

'NEEDS IMPROVEMENT': POSITIONING GOOD PRACTICE WRITING PEDAGOGY IN THE AUSTRALIAN LAW SCHOOL CURRICULUM

SANDRA NOAKES*

Australian law schools have a responsibility to support the development of their students' writing skills. This article discusses evidence that poor legal writing creates problems for clients and for legal practitioners, and positions writing support as a social justice issue for students, who now come to law school with a wide range of prior learning experiences. However, the article's original empirical research demonstrates that Australian law schools' adherence to good practice pedagogy in relation to writing is at best partial. It is not underpinned by literacy theory, still relies on the separate 'legal skills' paradigm, fails to fully adopt an embedded approach, and is perceived as the province of the first-year curriculum. All of these factors contribute to a 'dumbing down' of writing pedagogy, which is particularly concerning in law, where language is the discipline.

I INTRODUCTION

The standard of written communication of university students in Australia has, yet again, captured media attention.¹ This is an issue which has vexed Australian law schools and the legal profession for some time. In 1998, Bell and Pether observed that 'there are ways in which legal writing, as it is currently practised in law schools, is not meeting the needs of legal graduates or their potential employers'.² This observation remains relevant today, despite the fact that there is evidence in the Australian case law that lawyers' poor written communication skills cause commercial uncertainty for clients, delays in our legal system, and problems for

* Lecturer, Director of Academic Program, First Year, Western Sydney University. The author acknowledges the contribution of Professor Catherine Renshaw for her comments on drafts of this article.

1 Jordan Baker, 'Writing Wrongs: "Our Society Is about to Hit a Literacy Crisis"', *Sydney Morning Herald* (Sydney, 19 September 2020).

2 Dean Bell and Penelope Pether, 'Re / Writing Skills Training in Law Schools: Legal Literacy Revisited' (1998) 9(2) *Legal Education Review* 113, 116.

the lawyers themselves.³ Bell and Pether proposed 'an interdisciplinary, theoretically-informed approach to literacy and language skills in legal education',⁴ recommending that writing support be based on a sociocultural paradigm of academic literacy, in which the primary responsibility for teaching writing rests with law academics as discipline experts.⁵ This approach to teaching writing in Australian law schools was more recently supported in the 2011 *Good Practice Guide (Bachelor of Laws): Communication (Threshold Learning Outcome 5)* ('GPG').⁶ This article positions writing support at law school as an issue of social justice for law students in an era of widening participation in higher education ('HE'). It examines Australian case law that demonstrates the problems caused by poor writing, and canvasses commentary indicating that the legal profession has some misgivings about whether law schools are appropriately supporting their students' writing development. It then reports on the author's empirical study of the extent to which Australian law schools observe good practice in relation to the development of their students' writing. An Academic Literacies ('AcLits') framework is used to analyse these practices, concluding that Australian law schools' adherence to good practice is, at best, partial, and does not consistently adopt the recommendations of the GPG.

II CONTEXTUALISING LAW STUDENT WRITING

Good legal writing is an issue of justice for clients and a social justice issue for students at law school. There are many disciplines and professions in which the ability to use and manipulate language is important. However, in law, language *is* the discipline and the profession. Notwithstanding the rapid changes to legal practice brought about by changes in technology and the concomitant requirement for lawyers to possess a diverse range of skills,⁷ law remains a discipline centred

- 3 See *Fitness First Australia Pty Ltd v Fenshaw Pty Ltd* (2016) 92 NSWLR 128 ('*Fitness First*'); *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 ('*Ecosse Property Holdings*'); *Taluja v Shree Shirdi Sai Sansthan Sydney Ltd* (2016) 18 BPR 36,079 ('*Taluja*'); *NSW Rifle Association Inc v Commonwealth* [1997] NSWCA 234 ('*NSW Rifle Association*'); *Namrood v Ebedeh-Ahvazi* (2018) ANZ Conv R ¶18-077 ('*Namrood*'); *Port Macquarie-Hastings Council v Diveva Pty Ltd* [2017] NSWCA 97 ('*Port Macquarie-Hastings Council*'); *Mylan Health Pty Ltd v Sun Pharma ANZ Pty Ltd [No 2]* [2019] FCA 883 ('*Mylan Health*'); *Elzahed v Commonwealth* [2015] NSWDC 271 ('*Elzahed*'); *Rozenblit v Vainer [No 2]* [2015] VSC 234 ('*Rozenblit*'); *KTC v David* [2019] FCA 1566 ('*KTC*'); *Day v Rogers* [2011] NSWCA 124 ('*Day*'); *Hudson Investment Group Ltd v Atanaskovic* (2014) 311 ALR 290 ('*Hudson Investment Group*'); *Surman v Dinsdale [No 2]* [2009] QSC 436 ('*Surman*'); *LM v ZJL* [2007] FMCAfam 691 ('*LM*'); *New South Wales Bar Association v Jones* [2008] NSWADT 253 ('*New South Wales Bar Association*').
- 4 Bell and Pether (n 2) 113.
- 5 *Ibid* 119, 125, 133.
- 6 Sharon Wesley, Australian Learning & Teaching Council, *Good Practice Guide (Bachelor of Laws): Communication (Threshold Learning Outcome 5)* (Report, 2011).
- 7 The Law Society of New South Wales, *Flip: The Future of Law and Innovation in the Profession* (Report, March 2017) 5–6 ('*Flip Report*'); Kate Galloway, 'A Rationale and Framework for Digital Literacies in Legal Education' (2017) 27(1) *Legal Education Review* 117; Marcus Smith, 'Integrating Technology in Contemporary Legal Education' (2020) 54(2) *Law Teacher* 209.

