understand this history (in itself a context), because it emphasises that the appropriate context of law is one that is contentious and evolving.

The statement in both TLO 1 and the CALD Standards that graduates should have an understanding of the 'broader contexts within which legal issues arise' amounts to an adoption of the contextual side of the debate on legal education over the past 150 years. It is thus useful for teachers to have an understanding of that history.

The dominant legal theory underlying approaches to legal education in the last 150 years is a form **legal positivism**, derived from its articulation by Austin in the 1830's. Austinian positivism as applied to legal analysis saw law as positively emanating from a sovereign rather than from nature, and as such law was as an autonomous discipline with its own internal logic (Dyzenhaus: 2010). The study of law was an exposition of what the law was, not an examination of what the law should be. Positivists thus saw little need to connect law to any broader contexts. Much of the development of legal education can be seen as a broadening of or reaction to this approach.

Legal education in both England and the United States in the early 19th century was controlled by the legal profession: primarily an apprenticeship in a law office based on forms and known precedents (Hoeflich: 1987). As the century progressed academic law schools emerged, particularly in the United States, and this in turn led to the publication of textbooks by the lecturers which promoted a more '**scientific**' or **formalist** approach to common law - one that argued the common law was based on underlying principles rather than having been developed through the inclinations of individual judges. These principles could be derived from a close analysis of the reasoning in judgments.

University law schools in England in the 19<sup>th</sup> century were more influenced by the German civil law tradition, and tended to take a theoretical approach with a strong emphasis on Roman law. In England the role of the universities in training lawyers was marginal in the first half of the 20<sup>th</sup> century. Most lawyers were trained in schools aligned with the profession. Law as an academic discipline was held in low regard, a position that did not change until the 1960's (Boon and Webb: 2008) One result was a narrow formalist approach to law, taught through lectures.

By contrast, in the US, university law schools came to monopolise legal education. The introduction of the **case-method of teaching** at Harvard in

the 1890's led to both a more detailed critical examination of the reasoning in judgments, and an elevation of the court developed principles of private (common) law as the core of the curriculum (Hoeflich: 1987; Gordon: 2007). Legal decisions were thus seen in the broader context of the area of law as a whole, and the principled basis of the legal system was seen to emerge from common law, rather than statute.

In the early 20th century arguments by prominent US academics in favour of progressive legislative frameworks and social welfare law led to a raft of consequent legislation – the **social law** movement. This research and legislation led to significant tension in US law schools over whether a continued concentration on private law case-method was appropriate. While at the time the social law movement did not impact on the private law based curriculum, it began the movement of legislative public law from the periphery to the centre of the curriculum (Gordon: 2007). Legal education expanded from a focus on development of law in the courts to include the broader context of the role of legislatures and government agencies.

The social law movement was followed by the **Realist movement**, primarily associated with Columbia and Yale Law Schools. Realists argued that the perceived scientific reasoning in legal decision making could be 'flipped' to achieve an equally plausible alternative result, and that the choice between the results was based on unarticulated value judgments. Realists then argued that the correct answer should be based on the findings of social science research. As such law could be reconceptualised as a social science (White: 1986). Their argument for teachers with practice experience, teaching through case studies rather than judicial decisions, and the use of court visits and clinics (Frank: 1933) presaged modern experiential developments. While the Realist movement initially failed to fundamentally alter the approach to legal education, other than at Yale, over time it had a significant impact on the way the case-method was taught, with teachers far more likely to use judicial decisions to demonstrate incoherence in doctrine or the impact of policy on which alternatives were favoured; and in courts themselves recognising policy issues (Singer: 1988). Singer argues:

The legal realists successfully changed the nature of persuasive argument. Most current legal scholars accept the realist message that it is wrong to attempt to answer legal questions by appealing to the inherent nature of the abstract concepts of property, contract, and liberty. They distinguish between concepts like freedom and duress by line-drawing rather than by definitional assertion. To draw the necessary lines, current theorists talk about the principles, policies, and purposes underlying legal rules. They hope to interpret and fashion legal rules to achieve those underlying purposes. This mainstream approach is, for the most part, consequentialist and anticonceptualist. Current scholars understand legal rules to be devices for achieving social ends of fairness and efficiency. Moreover, virtually every approach to legal thought depends heavily on the realists' metaphor of balancing competing interests (Singer: 1988)

The questions that the Realists raised have influenced many of the jurisprudential schools of thought that have followed. Recently, the realist approach has been reconstituted as new project called **New Legal Realism** (<http://www.newlegalrealism.org/>), which has a strong focus on finding ways to translate the findings of law and social sciences to each other.

In 1943 McDougal and Lasswell, professors at Yale published a widely cited article calling for a radical rethink of legal education that they argued had to become a 'conscious, efficient, and systematic training for policy-making' (Lasswell and McDougal: 1943). While not having an impact on legal education at the time, their argument for policy-based approaches became accepted over time. They were also influential in encouraging international perspectives on law.

