A BRIEF HISTORY OF CRITIQUE IN AUSTRALIAN LEGAL EDUCATION

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[For much of its history, Australian legal education has been dominated by doctrinal approaches to the teaching of law. Initially, legal education in Australia was little more than the uncritical transmission of legal doctrine by legal practitioners. It was not until the post-World War II emergence of the professional law teacher in Australia that a more scholarly approach was taken to the teaching of law. It took the influence of radicalism, feminism and the Critical Legal Studies movement in the 1970s and 1980s for legal critique to be taught in the law school. Resistance to trends within legal education perceived by some to be too radical meant that the decision to include legal critique in the curriculum was often a controversial one, and that the growth of legal critique in Australian legal education was generally slow. In the past decade, critique has flourished in Australian legal scholarship, and mainstream legal education scholars have increasingly called for a greater emphasis on legal critique in the teaching of law. However, while many law schools have adopted teaching policies and programs which appear to encourage legal critique, it is still given a relatively low priority, and the present trend appears to be for legal education to become more practical rather than more critical. In the year 2000 legal critique remains an underemphasised and marginalised approach to the teaching of law in Australia.]

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I INTRODUCTION

I do not have fond memories of my time as an undergraduate law student. I recall many long hours struggling to understand and to commit to memory vast quantities of legal doctrine. I might occasionally have smiled slightly at some witticism scribbled by another student in the margin of a particularly dull case report, but otherwise, my expression for five years was a bored pout. I knew people who were excited or passionate about the subject matter of their study, but to me, it all seemed so dry, so technical, and so irrelevant.

It was not until I commenced my postgraduate studies that I discovered an approach to law that was of genuine interest to me: critique. Finally, the discipline of law came to life. Critique excited my attitude and invigorated my intelligence. It painted a picture of the law not as a body of dead rules, but as a

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political mechanism, a social phenomenon, an imperfect regime. Critique placed
the law into a context, and connected the law to a higher reality. Critique dared to
mock the law’s self-righteousness.

Why had I remained oblivious to this perspective for so long? Why had I spent
so many years studying legal doctrine, and so little time engaging in legal
critique? I had completed the obligatory Jurisprudence course, but at the time it
had seemed to be nothing more than obscure and irrelevant theorising. It was
understood amongst my fellow students that it was a subject that was to be
painfully endured and quickly forgotten. If only legal critique had been revealed
to me sooner; if only I had been encouraged to take it more seriously, to give it
the importance that it deserved, an importance that it was so rarely accorded in
undergraduate programs.

In this paper I trace the story of legal critique in Australian legal education, and
assess the status of legal critique today. I conclude that, in the year 2000, while
many law schools are finally beginning to recognise and accept its importance,
legal critique remains a marginalised and underemphasised approach to the
teaching of law.

The story of legal critique is only one aspect of the ongoing development of
legal education in Australia, but it is a distinctive and crucial one. Two things
become apparent upon consideration of legal critique in its historical context.
The first is that there are as many understandings of the meaning and purpose of
legal critique as there are participants in the story. The second is that opinions
vary markedly: some teachers would like to see legal critique become an im-
portant component of legal education, while others would like to see it dominate,
or even disrupt; others still would prefer that it not be present at all.

II COLONIAL LEGAL EDUCATION

Until the latter half of the 19th century aspiring lawyers in Australia were
trained by more experienced practitioners in accordance with the apprenticeship
model imported from England. Colonial legal education was limited to on-the-job
training, with the consequence that legal knowledge was relatively narrow, and
primarily practical; theoretical development of the discipline was minimal.
Eventually, concern within the community about the ability, competence and
respectability of the colonial lawyers (some of whom were former convicts) led
to a recognition of the need to improve the image of the profession, and steps
were taken to shift responsibility for professional legal education from the
profession itself to the universities.1

The first law school in Australia was established at the University of Sydney in
1855.2 The decision to install professional legal education as a discipline within

1 See, eg, Linda Martin, ‘From Apprenticeship to Law School: A Social History of Legal
Education in Nineteenth Century New South Wales’ (1986) 9 University of New South Wales
Law Journal 111.
2 Dennis Pearce, Enid Campbell and Don Harding, Australian Law Schools: A Discipline
the academy was a controversial one. Many scholars viewed law as a practical vocation rather than as an academic discipline. Nevertheless, the political power of the profession was sufficient to overcome any resistance, and ensured that its desire to see law taught in Australian universities was implemented. Law schools were subsequently established at the University of Melbourne in 1857, the University of Adelaide in 1883, the University of Tasmania in 1893, the University of Western Australia in 1927, and the University of Queensland in 1935.