around text. Steel notes that ‘[l]egal practice is overwhelmingly a life of words. Laws, legal judgments, contracts and letters all involve complex concepts reduced to written English’⁸ and, as acknowledged by Bell and Pether, words are a lawyer’s main tools of trade.⁹

A Writing Support as a Justice Issue

Increasingly, Australian law students come from a wide variety of backgrounds, bringing with them a diverse range of learning experiences prior to arriving at law school.¹⁰ This should be encouraged. Educating lawyers from diverse backgrounds and ensuring pathways to the legal profession for students who would not traditionally have studied law is one way of addressing access to justice. The importance of diversity in the legal profession as a means of increasing access to justice has been noted in the context of the need for a judiciary that is more representative of Australian society.¹¹ In several countries, the connection has been made between the legal education of ‘non-traditional’ students and a just legal system,¹² and Australian research has emphasised the importance of a diverse legal profession in meeting the legal needs of Indigenous communities¹³ and people from culturally and linguistically diverse backgrounds.¹⁴ Melville notes that a

8 Alex Steel, ‘The Law School and the Assessment Project’ in Richard Henry, Stephen Marshall and Prem Ramburuth (eds), *Improving Assessment in Higher Education: A Whole-Of-Institution Approach* (University of New South Wales Press, 2013) 189, 190.

9 Bell and Pether (n 2) 116.

10 Peter Moraitis and Helen Murphy, ‘Language, Law and Identity: A Language and Learning Response to the Challenges of Widening Participation of Students in Law Subjects’ (2013) 47(2) *Law Teacher* 159; Michelle Sanson and Susan Armstrong, ‘Holistic Approaches to Academic and Social Transition to Law School’ in Leon Wolff and Maria Nicolae (eds), *The First-Year Law Experience: A New Beginning* (Halstead Press, 2014) 96; Felicity Deane and Danielle Bozin, ‘Using Guiding Principles to Construct Effective Multiple Choice Exams to Assess Legal Reasoning’ (2016) 26(1–2) *Legal Education Review* 1, 16.

11 Chief Justice TF Bathurst, ‘Keynote Address: Trust in the Judiciary’ (Speech, Affinity NSW Parliament Friendship & Dialogue Iftar Dinner, 29 May 2018) [16]–[17] <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180529.pdf>; See also Chief Justice Wayne Martin, ‘Judicial Council on Cultural Diversity’ (2015) 24(4) *Journal of Judicial Administration* 214.

12 Russell G Pearce and Sinna Nasser, ‘The Virtue of Low Barriers to Becoming a Lawyer: Promoting Liberal and Democratic Values’ (2012) 19(2–3) *International Journal of the Legal Profession* 357; Avner Levin and Asher Alkoby, ‘Is Access to the Profession Access to Justice: Lessons from Canada’ (2012) 19(2–3) *International Journal of the Legal Profession* 283. Warren defines the ‘traditional’ higher education student as one who ‘enter[s] university shortly after completing their secondary education, and who, owing to their prior socialization, schooling and attainment, are relatively well prepared for academic study’: Digby Warren, ‘Curriculum Design in a Context of Widening Participation in Higher Education’ (2002) 1(1) *Arts and Humanities in Higher Education* 85, 86. He observes that “[n]on-traditional” students are far more mixed in terms of age’, educational attainment, socio-economic status, and ‘cultural and linguistic background’: at 86–7.