In Australia until the 1960s law schools were, like England, primarily 'trade schools' seen as adjuncts to the legal profession, and most classes taught part-time by practitioners (Chesterman and Weisbrot: 1987; Keyes and Johnson: 2004). In such an environment there was little appetite for broader visions of legal education.

This was generally manifested in a teaching method of straight lectures which expounded rules and authoritative precedent, distinguishing ratio from obiter dicta with meticulous and wonderful precision. The discipline demanded limited intellectual horizons. Memory exercise was literally the only skill demanded of the average Australian student: straight exposition of texts with references to the Australian cases (since the texts were usually English) was the primary skill of the teacher (Wallace and Fiocco: 1980).

Amongst the full time staff there was however an interest in US contextual approaches (Bartie: 2010). One significant example was Julius Stone at the University of Sydney, a leading Realist. Although Australian law schools generally remained resistant to the analysis of realism for longer than US law schools, Stone's influence on the next generation lawyers and thus of academics was profound. He also appears to have significantly influenced the High Court's understanding of its own role (Blackshield: 1997)

While the Realists had taken the methodologies of social science largely for granted, the rise of the US civil rights movements in the 1950's and 1960's raised the question of whether there was still a significant disjunction between 'law in the books' and 'law in action'. This led to the development of a range of new approaches to understanding law.

The mid 1960's saw the emergence of the **Law and Society** movement in both the US and England. This movement suggested that there were inherent biases in legal structures that failed to take account of the realities of life, and that law privileged the wealthy and powerful. As such they called for a renewed examination of the broader social impacts and the practical effects of law – an area of research that came to be called socio-legal studies. One key aspect was that legal research should be concerned with effecting social change and law reform rather than being merely concerned with the meaning of texts (Cranston: 1995). In England the law and society movement (also known as socio-legal studies) was more clearly focused on legal education, and the Law and Society textbook series was begun, the editors arguing that existing black letter law textbooks were overly authoritarian and dogmatic and did not encourage students to think for themselves (Twining: 1997).

In an article arguing for the adoption of similar approaches in Australia, Ross Cranston described its application as follows:

Company law is not simply a set of rules regulating a company mainly as to its internal workings. A true appreciation of company law demands a knowledge of matters like finance (the role of the stock market, the internal generation of funds, the taxation system), extra-legal concepts like social responsibility, market phenomena such as mergers and monopoly power, and government policy such as that relating to foreign takeovers and industrial democratization. Trusts law can never be fully comprehended unless emphasis is given to how trusts have been utilized for intergenerational capital preservation, and more recently for tax avoidance. Industrial law must be viewed against background factors such as history (the employer-worker conflict), the economy (as it affects capital substitution, job security etc.), and the mechanics of dispute resolution. Similarly, Australian constitutional law: its evolution can never be fully explained in conceptual terms, and reference must be made to political factors. For instance, the High Court has always been dominated by judges with conservative political beliefs deriving from their social background and their many years at the bar working mainly in the commercial area. Appreciating this background enables a better understanding of aspects of constitutional law, such as the interpretation of section 92. ... The standpoint from which a subject is taught also varies depending on the nature of the problem: thus the context of consumer law is the ordinary person in the street; that for constitutional law, the political system; and that for international law, the world order. Much relevant research has already been done by psychologists, sociologists, political scientists and economists and only needs to be integrated with the legal rules (Cranston: 1978, 64).

The English law and society movement was applied to legal curriculum most famously at Warwick, (Wilson: 1995). In Australia it had impact most notably in the curriculums of Monash, UNSW and Macquarie. UNSW and Macquarie's approach also influenced by an emphasis on small group interactive and student-centred learning, which reinforced a critical or law-and-society stance in the classroom.

By 1986 broader social perspectives had become mainstream, with the Pearce Committee review of Australian law schools stating:

*1.53 Interdisciplinary understanding.* An important aspect of this evaluative and critical work in law involves seeing law, legal institutions and legal processes from an interdisciplinary perspective, examining the role of law in contrast to other means of social control, evaluating the effectiveness of legal institutions and methods and considering proposals and alternatives in the light of insights from other fields. Hence the conviction has become widespread that law students should have exposure to other fields, particularly in the social sciences and humanities. Some areas commonly have been seen as more important than others, for example history, philosophy including moral philosophy, economics, political science, psychology, sociology and anthropology. More recently, some areas of the physical and biological sciences have seemed of greater relevance, in part because of the issues of ethics and regulation which their discoveries raise. Many fields which overlap with law vocationally or which open up a range of occupations have also come to be combined with law quite commonly (eg accounting) but some do not provide the same intellectual perspectives as the studies in the social sciences and humanities listed. Nevertheless there are answers required of lawyers which the social sciences may not provide. The social sciences may not provide answers to questions on social or economic

policy nor, of course, on matters of ethics and justice. Legal education is concerned with the development of perspectives on the range of considerations to be taken into account in reaching a judgment and with devising a needed answer or program of action (Pearce et al: 1987)

This finding was said to have had a significant impact on Australian law schools generally, and led to more emphasis on theoretical and critical analysis in the curriculum (McInnes and Marginson: 1994). Socio-legal studies remain a vital part of legal research in Australia and frequently a basis for teaching legal issues.