The approach of the first Australian law schools to teaching law was strictly formalist and doctrinal. Legal education was little more than ‘the imparting of information in the form of legal principles, rules and propositions … to be committed to memory for examination purposes’. The legal profession controlled both the content of the curriculum and its teaching. Further, law teachers were usually practitioners appointed to the university on a part-time basis, and lectures were generally given in the evenings to students who were studying part-time whilst completing articles.

The existence of the law school within the academy was grudgingly accepted as a reality by other scholars, but the discipline was accorded a relatively low status, and the law schools were perceived as mere ‘adjuncts to the profession rather than truly academic institutions’.

III POST-WORLD WAR II: THE PROFESSIONAL LAW TEACHER AND THE SCIENCE OF LAW

After World War II the academic status of Australian legal education began to improve. The approaches and practices of the profession at that time were perceived by the Australian government as lagging behind those in directly comparable countries, and changes to university legal education were made as a means of ‘modernising’ the legal profession. Part-time teaching by practitioners in law schools was discouraged, and the number of full-time legal academics

3 See Martin, above n 1, 127–8.
4 The discipline of law has actually been a part of the university for as long as there have been universities: it is one of the founding disciplines. It was first taught at the University of Bologna in Italy in the 12th century, and was later taught in England at the Universities of Oxford and Cambridge. The first law schools, however, taught law as a liberal art; legal education within the university had nothing to do with training for legal practice. Rather, the focus was on Roman law, canon law and jurisprudence. See, eg, Helene Wieruszowski, The Medieval University: Masters, Students, Learning (1966) 62–73.
6 Ibid 80.
7 Ibid 83.
8 Ibid 90.
9 Ibid 103.
11 Pearce, Campbell and Harding, above n 2, vol 1, 3.
was increased significantly. This led to the emergence of the ‘professional law teacher’, and to a concerted endeavour to adopt a more scholarly approach to the teaching of law.14 With the existence of larger numbers of full-time legal academics, other scholars began to accord the discipline a greater level of academic credibility.15

The new full-time law teachers in Australia marginalised, and eventually excluded, the contributions of legal practitioners. Professional law teachers created their own uniqueness and justified their own existence by emphasising their distinctive ways of thinking about and teaching law as a scientific and rigorous academic discipline.16 Australian law schools embraced legal scientism or the ‘law as science’ approach that had been developed in the United States nearly three quarters of a century earlier. This new approach to teaching law de-emphasised the connections with legal practice and, at the same, time maintained the separation of law from other disciplines in the university. The taking of a scientific approach to teaching law involved dividing the law into discrete conceptual fields, each with its own set of principles, while excluding questions of social policy, politics and the use of non-legal data. Law was taught as ‘a system of rules … ordered logically within an internally consistent, hermetically sealed legal universe’.17 There was no need to look beyond the confines of legal doctrine to understand law and its operation. Legal scientism thus served to enhance and protect the discipline’s new found academic credibility.

In the United States legal scientism had been criticised, and significantly modified, by the Legal Realist movement. The Legal Realists were a disparate group of teachers and scholars of the 1920s and 1930s who espoused a critical and relativistic approach to the study and teaching of law.18 Their tenets were threefold. They argued first that law was not a science, and that legal rules were not objective and value free. Second, they demonstrated the ways in which law and legal knowledge were politically constructed. Finally, they pointed to the malleability of the language of law and the circularity of traditional legal reasoning, and emphasised the role of policy choices rather than rules in judicial

14 Margaret Thornton, ‘Portia Lost in the Groves of Academe Wondering What to Do about Legal Education’ (1991) 9(2) Law in Context 9, 10.
15 According to Schlegel, the acceptance of many modern disciplines into universities has followed a similar pattern:

Each group began by staking out part of the intellectual world as its ‘turf’, adopting a particular way of looking at that turf, a method as it were, and moving to cut out the ‘amateurs’ who formerly had a claim to that turf. Finally they justified those activities by pointing to the ‘mission’ of the discipline. Such is the process of academic professionalization …

17 Le Brun and Johnstone, above n 16, 8.
decisions. However, no comparable movement occurred in Australia, either contemporaneously or subsequently. At the time, unlike their counterparts in the United States, Australian law schools did not have full-time complements of staff, and were still closely controlled by the profession. Consequently, students were still being taught legal doctrine and little else. Even with the new generation of professional law teachers, legal critique remained relatively rare; indeed, any suggestion that the scientific approach might be deficient was regarded as ‘deeply subversive’. It was not until the influence of radicalism, feminism and the Critical Legal Studies (‘CLS’) movement in the 1960s and 1970s that the dominance of legal doctrinalism and scientism in Australian legal education began to be subverted.