13 Dennis Foley, ‘Quadrivium: So You Want to Be a Lawyer?’ (2014) 8(11) *Indigenous Law Bulletin* 19.

14 Naveed Khan, ‘An Evolution, Not a Revolution: The Legal Profession Does Not Reflect the Cultural Diversity in the Community’ (2017) 91(10) *Law Institute Journal* 65; Asian Australian

certain level of moral panic has developed in Australia in the past decade concerning the perception of an 'oversupply' of law students, fuelling a debate about whether there are too many law graduates, and suggestions that entry to law school should be restricted.¹⁵ However, she further observes that restricting access to legal education 'exclude[s] disadvantaged groups from the profession',¹⁶ potentially reducing its diversity.

A law student's ability to 'think like a lawyer' is manifested through their ability to speak, read and write like a lawyer.¹⁷ Whilst there are a number of important communication skills that students need to succeed at law school, writing is the most significant skill for law students to master, because it is the primary means by which law students are assessed, and, in legal practice, it is still the dominant method of communication.¹⁸ Studies have demonstrated a strong positive correlation between law students' writing skills and their overall success at law school.¹⁹ Therefore, supporting student writing is an issue of social justice for law schools in Australia. If greater diversity in participation in the study of law is to be encouraged, then law pedagogy cannot assume a background of common 'cultural understandings, associated identities and ... language capacities of students'.²⁰ Law schools need to ensure that they are appropriately developing and supporting their students' writing skills, taking into account that their students now come from a wide variety of backgrounds.

B Current Performance of Australian Law Schools

There is evidence in Australia that the legal profession believes our law schools could do more to support students' writing skills.²¹ These concerns are not limited to Australia, and it is possible for example to find evidence that this is an issue for

Lawyers Association, *The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015* (Report, 2015) 4.

15 Angela Melville, 'It Is the Worst Time in Living History to Be a Law Graduate: Or Is It? Does Australia Have Too Many Law Graduates?' (2017) 51(2) *Law Teacher* 203.

16 Ibid 206.

17 Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford University Press, 2007) 3.

18 Samantha Hardy, 'Improving Law Students' Written Skills' (Conference Paper, Teaching Matters Conference, 2005) 12, citing Mary Ellen Gale, 'Legal Writing: The Impossible Takes a Little Longer' (1980) 44(2) *Albany Law Review* 298, 300–1; Simon Knight et al, 'Designing Academic Writing Analytics for Civil Law Student Self-Assessment' (2018) 28(1) *International Journal of Artificial Intelligence in Education* 1.

19 See generally Jessica L Clark, 'Grades Matter: Legal Writing Grades Matter Most' (2014) 32(3) *Mississippi College Law Review* 375.

20 Moraitis and Murphy (n 10) 161.

21 See below nn 47, 52 and accompanying text.

law schools in the USA,²² South Africa²³ and the UK.²⁴ In all of these jurisdictions, English is the primary language, and the majority of students educated in these jurisdictions are domestic students.²⁵ The legal profession does not frame its concerns in terms of the language standards of international students or students from culturally and linguistically diverse backgrounds; it is an issue that appears to relate to the writing standards of law graduates generally, regardless of background.

In Australia, until the early 2000s, debates about literacy standards tended to focus on primary and secondary school students, and little attention was paid to the literacy of students in HE.²⁶ From the mid-2000s in Australia, there was concern about the standards of university graduates' literacy with a particular focus on the