While law in context was now mainstream the Pearce Committee was controversially much more critical of the emerging **Critical Legal Studies** approach (James: 2000). In the US the Law and Society movement had suffered a severe fracture with younger more radical academics breaking off to form what became known as the Critical Legal Studies movement. This movement was strongly centred on re-design of the law curriculum as a fundamental critique of legal doctrine and society (Kennedy: 2004). Critical Legal Studies was never a unified theory, but had some key themes. One was the rejection of the Realist's belief that bias in the legal system could be alleviated by scientific analysis. Instead they argued that law was overwhelmingly political, and that legal doctrines should be deconstructed to reveal the political realities behind a neutral façade. There was a strong emphasis demonstrating that objective meaning was impossible. Marxism and postmodernism were strong influences (Turley: 1987). Some of the most enduring legacies of CLS are in the approaches to teaching it encouraged. CLS emphasised exposing students to the full range of rhetorical techniques and policy positions that could be taken on an issue and then critiquing a court's approach in light of these (Gordon: 1989).

At the same time significant re-conceptualisations of law were also being developed by critical race theorists, feminists, law and economics, law and literature scholars and others. These more focussed perspectives largely subsumed the CLS movement. Such approaches remain vibrant areas of research and teaching in law schools. Critical Legal Studies had a major influence at Macquarie and La Trobe. More generally, Australian academics, feeling somewhat distant from the northern hemisphere, tended to pick and choose amongst theories. Thus, a student in any university was likely to be exposed to feminist theory, race theory, critical legal studies, positivism and various forms of deconstruction, postmodernist or otherwise, during a degree, and this continues to be true today. Three of these perspectives are outlined below.

Rather than seeing law as an autonomous system in itself **law and economics** scholars argue that law has validity to the extent that it conforms to broader economic principles. As such the organising principles lie outside, rather than inside law. The most well known form of this movement is the neo-classical approach identified with Chicago law school that seeks to make laws more efficient by the use of microeconomic principles to evaluate the appropriateness of laws. But the movement is broader than this and applies different economic models in different ways. Factors such as rational choice, individual maximization models, social norms, and other 'regulators' of



behaviour are all part of the economic analysis of law. In its broader sense it has become an influential jurisprudential model in the US (Mercurio: 2009). While some teach a straightforward economic efficiency analysis of law others emphasise:

not only an understanding of microeconomic techniques and their application to legal questions, but also a critical perspective that is sensitive to the problems of normative bias and subjectivity inherent in the use of those techniques (Crespi: 1994).

**Feminist** scholars argue that law has been overwhelmingly developed from a male perspective and abstracted in such a way that much necessary context has been removed. As Naffine explains:

Often missing from the legal understanding of life, they maintain, are significant aspects of experience. Pregnancy and childbirth, disease and aging, the dependency of all persons at some stage of their lives, and the consequent need for others to care for them, indeed, the essentially social and relational nature of all human beings, have performed but a minor part in shaping our liberal legal culture. ... By insisting that law is a social life form, with a particular set of governing conventions, it has been possible to drag everything out into the open. Feminists have therefore refused to accept the orthodox liberal argument that some parts of life with which law deals - the supposedly private, the natural, the sexual, the biological – are simply not the responsibility of law. (Naffine: 2002)

Within the law curriculum feminist scholars argue not only for the examination of areas where women are directly discriminated against such as domestic violence and the workplace. They have also questioned the indirect discrimination inherent in the supposed neutrality of abstracted doctrines of property, contract and tort law etc (Lacey:2004).

Feminist legal theories also provide a unique approach to contextualising law:

[F]eminist legal theories do not merely seek to rationalise legal practices; nor, conversely, do they typically engage in entirely external critique and prescription. Rather, they aspire to produce a critical interpretation of legal practices: an account which at once takes seriously the legal point of view yet which subjects that point of view to critical scrutiny on the basis of both its own professed values and a range of other ethical and political commitments.(Lacey: 2004)

Feminist perspectives are strongly interdisciplinary, and seek to question all assumptions underlying legal doctrine and practice. In Australia the 1980's saw the emergence of elective subjects on feminist concerns with a key text being Graycar and Morgan's *The Hidden Gender of Law* (1990). In 1996 a government funded project worked to create a set of teaching materials to assist the inclusion of feminist perspectives into the core legal curriculum (Work and Violence Themes: Including Gender Issues in The Core Law Curriculum – accessible at <http://pandora.nla.gov.au/tep/10029>).

**Critical race theory** in the US grew out of the civil rights movement and the history of black slavery and racism. It argues that the legal system reflects the dominant interests of society which is pervasively racist (Watson: 2005).