The political conservatism within most Australian law schools in the first half of the 20th century certainly did not reflect the wider political landscape. There had been a tradition of criticism of orthodoxy and subversion of dominance within Australian politics for some time. Trade unions had been a force calling for changes to the workplace since the 1880s; labour parties were established in the various States during the 1890s to provide a political voice for the workers; and the Communist Party of Australia was established in the 1920s. During the 1970s this critical tradition began to influence the teaching of law within Australian law schools. Many teachers began to explore alternative politics, and to question orthodox approaches to teaching. Some publicly associated themselves with politically radical causes, including left-wing political parties, prisoners’ rights movements and community-based legal centres. Within the newer law schools in particular, the traditional approaches to legal education were openly criticised by Marxists and other political radicals.

The feminist movement also began to influence some Australian law schools in the setting of their curriculum. Elective subjects such as ‘Women and the Law’ and ‘Sex Discrimination’ were offered; both sought to teach women’s perspectives on the law. While acknowledged as a step in the right direction, these
subjects were subsequently criticised by feminist scholars because they reinforced the perception that ‘women’s issues’ were appropriately taught in specialist elective subjects, and ignored the consequences of those issues for the mainstream legal curriculum.\textsuperscript{25} By the late 1970s, however, a uniquely feminist legal scholarship had begun to develop. This scholarship was described as being derived from female experience and as presenting a point of view contrary to the dominant male perception.\textsuperscript{26} Feminist legal scholars claimed that masculine legal scholarship failed to acknowledge or respond to the values, fears and harms experienced by women.\textsuperscript{27} They analysed a wide range of issues — including ‘black letter doctrines’ — from feminist viewpoints.\textsuperscript{28} Feminist law teachers began to exert pressure on law schools to introduce feminist perspectives into the compulsory core of the curriculum. However, the disproportionately low number of female law teachers and the inherently conservative nature of the discipline meant that this project initially met with little success.

Other radicals in Australian law schools openly declared support for the CLS movement. The CLS movement originated in the United States in the late 1970s.\textsuperscript{29} At the time, an extremely diluted form of Legal Realism dominated American legal education. CLS scholars rediscovered the more controversial and critical insights of the Legal Realists, and built on them.\textsuperscript{30} They accepted the insight of the Legal Realists that legal decisions were a matter of choice rather than the inevitable conclusions of abstract rules. Nonetheless, they rejected the Realists’ belief in the possibility of a legal science founded in the analysis of ‘policy’, and instead argued that law and legal systems could never be ‘objective’ or ‘scientific’. They argued that law was a constructed system of beliefs and meanings — in the same way that politics and religion are — that operates to make inequalities of wealth and privilege appear natural.\textsuperscript{31}

In Australia in 1978 the Critique of Law Editorial Collective published a book entitled \textit{Critique of Law},\textsuperscript{32} one of the principal themes of which was the explora-


\textsuperscript{28} Graycar and Morgan, above n 25, 9.


\textsuperscript{31} Charlesworth, ‘New Directions in Legal Theory’, above n 29, 248. According to Charlesworth, the CLS movement in fact embraced a range of sometimes contradictory concerns and theories and did not offer a single, homogeneous philosophy of law: at 249.

tion of alternatives to the orthodox approach to teaching law in Australia.\textsuperscript{33} The Macquarie Law School and the Department of Legal Studies at La Trobe University developed non-orthodox programs of legal education.\textsuperscript{34} Some of the more progressive teachers in other law schools called for the insights of the CLS movement to be incorporated into the law curriculum.

Political theorists and sociologists within universities had been critiquing the law for decades, but the question of whether or not it was appropriate for law teachers to criticise legal rules and institutions was a novel one in Australia. Some endorsed this new role. According to Gordon Samuels, a New South Wales Supreme Court judge and university chancellor:

\begin{quote}
[\textit{A}cademics … have increasingly assumed the character of social conscience to the profession and the judiciary. It is a role for which they are well cast, since they are neither influenced by professional self-interest nor trammelled by professional responsibility. Academics are no more immune than others from eventual intellectual sclerosis; but their work keeps them aware of the wider ranging currents of legal thought and experiment, and they are constantly exposed to the irreverent reactions of students first encountering the more opaque areas of the law. So their contribution ought to be a generally critical one.}\textsuperscript{35}
\end{quote}