- 22 Susan Hanley Kosse and David T ButleRitchie, 'How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study' (2003) 53(1) *Journal of Legal Education* 80; James Etienne Viator, 'Legal Education's Perfect Storm: Law Students' Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum' (2012) 61(3) *Catholic University Law Review* 735; Susan Stuart and Ruth Vance, 'Bringing a Knife to the Gunfight: The Academically Underprepared Law Student & Legal Education Reform' (2013) 48(1) *Valparaiso University Law Review* 41, 58–65; American Bar Association, *Report and Recommendations: American Bar Association Taskforce on the Future of Legal Education* (Final Report, January 2014) 3; Nancy E Millar, 'The Science of Successful Teaching: Incorporating Mind, Brain, and Education Research into the Legal Writing Course' (2019) 63(3) *Saint Louis University Law Journal* 373.
- 23 Lesley A Greenbaum, 'Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives' (2004) 15(1) *Stellenbosch Law Review* 3; Sherran Clarence, Latiefa Albertus and Lea Mwambene, 'Building an Evolving Method and Materials for Teaching Legal Writing in Large Classes' (2014) 67(6) *Higher Education* 839, 840, citing Pierre de Vos, 'Law Society Bemoans "Lack of Basic Skills" of Law Graduates', *Constitutionally Speaking* (Web Page, 23 November 2010) <<http://constitutionallyspeaking.co.za/law-society-bemoans-lack-of-basic-skills-of-law-graduates>>; Leon Dicker, 'The 2013 LLB Summit' [2013] (August) *Advocate* 15; AD Crocker, 'Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School' (2018) 21(1) *Potchefstroom Electronic Law Journal* 1–27.
- 24 Legal Education and Training Review, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (Final Report, June 2013) 41.
- 25 For the USA, see Legal Education and Admissions to the Bar, American Bar Association, *2019 Standard 509 Information Report Data Overview* (Report, 12 December 2019); Swethaa S Ballakrishnen and Carole Silver, 'A New Minority: International JD Students in US Law Schools' (2019) 44(3) *Law and Social Inquiry* 647. For the UK, see 'Where Do HE Students Come from?', *HESA* (Web Page) <<https://www.hesa.ac.uk/data-and-analysis/students/where-from>>. For Australia, see '2018 Student Summary Infographic', *Higher Education Statistics* (Web Page, 28 October 2019) <<https://www.dese.gov.au/higher-education-statistics/resources/2018-student-summary-infographic>>. For South Africa, see Roshen Kishun, 'The Internationalisation of Higher Education in South Africa: Progress and Challenges' (2007) 11(3–4) *Journal of Studies in International Education* 455; Sepideh Rouhani, 'Internationalisation of South African Higher Education in the Postapartheid Era' (2007) 11(3–4) *Journal of Studies in International Education* 470; Jenny J Lee and Chika Schoole, 'Regional, Continental, and Global Mobility to an Emerging Economy: The Case of South Africa' (2015) 70(5) *Higher Education* 827.
- 26 Elizabeth Hirst et al, 'Repositioning Academic Literacy: Charting the Emergence of a Community of Practice' (2004) 27(1) *Australian Journal of Language and Literacy* 66, 66.

academic literacy of international students.²⁷ However, the past decade has seen a growing recognition that Australian universities need to support the language skills of *all* students.²⁸ Australian university academics have expressed concerns about the standard of their students' communication skills, but believe they do not have the time nor training to address these issues within their disciplines.²⁹ The 2019 Productivity Commission report concerning the Demand Driven Funding System made a direct link between low literacy scores and dropout rates.³⁰

The legal profession in Australia has emphasised the importance of good writing skills for law graduates. Peden and Riley's study of employer perspectives on the skills required of Australian law graduates found that 'it is clear that generic skills [such as the ability to write grammatically] are valued by employers, even more perhaps than purely legal skills, and so law teachers need to evaluate whether their graduates are being given appropriate opportunities to develop these skills'.³¹ In 2017, the New South Wales Law Society found that an expectation existed 'that graduates would have not just an understanding, but an ability to employ in practice, the basics of drafting, presenting and negotiating',³² and that '[c]onsideration needs to be given to how practice skills should be distributed between the various stages of legal education so as to build on and reinforce earlier stages of learning without unnecessary repetition'.³³

However, the Australian legal profession is less than satisfied with the performance of Australian law schools in relation to their graduates' writing skills. Since the

- 27 Bob Birrell, 'Implications of Low English Standards among Overseas Students at Australian Universities' (2006) 14(4) *People and Place* 53; Tracey Bretag, 'The Emperor's New Clothes: Yes, There Is a Link Between English Language Competence and Academic Standards' (2007) 15(1) *People and Place* 13; Sophie Arkoudis et al, 'The Impact of English Language Proficiency and Workplace Readiness on Employment Outcomes and Performance of Tertiary International Students' (Study, Centre for the Study of Higher Education, The University of Melbourne, April 2009).
- 28 Neil L Murray, 'Conceptualising the English Language Needs of First Year University Students' (2010) 1(1) *International Journal of the First Year in Higher Education* 55; Sophie Arkoudis, 'English Language Standards and Claims of Soft Marking' in Simon Marginson (ed), *Tertiary Education Policy in Australia* (University of Melbourne, 2013) 123, 126; Sophie Arkoudis, Chi Baik and Sarah Richardson, *English Language Standards in Higher Education: From Entry to Exit* (ACER Press, 2012) 3, 10; Anne Harris, 'Integrating Written Communication Skills: Working Towards a Whole of Course Approach' (2016) 21(3) *Teaching in Higher Education* 287.
- 29 Sophie Arkoudis, *Integrating English Language Communication Skills into Disciplinary Curricula: Options and Strategies* (Final Report, 2014) 11 ('Options and Strategies'), citing Chi Baik, 'Assessing Linguistically Diverse Students in Higher Education: A Study of Academics' Beliefs and Practices' (PhD Thesis, The University of Melbourne, June 2010) 116–17 and Kieran O'Loughlin and Sophie Arkoudis, 'Investigating IELTS Exit Score Gains in Higher Education' in Jenny Osborne and IELTS Australia (eds), *IELTS Research Reports* (IELTS Australia and British Council, 2009) vol 10, 95, 127–8.
- 30 Productivity Commission, Commonwealth, 'The Demand Driven University System: A Mixed Report Card' (Research Paper, June 2019) 44.
- 31 Elisabeth Peden and Joellen Riley, 'Law Graduates' Skills: A Pilot Study into Employers' Perspectives' (2005) 15(1–2) *Legal Education Review* 87, 119.
- 32 *Flip Report* (n 7) 77.
- 33 *Ibid* 78.