In Australia the concerns have largely focussed around **multiculturalism** and **indigenous** issues. Advocates argue that the Australian legal system overwhelmingly assumes a white Anglo-Saxon, English speaking subject and is blind to the experiences of other cultures. They seek to make clear the racist assumptions of Australia's legal history, and the implicit racism of current approaches to law. The negative impact of colonialism on indigenous societies is also highlighted. There is a need for the Australian legal system to accommodate other approaches to law – whether indigenous, cultural or religious, and to recognise that Australia is currently a multicultural society governed by a mono-cultural framework. Scholars arguing for recognition of indigenous perspectives argue:

[L]imited critical analysis has been given to the relationship between colonised peoples and Western values, beliefs, laws and institutions. Notions of legal neutrality, legal positivism, formal equality, and legal objectivity have failed to reflect Indigenous peoples' conditions of substantive social, political, and economic inequality and marginality. Western claims to absolute sovereignty have undermined the legitimacy of the laws of colonized peoples—which are often characterized as partial, incomplete, and customary ... The imposition of Western values and beliefs... have largely ignored differences due to race, culture and gender, and further undermined Indigenous approaches to healing, health and wellbeing ... Indeed transplanting and applying Western laws, values, and beliefs to colonial peoples were a key part of the process of empire building, a process that continues to have exploitative consequences today. (Cunneen and Rowe: 2013)

There are of course many more perspectives than these. As the notes to the TLO mention, possible perspectives include those of: social justice; cultural and linguistic diversity; the commercial or business environment; globalisation; public policy; moral contexts; and issues of sustainability. Others include historical and political perspectives. All of these perspectives can be found in academic legal writing and can be used in teaching.

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- Mercuro, Nicholas, 'The Jurisprudential Niche Occupied by Law and Economics' (2009) 2 *The Journal Jurisprudence* 61
- Naffine, Ngaire 'In Praise of Legal Feminism', (2002) 22 *Legal Studies* 71
- Morss, John, 'Part of the Problem or Part of the Solution? Legal Positivism and Legal Education' (2008) 18 *Legal Education Review* 55
- Pearce, Dennis, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987)
- Selznick, Philip, "'Law in Context" Revisited' (2003) 30 *Journal of Law and Society* 177
- Singer, Joseph, 'Legal Realism Now' (1988) 76 *California Law Review* 465



Sullivan, William, Anne Colby, Judith Wegner, Lloyd Bond and Lee Shulman, *Educating Lawyers: Preparation for the Profession of Law* (John Wiley & Sons, 2007)

Turley, Jonathan, 'A Hitchhikers guide to CLS, Unger and Deep Thought' (1986-1987) 81 *Northwestern University Law Review* 593

Twining, William *Law in Context: Enlarging a Discipline* (Oxford University Press, 1997)

Unger, Roberto, 'The Critical Legal Studies Movement' (1982-1983) 96 *Harvard Law Review* 562

Wallace, Jude and John Fiocco, 'Recent Criticisms of Formalism in Legal Theory and Legal Education' (1980) 7 *Adelaide Law Review* 309

Wilson, Geoffrey (ed), *Frontiers of Legal Scholarship: Twenty-five Years of Warwick Law School* (John Wiley and Sons, 1995)

## Key contexts relevant to legal issues

Following are some brief introductions to the possible ways in which broader contexts can enrich the study of legal issues. Providing students with multiple, and conflicting, perspectives on issues can also help to demonstrate the implications of each perspective.

### **Commercial/Business**

Law can be analysed in terms of how it affects the operation of business, and the commercial practicalities of regulatory schemes. Students can be asked to determine if these effects are desirable, and can assess them against the professed intentions of regulatory schemes. Students can be asked to consider how best to advise commercial clients.

### **Cultural and linguistic**

Australia is not a mono-cultural society, and many people have English as a second language or have difficulties understanding complex legal language. Students can be asked to try to see law from the perspectives of those with different cultural and linguistic backgrounds to their own, to analyse how different cultural traditions interpret and use law. The cultural assumptions of law can be examined and any disconnects with lived experience exposed. Students can be asked to consider how to advise clients from different cultural backgrounds.

### **Disability and impairment**

Law's assumption of the reasonable person often overlooks those with physical and mental impairments. Students can be asked to consider how law may impact on those with disability and impairment. Legal attempts to overcome discrimination can be critically assessed from the perspective of those for whom the laws were developed.

## **Economics**

Law can be analysed using different economic theories to assess whether the overall benefits of law justify the costs of regulation and enforcement. Students can be asked to consider how relevant such analyses should be; whether laws can be justified if they impose significant costs on society; and on whom it is appropriate such cost should fall.

## **Environment/Sustainability**

Law can have both direct and indirect impacts on the environment. Students can be asked to consider what would be the most environmentally sustainable way to regulate activities and what the appropriate balance is between environmental and social/business needs.