Others less supportive of this new critical movement argued that:

\begin{quote}
In the whole of Australia … there are only one or two academic teachers of any real value in real property, in contracts or in torts; yet there are about seventeen law schools. … There are, to be sure, multitudes of academic homunculi who scribble and prattle relentlessly about such non-subjects as criminology, bail, poverty, consumerism, computers and racism. These may be dismissed from calculation: they possess neither practical skills nor legal learning. They are failed sociologists.\textsuperscript{36}
\end{quote}

The CLS movement also had opponents in the United States. In the controversial 1984 article, ‘Of Law and the River’, Paul Carrington, the Dean of Duke University Law School, argued that the radical questioning of the legal order by the CLS movement and its loss of romantic innocence and faith in the idea of law and its institutions meant that its proponents had ‘an ethical duty to depart the Law School’.\textsuperscript{37} Carrington even suggested that the cynicism of CLS could result in students learning the ‘the skills of corruption: bribery and intimidation’.\textsuperscript{38}

\textsuperscript{33} McQueen, above n 21, 3–4.
\textsuperscript{34} Ibid 4.
\textsuperscript{35} Justice Gordon Samuels, ‘Control of Admission to Practice — Its Effect on Legal Education’ in Rosemary Balmford (ed), \textit{Legal Education in Australia} (1976) vol 1, 681.
\textsuperscript{38} Ibid. There were other criticisms of CLS, both from outside and from within the movement itself. Some critics assumed that the movement was just a Marxist analysis of law by another name; others described it as obscure or ‘trivially provocative’, or dismissed it as unrealistic, idealistic and impractical. See, eg, Charlesworth, ‘New Directions in Legal Theory’, above n 29, 249; and especially Alan Hutchinson and Patrick Monahan, ‘Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought’ (1984) 36 \textit{Stanford Law Review} 199, 238; Donald Broun, ‘Serious but Not Critical’ (1986) 60 \textit{Southern California Law Review} 262; Lawrence Solum, ‘On the Indeterminacy Crisis: Critiquing Critical Dogma’
In Australia the reaction to radical movements such as CLS seems to have been even more passionate. According to one of the radicals from the University of New South Wales Law School,

[w]hat we in fact got was abuse. We were accused of putting an end to the Law School, of working against the students, of destroying the degree, subjected to personal abuse, and a scare campaign was concentrated on the students to convince them that their degrees and careers were on the verge of extinction.39

An article in the *Australian Financial Review* in 1989 argued that supporters of CLS should not be allowed to teach in law schools, because ‘it is their avowed intention not to teach law in a way that will be useful to practitioners in the actual legal system’; that CLS ‘represents the loony Left of the legal profession’; and that its advocates ‘have many of the features of a fundamentalist sect, being intolerant of democracy and willing to employ intimidation and misrepresentation.’40 In the same newspaper the Shadow Minister for Education, Julian Beale, referred to the proponents of CLS as ‘a bunch of Leninist fanatics’.41

In an article published in the *Law Society of New South Wales Journal*, Andrew Lang, a former academic, asked whether students who were taught in a particular school staffed by CLS proponents would be employable.42 His answer was a conditional ‘no’, because of ‘an abandonment of the balance in the quality and interests of the teaching staff, in favour of the theoretical (including sociological), at the expense of professionally-oriented courses and adequate coverage of substantive law.’43

A widespread critical legal education movement failed to take hold in Australia. According to Rob McQueen, this was because ‘[t]he lack of any broader purpose, even in the form of a loose national body, exposed many of the initiatives of the late 1970s to various processes of attack and/or decay.’44 Many of the more progressive academics were ‘weeded out, discriminated against, or alternatively pressured to water down unconventional aspects of their courses.’45 The Pearce Report criticised radical law teachers for what it considered were ‘unacceptable attitudes to the “legal system” and the requirements of professional training.’46


43 Ibid 47.
44 McQueen, above n 21, 4.
45 Ibid.
46 Ibid 4–5.
The publication of the Pearce Report \(^{47}\) was one of the events most influential on the form and direction of Australian legal education at the end of the 20\(^{th}\) century. The Report was commissioned in 1985 and submitted in 1987. \(^{48}\) It identified a number of problems with Australian legal education, including inertia, \(^{49}\) cause for concern about the commitment to teaching, \(^{50}\) student dissatisfaction with the intellectual calibre, \(^{51}\) a dreary program \(^{52}\) and conflicts and divisions. \(^{53}\) It went on to make a series of suggestions about reforming legal education in Australia. In relation to the role of critique in legal education, the Report noted the following:

[U]niversities are concerned to evaluate social institutions. They have an important role as the critic and the conscience of society. They are allowed a wide freedom or autonomy to protect that. A university law school is concerned to evaluate and criticise the law, legal institutions and legal processes and to ask of them "what are you good for" and to assess whether they should be changed. In educating law students, accordingly, it is desirable to cultivate a student’s intellect in a spirit of free enquiry and to encourage independent thought and enquiry about the law.\(^{54}\)

A university is not just concerned to impart knowledge to students. It is concerned with educating them to develop their intellectual skills of reasoning, independent thought, enquiry, criticism and evaluation, written and oral communication, and independent research so that they can realise their human intellectual potential, contribute to society and adapt to change. \(^{55}\)

[A] good undergraduate course should provide an 'intellectual base for life long critical reflectiveness about legal institutions, the profession and one’s own work, in the actual and changing conditions of social life and legal practice' … [L]aw courses should expose students to an understanding of the processes and functions in society of law and legal institutions, to the variety of modes of social control, to the moral and political outlooks embedded in law and concepts of professional roles, to questions of justice, to the relevance of social, political and moral theories and forces to law, legal institutions and their change and development, and to the information and understanding to be drawn

\(^{47}\) Pearce, Campbell and Harding, above n 2.

\(^{48}\) The Report covered a wide range of legal education issues, including an assessment of the quality and economic efficiency of each institution providing legal education; the suitability and feasibility of the aims of each institution; the nature and quality of undergraduate and postgraduate courses; the standards of teaching and research; staff contributions to law reform, the work of government, the profession, and the community’s welfare; the effectiveness of resource utilisation and the extent of unnecessary duplication; current deficiencies; the community requirement for graduates; and the selection and admission processes. Judith Lancaster, The Modernisation of Legal Education: A Critique of the Martin, Bowen and Pearce Reports (1993) 51.

\(^{49}\) The University of Sydney: Pearce, Campbell and Harding, above n 2, vol 1, 40.

\(^{50}\) The University of Melbourne: ibid vol 1, 216–17.

\(^{51}\) The University of Adelaide: ibid vol 1, 209.

\(^{52}\) The University of Western Australia: ibid vol 1, 229.

\(^{53}\) Macquarie University: ibid vol 3, 945.

\(^{54}\) Ibid vol 1, 21 (citation omitted).

\(^{55}\) Ibid vol 1, 22.
from the social sciences and social science research for the purpose of evaluating law.56

The first of the suggestions made in the Report about reforming legal education in Australia was ‘that all law schools examine the adequacy of their attention to theoretical and critical perspectives, including the study of law in operation and the study of the relations between law and other social forces.’57

The Report thus seemed to be strongly in favour of the inclusion of critique of law within legal education. However, despite these recommendations, the Pearce Report also indicated that ‘radical’ movements such as CLS were beyond the bounds of appropriate theoretical and critical inquiry in law schools:

The CLS movement is intimately tied to criticism of American liberalism and its influence on Australian law schools has not as yet been marked. That Movement and some of the other radical movements currently finding expression are different from earlier ‘schools’ or trends of thought critical of the law and legal institutions in that they appear to attack law schools very fundamentally. They oppose strongly efforts to educate students for careers requiring full legal qualifications. While dissent, controversy and critical thought in a university or democracy are to be expected and protected there is some concern about some of the effects on the functioning of law schools. Observations confirm the relevance of that to the Australian context.58

The Pearce Report particularly criticised the teaching of law in the Macquarie University Law School, and recommended that the School be either phased out or radically restructured. This recommendation was linked to the identification of some of the school’s staff with the CLS movement.59

The Report’s allegations regarding CLS were subsequently refuted by supporters of the movement. In an article encouraging the adoption of some of the insights of the CLS movement into Australian legal education, Hilary Charlesworth wrote:

The charge that the aims of the CLS movement are fundamentally at odds with the education of students for careers requiring full legal qualifications is based on a misunderstanding of the Critical project. The CLS movement challenges traditional forms of legal education, but it does not question the importance of legal education in training legal practitioners. Indeed, the asserted incompatibility of the CLS movement and legal education can only be sustained if the proper role of legal education is seen as simply the transmission and absorption of packages of rules.60

McQueen responded to the Report in a similar fashion:

This analysis contained in the Pearce Report of the Macquarie situation in particular, and the ‘critical legal studies’ movement more generally, seems unfortunately to confuse an attack on certain aspects of current law teaching with an