1970s in Australia, numerous reports have recommended changes to Australian legal education ‘with varying levels of implementation and success’.³⁴ In 2014, the Commonwealth Productivity Commission recommended a comprehensive review of the three stages of legal education in Australia.³⁵ This is yet to occur. The Priestley 11 continues to dominate the curricula at most law schools. However, Huggins notes that several reports reviewing university legal education in Australia have argued that legal education should focus on “‘what lawyers need to be able to do”, rather than ... “what lawyers need to know””.³⁶

A number of these reports indicate dissatisfaction with the written communication of Australian law graduates. In 2003, Johnstone and Vignaendra’s ‘stocktake’ of legal education in Australia noted that employers perceived that graduates’ written communication skills were ‘underdeveloped’ and that law schools could do more to provide ‘basic training’ in written communication that law firms could develop.³⁷ They further observed:

It would be safe to say that from the 1990s most Australian law schools have largely improved their approaches to the teaching of these skills, and at the same time have, in the main, expanded the range of skills taught in the LLB curriculum. But beyond that it is very difficult to generalise — either about the type of skills taught in the LLB curriculum, the way skills are taught, or the extent to which skills have incrementally and systematically been embedded in the curriculum.³⁸

These authors noted that law schools’ attempts to integrate skills into the curriculum had been ‘tentative’, with insufficient resources devoted to ‘working out how to approach skills teaching in the context of an academic law program, or to mapping and embedding skills teaching within the curriculum’.³⁹ Around the same time, Wolski noted the ad hoc way in which skills were integrated into the

34 Anna Huggins, ‘Incremental and Inevitable: Contextualising the Threshold Learning Outcomes for Law’ (2015) 38(1) *University of New South Wales Law Journal* 264, 267, citing Sally Kift, ‘For Better or For Worse?: 21st Century Legal Education’ (Conference Paper, LAWASIA Downunder, 20–24 March 2005) 7 <<http://eprints.qut.edu.au/7439/>>. For an overview of these reports prior to 2003, see Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law* (Report, January 2003) 14–16. See also Law Admissions Consultative Committee, ‘Rethinking Academic Requirements for Admission’ (Discussion Paper, 26 February 2010); Sally Kift, Mark Israel and Rachael Field, ‘Learning and Teaching Academic Standards Project: Bachelor of Laws’ (Statement, Australian Learning & Teaching Council, December 2010); Productivity Commission, Commonwealth, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 1, 244–54; Law Admissions Consultative Committee, ‘Redrafting the Academic Requirements for Admission’ (Proposal, 2019).

35 *Access to Justice Arrangements* (n 34) vol 1, 46.

36 Huggins (n 34) 270 (emphasis omitted), citing Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000) 126 [2.21], quoting Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Discussion Paper No 62, 1999) 45–6 [3.23].

37 Johnstone and Vignaendra (n 34) 239.

38 *Ibid* 133.

39 *Ibid* 161.

LLB curriculum in Australia.⁴⁰ This was particularly so in relation to 'generic skills such as communication'.⁴¹

There is evidence in the academic literature that adopting good practice to support writing skills leads to positive outcomes for Australian law students. For example, Curró's study of a discipline-based writing program in the College of Law and Justice at Victoria University examines the effectiveness of a series of workshops which focused on the genres of writing that students were required to do for their first-year law subjects.⁴² The study found that students who attended workshops found them useful and these students also seemed to perform better in their legal research methods subject.⁴³ McNamara's study of a legal drafting assessment embedded in a contract law subject found that students perceived the assessment as being more relevant than other written assessments in their law subjects.⁴⁴ Other studies have demonstrated the importance of the involvement of law tutors as discipline experts in supporting the development of law student writing in embedded, discipline-specific writing programs.⁴⁵