## **Ethical/professional**

Ethical issues arise both in the requirements of laws and also in the way in which it is practiced. A separate *Good Practice Guide Ethics and Professional Responsibility TLO 2* deals with these issues in detail.

## **Gender**

Australian law has been overwhelmingly been written and enforced from a white male perspective. Students can be asked to consider what the assumptions and impacts of such an approach are, and what an alternative feminist construction and use of the law might look like.

## **Global/Local**

Both the form and interpretation of law differs in different parts of the world and different areas of Australia. Students can be asked to engage in a comparative analysis of law in different places, or be asked to consider what impact globalisation has had or may have on local laws. International and comparative contexts are separately listed as part of TLO 1(a).

## **History**

The common law is a product of a particular English history transplanted to Australia. The form of each piece of legislation is also intimately tied to the historical moments of its introduction and subsequent development. Students can be asked to compare the understanding of law at other points in time and to assess how the history of laws impact their structure and interpretation.

## **Indigenous**

The existence of Indigenous societies with their own legal systems prior to European settlement, and the continuation of those societies and systems, is fundamentally relevant to understanding how the Australian legal system operates. Students can be asked to compare European and indigenous understandings of law, and to assess law's impact on the original Indigenous inhabitants of Australia.

## **Law Reform**

No law is static and law is critiqued, not only from those outside of the profession, but also from within by both government and academic bodies. Law reform proposals can be used to expose students to the constant dynamic of law and to help them develop a critical perspective on current law.

## **Political**

Legislation is explicitly formed as a result of political debate, and case-law often less obviously. Students can be asked to consider which political positions were most influential in generating law and what might have been the alternative if other positions had been more influential. Students can consider if the political aims of the framers of law are realised in later interpretation and enforcement.

## **Public Policy**

The development and use of law is often directly related to broader public policy positions government and the courts seek to pursue. Students can be asked to consider those policies and alternative approaches, and whether the law advances those policies in the way policy makers envisage.

## **Sexual orientation**

Often Australian law assumes a heterosexual subject or relationship. Students can be asked to consider how the law impacts on those whose sexual orientation is different to that assumed norm. Insights from queer theory can be used to critique the construction of the legal subject.

## **Social justice**

In many ways an overarching context for the contexts above, social justice is seen by many as a necessary aim of a legal system. Questions of social justice can be used to ask students to evaluate between policy positions and enforcement approaches to law. Justice issues are discussed in more detail in the *Good Practice Guide Ethics and Professional Responsibility TLO 2*.

## **Resources for broader contextual approaches**

In teaching law in broader contexts teachers can draw on a vast range of relevant materials from scholarly publications to newspaper reports. The following lists are indicative of academic writing that aims to build links between broader contexts and legal education. These resources are organised by general or theoretical positions. Primarily the resources describe approaches that teachers might take in introducing broader contexts into the law curriculum. The resources also include a number student texts, which are noted with an asterisk. Such texts may be suitable for teaching introductory or elective subjects, or to provide additional materials for substantive law subjects. Textbooks for other subjects are listed in the following section.

### **Socio-legal approaches generally**

\*Bottomley, Stephen and Bronitt, Simon *Law in Context* (Federation Press, 4<sup>th</sup> ed, 2012)

Berard, Timothy, 'The Relevance of the Social Sciences for Legal Education' (2009) 19(1) *Legal Education Review* 189

Friedland, Steven and Hess, Gerald, *Teaching the Law School Curriculum* (Carolina Academic Press 2004)

<<http://lawteaching.org/resources/books/teachingthelawschoolcurriculum/teachingthelawschoolcurriculum.pdf>>

Gadlin, Howard, 'Contributions from the Social Sciences' (2004) 54 *Journal of Legal Education* 34

Hunter, Caroline (ed) *Integrating Socio-Legal Studies into the Law Curriculum* (Palgrave Macmillan 2012)

\*Laster, Kathy, *Law as Culture* (Federation Press)

Mertz, Elizabeth, 'Social Science and the Intellectual Apprenticeship: Moving the Scholarly Mission of Law Schools Forward' (2011) 7 *Legal Writing* 427

Stubbs, Julie, 'Teaching about Violence against Women: An Interdisciplinary Project' (1995) 6 *Legal Education Review* 229

### **Indigenous Contexts**

Anthony, Thalia, 'Embedding Specific Graduate Attributes: Cultural Awareness and Indigenous Perspectives' in *Excellence and Innovation in Legal Education*, Kift et al (eds) (LexisNexis, 2011)

Behrendt, Larissa, 'Women's Work: The Inclusion of the Voice of Aboriginal Women' (1995) 6 *Legal Education Review* 169

\*Behrendt, Larissa, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (OUP)

Brennan, Sean et al, 'Indigenous Legal Education at UNSW: A Work in Progress' (2005) 6 *Indigenous Law Review* 23

Douglas, Heather, 'Indigenous Legal Education: Looking Towards the Future' (1996) 7 *Legal Education Review* 225