56 Ibid vol 1, 105 (citation omitted).
57 Ibid vol 1, 59.
58 Ibid vol 1, 49.
59 Ibid vol 3, 947; see also Charlesworth, ‘New Directions in Legal Theory’, above n 29, 248.
attack on ‘Law Schools’ per se. An argument for the severing of the existing ties between the profession and the legal academies does not necessarily have as its corollary an end to all professional training. …

The project of many so-called ‘CLS’ adherents might amount to little more than having legal ‘scholarship’ accorded its due weighting in the legal curricula. This is hardly subversive of legal education per se, and could indeed be seen as adding a vital component to University studies in law.61

The fate of Macquarie University Law School was ultimately decided by the report of the committee established by the University itself to review the Law School.62 In the lead up to that report the ‘traditionalist majority’ within the Law School had criticised those of their colleagues who belonged to the narrow American based movement which has abrogated to itself the title ‘critical legal studies’. This is simply a minority movement of academics who are attempting to destabilize and politicize the legal structure and the basics of legal scholarship in accordance with Marxist or neo-Marxist doctrine.63

The response of the ‘progressives’ to this allegation, and to the claim that the ‘professional’ function of legal education should take priority over the ‘academic’ function, included the following:

[T]here is a need, unfulfilled by traditional/professional approaches to legal education, to develop in students proper intellectual skills and habits — essentially the capacity to analyse and reflect systematically upon problems, drawing on a store of knowledge and experience of their own — and others’ — culture; they also need to develop a critical mind, one which requires authority to justify itself, one which looks beyond the obvious and taken-for-granted world of ‘common sense’ or legal doctrine and precedent. It is a mind which is open intellectually, flexible and innovative. A ‘professional’ approach to legal education cannot aspire to those goals.64

The Review Committee essentially endorsed this progressive approach, and recommended that ‘[t]he School should continue to direct its efforts towards a coherent, broad-based and interdisciplinary legal education’ and that in pressing forward with this aim, ‘the School should endeavour to infuse relevant background material (historical, sociological, etc) and critical analysis into the so-called professional subjects’.65

The majority of Australian law schools were left to wrestle with the dilemma created by the Pearce Report: how to include critical perspectives in the curriculum without being too critical of legal institutions and the law school.

61 McQueen, above n 21, 9.
64 Boehringer, above n 62, 97, citing Boehringer et al, ‘Submission to the Committee to Review the School of Law: The Way Forward’ (1985).
During the 1990s Australian legal education scholarship generally shifted towards emphasising clinical or skills-based legal education. On the other hand, ‘mainstream’ legal education scholars increasingly included references to the importance of critique in their writing, and many law schools began to include references to legal critique in their teaching policies and course descriptions.

Feminist legal scholarship and literature about feminist approaches to teaching increased, but very little was written, either in Australia or the United States, about the contribution of CLS to the teaching of law. While CLS still existed as a trend within, or as a category of, United States literature on legal theory, it no longer seemed to be as controversial or as prominent a ‘movement’ as it was in the 1980s, particularly in Australia. There are a number of reasons for the ‘failure’ of the CLS movement in Australia. First, the links between CLS and Marxism provoked a stronger conservative reaction in Australia because of the activist nature of Australian Marxism. This political backlash led to a reluctance on the part of many teachers and scholars to identify themselves as CLS adherents. Second, conflict within the movement itself about the meaning and direction of critique resulted in a failure to present a united front against more conservative trends. The final reason is that the linguistic/postmodern ‘turn’ of CLS scholarship alienated many adherents, and excluded potentially interested outsiders. Nevertheless, CLS did not vanish completely, and it continued to influence the teaching of law in Australia. Some law teachers incorporated the insights of the CLS movement into their teaching, and a small number of law schools adopted the teaching of CLS perspectives into subjects in the undergraduate and postgraduate curriculum.

Many radical law teachers resisted the pressure to make their courses and scholarship more ‘practical’ and, although refusing to identify themselves as...

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66 More recently, this has extended to the teaching of legal professional ethics. There is also an increased emphasis on the meaning and process of ‘learning’: Le Brun and Johnstone, above n 16, 54–88.

67 This may be contrasted with the more theoretical (ie, Frankfurt School) Marxism in the law schools of the United States.