Notwithstanding these examples of good practice, Baron and Corbin have observed that, while writing support in Australian law schools still tends to present writing as technical and formalistic, more attention needs to be paid to writing support which 'emphasises process, mastery, awareness of the discourse community and appreciation of professional obligations'.⁴⁶ The legal profession in Australia has expressed disquiet about the schism between the skills the profession believes are essential for graduate entry lawyers, and what is being taught to students in Australian law schools. In a submission to the Law Admissions Consultative Committee's 2015 review of the academic requirements for admission to the legal profession, the Large Law Firm Group (now called Law Firms Australia) observed that it perceived 'a widening gap ... between the skill sets required by the profession and those developed by tertiary institutions'.⁴⁷ It

40 Bobette Wolski, 'Why, How, and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum' (2002) 52(1-2) *Journal of Legal Education* 287. See also Hardy (n 18) 2.

41 Sharon Christensen and Sally Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration?' (2000) 11(2) *Legal Education Review* 207, 213.

42 Gina Curró, 'Writing Workshops for First Year Law: My Contribution as an Applied Linguist' (2017) 51(3) *Law Teacher* 312.

43 Ibid 324-5.

44 Noeleen McNamara, 'Authentic Assessment in Contract Law: Legal Drafting' (2017) 51(4) *Law Teacher* 486.

45 See, eg, Graham D Hendry, Susan Armstrong and Nikki Bromberger, 'Implementing Standards-Based Assessment Effectively: Incorporating Discussion of Exemplars into Classroom Teaching' (2012) 37(2) *Assessment and Evaluation in Higher Education* 149; Katherine Curnow, 'More than the Rules: Using Pleading Drafting to Develop Lawyering and Transferable Skills' (2015) 25(1-2) *Legal Education Review* 203.

46 Paula Baron and Lillian Corbin, *Legal Writing: Academic and Professional Communication* (Oxford University Press, 2016) 2 (emphasis omitted).

47 Large Law Firm Group, Submission to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession* (30 March 2015) 1.

indicated that the profession would prefer to see a greater emphasis on ‘strong communication skills’.⁴⁸ The Law Institute of Victoria submitted that:

Practical legal training subjects offered at university are extremely useful in assisting with developing the skills required to enter the legal profession as a solicitor. However, there were not a large number of these subjects offered and recently there has been a trend to discontinue offering them. This lack of practical training does not provide junior lawyers with a basic level of training to undertake common tasks required of them, such as drafting letters to clients, preparing court documents and drafting memoranda of advice.⁴⁹

Some authorities that admit law graduates to legal practice in Australia have expressed concerns about the standards of law graduates’ English language proficiency. The criteria for admission to practise law in Australia are not uniform across jurisdictions. However, each admitting authority requires that applicants for admission to practise law hold a recognised law degree, have completed a period of practical legal training, and meet certain suitability requirements.⁵⁰ In some jurisdictions, one of the suitability requirements is that applicants for admission have appropriate standards of English language proficiency.⁵¹ In its 2017–18 Annual Report, the Legal Practice Board of Western Australia indicated that it no longer trusted Australian universities to ensure that their graduates possessed appropriate standards of language proficiency. Prior to 2017, the Board’s policy was that graduates from an Australian law school who applied to be admitted to the profession were not required to undertake an English language test — such as the International English Language Testing System (‘IELTS’) — in order to obtain admission to legal practice. However, this policy was changed in 2017, primarily because a graduate of an Australian law school who applied to be admitted had disclosed, in a written statutory declaration, certain matters relating to her suitability to practise. The Board noted that the statutory declaration demonstrated

48 Ibid.

49 Law Institute of Victoria, Submission to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession* (30 March 2015) 7–8 (emphasis omitted).

50 There are uniform admission rules that apply in New South Wales and Victoria: see *Legal Profession Uniform Law* (NSW) (‘*NSW Uniform Law*’); *Legal Profession Uniform Admission Rules 2015* (NSW) (‘*NSW Admission Rules*’). Each other jurisdiction has its own admission rules relating to academic qualifications, practical legal training and suitability requirements: see *Legal Profession Act 2006* (ACT) (‘*ACT Legal Profession Act*’); *Court Procedures Rules 2006* (ACT); *Legal Profession Act 2006* (NT) (‘*NT Legal Profession Act*’); *Legal Profession Admission Rules 2007* (NT); *Legal Profession Act 2007* (Qld) (‘*Qld Legal Profession Act*’); *Supreme Court (Admission) Rules 2004* (Qld) (‘*Qld Admission Rules*’); *Legal Practitioners Act 1981* (SA) (‘*SA Legal Practitioners Act*’); *LPEAC Rules 2018* (SA) (‘*SA LPEAC Rules*’); *Legal Profession Act 2007* (Tas) (‘*Tas Legal Profession Act*’); *Legal Profession (Board of Legal Education) Rules 2010* (Tas); *Legal Profession Act 2008* (WA) (‘*WA Legal Profession Act*’); *Legal Profession (Admission) Rules 2009* (WA) (‘*WA Admission Rules*’).