Douglas, Heather, 'Towards Indigenisation' (2005) 6 *Indigenous Law Bulletin* 12

\*McRae, Heather, Garth Nettheim, Thalia Anthony, Laura Beacroft Sean Brennan, Megan Davis and Terri Janke, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters)

*Ngiya: Talk the Law – Special edition on Indigenous Legal Education* (2013) <<http://www.jumbunna.uts.edu.au/researchareas/journals/ngiya.html>>

Watson, Nicole, 'Indigenous People in Legal Education: Staring into a Mirror without Reflection' (2005) 6 *Indigenous Law Bulletin* 4

### **Feminist contexts**

Alegre, Marcela Huaita, 'Integrating Gender Into Legal Education: The Obstacles, Challenges and Possibilities' (1998-99) 7 *Journal Of Gender, Social Policy & The Law* 279

Behrendt, Larissa. 'Women's Work: The Inclusion of the Voice of Aboriginal Women' (1995) 6 *Legal Education Review* 169

\*Graycar, Regina and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002)

Gear, Anna, 'Learning Legal Reasoning While Rejecting the Oxymoronic Status of Feminist Judicial Rationalities: A View from the Law Classroom' (2012) 46 *The Law Teacher* 239

Hocking, Barbara Ann, 'Feminist Jurisprudence: The New Legal Education' (1992) 18 *Melbourne University Law Review* 727

Hunter, Rosemary, 'Introduction: Feminist Judgments as Teaching Resources' (2012) 46 *The Law Teacher* 1

Mossman, Mary Jane, 'Gender Issues in Teaching Methods: Reflections on Shifting the Paradigm' (1995) 6 *Legal Education Review* 129

Thornton, Margaret, 'Portia Lost in the Groves of Academe Wondering What to Do About Legal Education' (1991) 9 *Law in Context* 9

Thornton, Margaret, 'The Development of Feminist Jurisprudence' (1998) 9 *Legal Education Review* 171

*The Australian Feminist Judgments Project* <http://www.law.uq.edu.au/australian-feminist-judgments-project>

*Work and Violence Themes: Including Gender Issues in The Core Law Curriculum* – accessible at <http://pandora.nla.gov.au/tep/10029>

### **Critical Legal Studies**

Charlesworth, Hilary, 'Critical Legal Education' (1988–1989) 5 *Australian Journal of Law and Society* 27

Frug, Gerald, 'A Critical Theory of Law' (1989) 1 *Legal Education Review* 43

Gordon, Robert, 'Critical Legal Studies as a Teaching Method, against the Background of the Intellectual Politics of Modern Legal Education in the United States' (1989) 1 *Legal Education Review* 59

McQueen, Rob, 'Is There a Critical Legal Studies Movement in Australia? Innovation in Australian Legal Education after the Pearce Report' (1990) 2 *Culture and Policy* 3

### **Cross Cultural and Global viewpoints**

Ali, Shaheen Sardar, 'Teaching and Learning Islamic Law in a Globalized World: Some Reflections and Perspectives' (2011-2012) 61 *Journal of Legal Education* 206

O'Donnell, Anthony, 'Thinking "Culture" in Legal Education' (1996) 7 *Legal Education Review* 135

Wenzler, Hariolf and Kwietniewska, Kasia, 'Educating the Global Lawyer: The German Experience' (2011-2012) 61 *Journal of Legal Education* 463

Zamora, Stephen, 'The Cultural Context of International Legal Cooperation' (2001) 51 *Journal of Legal Education* 462

### **Law and Economics**

Cooper, Graeme, 'Inevitability and Use' (1989) 1 *Legal Education Review* 29

Crespi, Gregory, 'Teaching the New Law and Economics' (1994) 25 *University of Toledo Law Review* 713

Easterbrook, Frank H, 'The Inevitability of Law and Economics' (1989) 1 *Legal Education Review* 3

Ulen, Thomas, 'Crowded House: Socioeconomics (and Other) Additions to the Law School and Law and Economics Curricula' (2004) 41 *San Diego Law Review* 54

### **Critical race theory**

Calmore, John 'Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations'(1996-1997) 31 *University of San Francisco Law Review* 903

Culp, Jerome, 'Toward a Black Legal Scholarship: Race and Original Understandings' [1991] *Duke Law Journal* 39

### **Subject specific resources**

In addition to materials that focus on broader contexts across the curriculum, there are resources that focus on introducing broader contexts into particular subject areas. Again, there are both case studies of subjects in the law curriculum taught in context, and also some student texts (asterisked).

### **Law across subjects**

*Law in Context* series (Cambridge University Press) includes titles on a range of subjects.