68 It seems that any movement solely concerned with critique inevitably self-destructs: a critical movement that does not critique itself is merely hypocritical, but a critical movement that does critique itself delegitimises itself, or at least appears to do so, and there after ceases to be taken seriously by outsiders.

critical scholars (for many, the terms ‘critical’ and ‘CLS’ are now inextricably entwined), they continued to critique the law. They continued to raise questions about the nature and legitimacy of legal knowledge as described in the traditional approaches to legal education and scholarship. They still sought to demonstrate the inadequacy of the conceptualisation of law as objective, neutral, non-gendered, value-free and voiceless; to question the claim that law is an autonomous area of inquiry that can be studied independently of political, economic, social and historical circumstance; and to argue that the status quo is not inevitable, but is shaped by the values and political forces of society. They often applied postmodern techniques of ‘deconstruction’ to legal doctrines and cases, in order to demonstrate how interpretations of legal texts privileged one meaning over other possible meanings. Some of these law teachers identified themselves through specific titles such as ‘critical race scholar’ or ‘feminist legal scholar’, or identified their scholarship as socio-legal, cultural-legal, feminist, indigenous, postmodern or ‘law and literature’. Many, though, did not label themselves at all.70

‘Mainstream’ Australian legal scholars increasingly emphasised the importance of incorporating some form of legal critique into the teaching of law. For example, Marlene Le Brun and Richard Johnstone stated in their influential 1994 text, The Quiet (R)Evolution: Improving Student Learning in Law:

Since we know that no one has a ‘purchase’ on reality — that our world is made up of a cacophony of voices — we believe that we as law teachers must ensure that our students understand that the knowledge, skills, attitudes, and beliefs that are transmitted in law schools are only perspectives on social life and law. As a result, in our opinion, our job as teachers of law is to expose our students to various theories so that they are better placed to select and adapt what they learn to construct their own legal world view. Teaching law in a critical way facilitates this objective.71

According to John Goldring, writing in 1998 about contemporary Australian legal scholarship:

Among legal academics there is a growing belief that whatever the aims of legal education and legal scholarship may be, they must include the development


71 Le Brun and Johnstone, above n 16, 394.
of critical techniques and attitudes. These objectives should be as important within legal education as they are in other areas of scholarship and higher education.72

Charles Sampford and David Wood echo this in their 1998 revision of an earlier article, arguing that

it is clear that a large proportion of the profession freely acknowledges that not only is a university-style education at the core of a good legal education, the traditional conception of a profession as involving a body of knowledge and skills is no longer adequate in the 20th (and soon 21st) century. What is needed is a critical questioning and reflexive awareness of that knowledge and skills; these qualities are the hallmark of a good university education.73

Andrew Stewart also concurred in his 1999 article, ‘Educating Australian Lawyers’:

A critical understanding of how the legal system actually works is arguably essential to being a good lawyer. … So whether or not law schools should continue to see their main role as preparing lawyers for practice … there is every reason to aim for a curriculum which equips graduates with the foundational knowledge and skills needed to go onto a legal career, including the capacity to reflect critically on the nature and practical operation of legal systems.74

The call for law teaching in Australia to be more critical no longer emanated solely from the radical fringe element of the law school, but was being voiced by some of the country’s most respected commentators on legal education.

VI TODAY: CRITICAL OR CLINICAL?

How have Australia’s law schools responded to this cry for a greater emphasis upon legal critique? More law schools appear to be willing to promote themselves openly as including legal critique in their curriculum. Griffith University Law School, for example, promotes itself as offering a law degree which ‘balances and integrates the satisfaction of admission requirements with emphasis upon the critical and theoretical aspects of legal education’.75 The homepage of Southern Cross University’s School of Law and Justice sets out five key aims of the law school, the first two of which are directly relevant to the issue of legal critique. The school promotes itself as seeking to produce graduates who are

Some law schools have adopted teaching and learning policies that expressly include objectives relating to the teaching of legal critique. The University of Tasmania Law School’s ‘Strategic Plan’ sets out nine attributes with which the school hopes to imbue its students. The first four refer to some aspect of legal critique:

- **a critical knowledge** of the institutions and operation of the Australian legal system and related legal systems, of the central concepts, principles and rules of those systems and of the values to which they give expression;
- **a critical knowledge and understanding** of the nature and function of law and the roles it performs in the ordering and functioning of the wider social system;
- **a critical understanding** of, and experience in, thinking about those influences and aspirations which have shaped the development of law;[and]
- **a critical appreciation** of the moral, ethical and normative problems associated with the law …

At Flinders University the document ‘About the Law School’, under the heading ‘Philosophy of Legal Education at Flinders’, states that the Bachelor of Laws at that university incorporates three key elements, the first of which is ‘the knowledge and critical evaluation of the Australian law with reference to its historical development and comparative place’. The policy lists as an essential ability, after legal research and reasoning skills, ‘critical evaluation of legal rules and policy issues’.