51 *NSW Admission Rules* (n 50) r 10(1)(1); *Qld Admission Rules* (n 50) r 8; *SA LPEAC Rules* (n 50) r 18(4). Pursuant to *WA Legal Profession Act* (n 50) s 25 and *WA Admission Rules* (n 50) r 11(3)(a), the applicant must submit a form to the Legal Practice Board of Western Australia detailing their English language proficiency: Legal Practice Board of Western Australia, *LPB Form A10* (at 6 November 2019) s F.

'a poor standard of English'.⁵² The Board's policy now requires law graduates to undertake the IELTS unless they have completed their law degree *and* their last two years of secondary schooling in one of 10 nominated countries.⁵³

C Impact on Clients

Client complaints relating to lawyers' general communication are common.⁵⁴ For example, in New South Wales, complaints concerning lawyers' poor communication have outnumbered complaints concerning matters such as ethics and overcharging since at least 2010.⁵⁵ In its 2016–17 Annual Report, the New South Wales Office of the Legal Services Commissioner observed that, despite the opportunities created for the provision of legal services by advances in technology,

[s]o as to be able to most effectively serve their clients' best interests within the over-riding context of safeguarding the system of justice ... an improvement in the skill of communication, in all its facets, will be required by lawyers in the future. ... [M]ore finely honed communication skills with clients, with courts and with colleagues will provide a sound foundation for the legal profession to adjust to and thrive upon the digital disruption already underway.⁵⁶

In its Annual Report for 2017–18, the Legal Profession Board of Tasmania cites an example of a client complaint about a costs agreement which was so poorly drafted 'that it was impossible to understand what the costs agreement meant from the written documents alone'.⁵⁷

52 Legal Practice Board of Western Australia, *Annual Report 2017–2018* (Report, 2018) 27.

53 These are Australia, New Zealand, England, Wales, Scotland, Northern Ireland, Republic of Ireland, Canada, South Africa and the United States of America: see 'English Language Proficiency Requirements', *Legal Practice Board of Western Australia* (Web Page) <<https://www.lpbwa.org.au/Becoming-A-Lawyer/English-Language-Proficiency-Requirements>>.

54 See, eg, 'Annual Reports', *Office of the Legal Services Commissioner* (Web Page, 21 December 2020) <http://www.olsc.nsw.gov.au/Pages/lsc_publications/lsc_annualreports.aspx> ('NSW OLSA Annual Reports'); 'Annual Reports', *Victorian Legal Services Board + Commissioner* (Web Page, 5 June 2021) <<https://lsbc.vic.gov.au/about-us/board-and-commissioner/annual-reports>>; 'Annual Reports', *LSC Queensland* (Web Page) <<https://www.lsc.qld.gov.au/publications/current-report>>; 'Annual Reports', *Legal Profession Board of Tasmania* (Web Page) <<https://www.lpbta.com.au/resources/annual-reports/>>; 'Annual Reports', *ACT Law Society* (Web Page) <<https://www.actlawsociety.asn.au/about/publications/annual-reports>>. Note that these reports do not provide data on complaints about written communication alone. Where reports have specifically commented on the standard of written communication, the author has included these in this article.

55 NSW OLSA Annual Reports (n 54). See, eg, The Office of the Legal Services Commissioner, *2014–15 Annual Report* (Report, 2015) 18.