### **Corporate and business law**

Gerber, Paula, 'The Teaching of Construction Law and the Practice of Construction Law: Never the Twain Shall Meet' (2010) 20 *Legal Education Review* 59

Hall, Katherine, 'Theory, Gender and Corporate Law' (1998) 9 *Legal Education Review* 31

Kingsford Smith, Dimity, 'Studying Modern Corporations Law in Context' (1999) 33 *The Law Teacher* 196

Nagarajan, Vijaya, 'Designing Learning Strategies for Competition Law - Finding a Place for Context and Problem Based Learning' (2002) 13 *Legal Education Review* 18

Tomasic, Roman, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press)

### **Criminal law and process**

\*Bronitt, Simon and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters)

\*Brown, David, et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW* (Federation Press)

Dubber, Markus D, 'Criminal Law in Comparative Context' (2006) 56 *Journal of Legal Education* 433

\*Findlay, Mark *Criminal Law: Problems in Context* (OUP)

Fradella, Henry, 'Integrating the Study of Sexuality into the Core Law School Curriculum: Suggestions for Substantive Criminal Law Courses' (2007) 57 *Journal of Legal Education* 67

\*Gans, Jeremy, et al, *Criminal Process and Human Rights* (Federation Press)

### **Dispute Resolution**

Menkel-Meadow, Carrie, 'From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context' (2004) 54 *Journal of Legal Education* 7



### **Environment and Sustainability**

\*Godden, Lee and Jacqueline Peel, *Environmental Law: Scientific, Policy And Regulatory Dimensions* (OUP)

Carruthers, Penny, Sharon Mascher and Natalie Skead (eds), *Property and Sustainability: Selected Essays* (Lawbook Co, 2011)

### **Evidence**

Biber, Katherine, 'Fact-Finding, Proof and Indigenous Knowledge: Teaching Evidence in Australia' (2010) 35 *Alternative Law Journal* 208

### **Family Law**

\*Fehlberg, Belinda; Behrens, Juliet, *Australian Family Law: The Contemporary Context* (OUP)

Parashar, Archana, 'Teaching Family Law as Feminist Critique of Law' (2000) 23 *University of New South Wales Law Journal* 58

\*Young, L, et al, *Family Law in Australia* (LexisNexis)

### **Foundations subjects**

\*James, Nick, *Critical Legal Thinking* (Pearson, 3rd ed, 2011)

\*Vines, Prue, *Law and Justice in Australia* (OUP)

Ward, Helen, 'The Adequacy of Their Attention: Gender-Bias and the Incorporation of Feminist Perspectives in the Australian Introductory Law Subject' (2000) 11 *Legal Education Review* 1

### **Intellectual Property**

\*Bowrey, Kathy, Michael Handler and Dianne Nicol, *Australian Intellectual Property* (OUP)

### **International law**

\*McBeth, Adam, Justine Nolan and Simon Rice, *The International Law of Human Rights* (OUP)

Orford, Anne, 'Citizenship, Sovereignty and Globalisation: Teaching International Law in the Post-Soviet Era' (1995) 6 *Legal Education Review* 251

Otto, Dianne, 'Integrating Questions of Gender into Discussion of "the Use of Force" in the International Law Curriculum' (1995) 6 *Legal Education Review* 219

### **Human Rights**

O'Neill, Nick, Simon Rice and Roger Douglas, *Retreat from Injustice: Human rights Law in Australia* (Federation Press)

### **Labour law**

Bennett, Laura, 'Gender in the Labour Law and Occupational Health and Safety Law Curriculum' (1995) 6 *Legal Education Review* 175

Bisom-Rapp, Susan, 'Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law' (1994) 44 *Journal of Legal Education* 366

Owens, Rosemary, 'Work and Gender in the Law Curriculum' (1995) 6 *Legal Education Review* 183

\*Owens, Rosemary, Joellen Riley and Jill Murray, *The Law of Work* (OUP)

Reilly, Amanda, 'Shedding Light at the Coalface: The Use of Socio-Legal Material in Labour Law Teaching' (2011) 21 *Legal Education Review* 123

### **Property, Equity and Trusts**

Auchmuty, Rosemary, 'Using Feminist Judgments in the Property Law Classroom' (2012) 46 *The Law Teacher* 227

Castan, Melissa and Jennifer Schultz, 'Teaching Native Title' (1997) *Legal Education Review* 75

Graham, Nicole, 'Indigenous Property Matters in Real Property Courses at Australian Universities' (2009) 19 *Legal Education Review* 289

Green, Kate "'There Once Was an Ugly Duckling: Land Law in 1985' (1985) 19 *The Law Teacher* 65

\*Mackie, Ken, Elise Histed and John Page, *Australian Land Law in Context* (Oxford, 2012)

O'Donnell, Anthony and Johnstone, Richard, 'Equity' in *Developing A Cross-Cultural Law Curriculum* (Cavendish, 1997)

O'Donnell, Anthony and Richard Johnstone, 'Property' in *Developing A Cross-Cultural Law Curriculum* (Cavendish 1997)

Sarmas, Lisa, 'Uncovering Issues of Sexual Violence in Equity and Trusts Law' (1995) 6 *Legal Education Review* 207