Some law schools now offer a substantial number of subjects that either address critical perspectives on the law or teach students to think critically about it. At the University of Sydney, for example, two of the 12 compulsory law subjects in the undergraduate program are described as teaching critical cognitive skills. The subject ‘Law, Lawyers and Justice in Australian Society’ is described as approaching the law from ‘a range of perspectives’, and appears to be concerned with teaching students to think critically about the law. ‘Criminal Law’ is described as having been designed to assist students to develop a critical understanding of certain key concepts, and as having a critical focus. Eleven of the 52 elective subjects primarily approach the law from international, theoretical or critical perspectives. One of these elective subjects, ‘Critical Legal Studies’, specifically focuses on the critical movement of the same name. Another, ‘Law

79 Ibid (emphasis in original).
80 The University of Sydney, Faculty of Law Handbook 2000 (1999) 8.
81 Ibid 7.
82 Ibid 13.
and Gender’, is described as critically examining feminist legal theories. The subject ‘Law, Communications, Culture and Global Economies’ critically examines the law in terms of its ability to keep up with new technologies. There are a number of jurisprudence subjects that are expressly described as approaching the law from critical perspectives: ‘Sociological Jurisprudence’, ‘Philosophy of Human Rights’, and ‘International/Comparative Jurisprudence’.

However, such policies and programs are in the minority. It would appear that, generally speaking, Australian law schools still give a relatively low priority to teaching legal critique. Only five of the 27 law schools expressly promote themselves as concerned with legal critique. Most law schools appear to be primarily concerned with advertising their close links with the profession and emphasising the satisfaction of local admission requirements: law schools would prefer to be perceived as ‘clinical’ rather than ‘critical’. Only 17 law schools are guided by teaching and learning policies that encourage legal critique, and of those 17 policies, only four contain more than a couple of token references to legal critique. None of the teaching and learning policies addresses legal critique in any depth. Many of the policies contain little or no reference at all to legal critique; those that do contain such references fail to clearly define their terminology or to expand upon their conceptions of legal critique. None of the law schools has adopted a clear definition of what it means to teach law critically. It almost appears as though law schools and universities assume that the meaning of the words ‘critical’ and ‘critique’ is self evident.

The proportion of subjects described as teaching some form of legal critique ranges across schools, from one percent to only 15 percent, with most schools falling below the 10 percent mark. None of the law schools appears to have adopted an approach to legal critique that pervades the whole law program. By far the majority of subjects taught by the law schools are still doctrinal or clinical. What few critical subjects do exist are in the minority and are generally isolated from the rest of the curriculum.

Recent graduate destination surveys have shown that more and more law students are electing not to practise law. Nevertheless, it seems that the present trend in Australian legal education is for the teaching of law to become, and to be seen to be becoming, more practice-oriented. Satisfaction of the perceived requirements of the profession is still one of the highest priorities. The tendency today for many law schools to promote themselves as taking a more practical or ‘real-world’ approach has coincided with an improvement in relations between academics and practitioners. This trend has important consequences for the

83 Ibid 16.
84 Ibid.
85 Ibid 15–19.
86 Griffith University Law School, Macquarie University Law School, Southern Cross University School of Law and Justice, University of New South Wales Law School, and the Faculty of Law at the University of Western Sydney (Macarthur).
role of critique in legal education. A law school’s proclaiming its intention to place a greater emphasis on legal critique may be perceived by the profession, rightly or wrongly, as a step towards making its courses more ‘theoretical’ and less ‘practical’. There is a fear that taking such a step may break the connections with the profession that law schools have in recent years worked so hard to reforge. Most law schools, thus, persist in their attempts to cater to the needs of the legal profession, and to teach law from a more practical perspective, focusing on technical excellence, advocacy, drafting, court procedures and negotiation, and placing little emphasis upon legal critique.88

It cannot be denied that the emphasis by Australian law schools on legal critique has increased since the beginning of the century, when law was taught solely by legal practitioners on a part-time basis. It has even increased since I completed my own undergraduate degree a decade ago. This notwithstanding, it appears that Australian legal education is, in many ways, returning to its colonial origins: the focus is becoming less ‘theoretical’ and more practical. Professional bodies are exerting an increasing influence over the curriculum, and more law courses are being taught by practitioners. Legal critique is strong in Australian scholarship, and many individual law teachers choose to incorporate critique in their teaching, but Australian law schools still place an unduly low emphasis on legal critique. Ultimately, it remains a marginalised approach to the teaching of law.

88 Stewart, above n 74, 145–6.