Spender, Peta, 'Women and the Epistemology of Corporations Law' (1995) 6 *Legal Education Review* 195

Warrington, Ronnie, 'Land Law and Legal Education: Is There any Justice or Morality in Blackacre?' (1984) 18 *The Law Teacher* 77

### **Public, Constitutional and Administrative law**

\*Head, Michael, *Administrative Law - Context and critique* (Federation Press)

Head, Michael, 'Deep Learning and Topical Issues in Teaching Administrative Law' (2007) 17 *Legal Education Review* 159

Reilly, Alexander, 'Finding an Indigenous Perspective in Administrative Law' (2009) 19(2) *Legal Education Review* 271

\*Reilly, Alexander, Gabrielle Appleby, Laura Grenfell and Wendy Lacey, *Australian Public Law* (OUP)

Rubenstein, Kim, 'Citizenship and Gender in the Public Law Curriculum: Reclaiming Political Stories and Context' (1995) 6 *Legal Education Review* 241

### **Tax**

Brennen, David A, 'Race and Equality Across the Law School Curriculum: The Law of Tax Exemption' (2004) 54 *Journal of Legal Education* 336

### **Theory**

\*Davies, Margaret, *Asking the Law Question* (Thomson Reuters)

Hunter, Caroline and Fitzpatrick, Ben, 'Feminist Judging and Legal Theory' (2012) 46 *The Law Teacher* 255

\*Leiboff, Marett and Mark Thomas, *Legal Theories, Context and Practice* (LexisNexis)

Seuffert, Nan, 'Feminist Epistemologies and a Law-in-Context Jurisprudence Course: A New Zealand Experience' (1995) 6 *Legal Education Review* 153

### **Torts**

O'Donnell, Anthony and Richard Johnstone, 'Torts' in *Developing A Cross-Cultural Law Curriculum* (Cavendish 1997)



Sebok, Anthony, 'Using Comparative Tort Materials to Teach First-Year Torts'  
(2007) 57 *Journal of Legal Education* 569

## Part 2: Summary of key points

The development of broader academic understandings of the teaching of law is a relatively new discipline – only emerging in England and Australia in the 1960's despite its longer history in the United States. That development has been marked by a move away from seeing legal education as merely the need to learn the 'rules' of legal analysis to a broader incorporation of the insights of other disciplines and theoretical perspectives.

A range of different theoretical and disciplinary approaches to contextualising law have developed over the last century. Many of these approaches have been adopted by Australian legal academics and there is a range of literature that demonstrates how it can be used both across a curriculum and in individual subjects.

Despite the encouragement of the 'Priestley 11' content requirements to see the law curriculum as a series of discrete doctrinal categories, Australian law schools have in recent decades increasingly adopted a variety of contextual approaches to teaching law. This has been supported by government reviews, discipline standards, and university policies. However the extent to which broader contexts are systematically embedded within law programs probably varies from school to school, and from subject to subject.

The range of contexts available underscores the need for law schools and individual teachers to make choices about which contexts are most appropriate for their purposes. The requirement of TLO 1 that students gain a coherent body of knowledge suggests that it would be best that schools develop an overall approach to the way broader contexts are used in the curriculum.

## Part 3: Further work

Nick Johnson notes:

[W]e are all contextualists now. All of us excise, appropriate and mix materials of different origin and tenor to elaborate and explain our arguments to students. Its half the fun of teaching. We shift in our analysis to different levels with the students hopefully hanging on to our coat tails. We often accommodate radically different approaches to the same object of study, suspending disbelief in the cause and pursuit of knowledge.

Some of the mixes produce a smooth and interesting amalgam, some curdle. Ultimately the central tenets of legal positivism are antithetical to contextualism and CLS. The pure black letter tort lawyer who then expounds the economic basis of tort law is either engaging in a contradiction or entering a wholly different discourse. Conversely, the contextualist who uses rigorously the tools of black letter law—case analysis, statutory interpretation—can do so without intellectual conflict. The exposition of what the law actually is, is not precluded by contextualism. Determining what the law actually is is a necessary prerequisite to understanding its role in society (Johnson: 2006)

This collection of resources on teaching law in broader contexts underscores the wealth of socio-legal research and research from other disciplines that is available to enrich the learning of law. It is also clear that there is much that can usefully be written on the successes and failures of contextual approaches to teaching law. We could all be encouraged to use the discipline of publication to reflect on the justifications and achievements of our approaches to teaching, and how to avoid 'curdle'.

While there are many case studies reflecting on particular practices in teaching law in a variety of contexts, there are fewer student materials, particularly for compulsory subjects, that offer subject specific knowledge within context. In many ways the broader adoption of contextual approaches to teaching law will be driven by the availability of student textbooks that contain significant contextual material as well as case-law.

Further, there is a need for the development of materials for law teachers that expressly provide frameworks for developing curricula adopting a theme (or a context). While particular case studies of themselves offer inspiration, it is possible that a broader and more generalised framework could assist curriculum development in this area.