56 The Office of the Legal Services Commissioner, *2016–2017 Annual Report* (Report, 2017) 5.

57 Legal Profession Board of Tasmania, *Annual Report 2017–2018* (Report, 2018) 32.

Australian case law also indicates that poor legal writing can result in commercial uncertainty and expensive and protracted litigation.⁵⁸ This appears to be so despite the emphasis on the need for plain English in legal writing, which has existed since the 1960s.⁵⁹ In many of these cases, there is considerable expense related to litigation concerning the meaning of poorly drafted commercial documents. In *Fitness First Australia Pty Ltd v Fenshaw Pty Ltd*, for example, a dispute concerning a poorly drafted commercial lease occupied three trial days in the Supreme Court, and one day in the Court of Appeal.⁶⁰ Both parties were represented by Counsel at trial and Senior Counsel on appeal. The combined legal costs of both parties were most likely in the vicinity of \$250,000–300,000. The Court of Appeal makes numerous comments in relation to the drafting of the lease, pointing to ‘a measure of imprecision’⁶¹ and the ‘clumsily drafted elements’⁶² of the relevant clause, which is described as ‘opaque’.⁶³

In other cases, poor drafting causes delays in legal proceedings, and results in clients incurring costs, because the courts are not willing to allow matters to proceed. In *Elzahed v Commonwealth*, the District Court of New South Wales struck out the plaintiffs’ defamation claim, primarily because it had been so poorly drafted by the plaintiffs’ lawyers.⁶⁴ Similarly, in *Rozenblit v Vainer [No 2]*, the Victorian Supreme Court refused the plaintiff’s application to amend pleadings in a dispute between former business partners, because the amendments were poorly drafted.⁶⁵ More recently, in *KTC v David*, the Federal Court demonstrated little patience in relation to pleadings which were so badly drafted that they breached numerous provisions in the *Federal Court Rules 2011* (Cth).⁶⁶ The Court observed that the pleadings were ‘three times as long as [they needed] to be’, ‘obscure[d] rather than identify[d] the [legal] issues’, were ‘incomprehensible’, and were ‘certain to cause prejudice and embarrassment’.⁶⁷ In his concluding remarks in this case, Perram J can barely disguise his exasperation:

I will give KTC one more chance. And by that I mean final. This is the end of the line; there are no more stops after this one. *It seems to me that there is a case in there somewhere struggling to free itself from this pleading.* I would encourage those advising KTC to have a long think about the next version and how it is drafted. One

58 See, eg, *Fitness First* (n 3); *Ecosse Property Holdings* (n 3); *Taluja* (n 3); *NSW Rifle Association* (n 3); *Namrood* (n 3); *Port Macquarie-Hastings Council* (n 3); *Mylan Health* (n 3).

59 Alissa J Hartig and Xiaofei Lu, ‘Plain English and Legal Writing: Comparing Expert and Novice Writers’ (2014) 33 *English for Specific Purposes* 87, 88, citing David Melinkoff, *The Language of the Law* (Little, Brown and Company, 1963).

60 *Fitness First Australia Pty Ltd v Fenshaw Pty Ltd* [2016] NSWSC 47; *Fitness First* (n 3) 128.

61 *Fitness First* (n 3) 136 [36] (Leeming JA).

62 *Ibid* 138 [46] (Leeming JA).

63 *Ibid* 134 [24] (Leeming JA).

64 *Elzahed* (n 3) [44]–[47] (Gibson DCJ).

65 *Rozenblit* (n 3) [88] (Lansdowne AsJ).

66 *KTC* (n 3) [49]–[52] (Perram J).

67 *Ibid* [51].

view might be that it is beyond repair in its current form. The task at hand is not a complex one for a skilled equity junior.⁶⁸

In some cases, the drafting of legal documents has been found to be so unsatisfactory that it may be grounds for a party avoiding its obligations under the document. Tanner analyses a clause in the Australian and New Zealand Banking Group's ('ANZ's') standard loan documentation which had been the subject of criticism in the case law.⁶⁹ He examines three different drafts of the same clause: ANZ's original draft; ANZ's 'plain English' draft; and his own attempt at a plain English redraft. In order to determine the comprehensibility of the clause, Tanner asked 75 respondents to answer a 100-question survey about the different drafts.⁷⁰ Six of the participants withdrew from the study and refused to participate once they had read ANZ's original clause.⁷¹ Tanner found that even the participants with legal qualifications had difficulty interpreting it.⁷² There was greater comprehension reported in relation to the two 'plain English' versions of the clause.⁷³ The plain English versions required some expert insider knowledge about the case law and legislation underpinning them. However, this is why non-lawyers seek the expertise of lawyers. Tanner notes that, unlike the original version, a layperson does not have to overcome *both* the language and the law to make sense of the two plain English clauses; they only need advice about the law to make sense of the clause.⁷⁴ He argues that, where legal drafting is so incomprehensible that it requires a layperson to possess mastery of *both* law and linguistics to decipher it, the layperson should be permitted to challenge the transaction as unconscionable.⁷⁵ Tanner's argument appears to find support in the case law.⁷⁶

D Impact on Lawyers

The impact of poor written communication may also be visited on legal practitioners. This may happen in the form of negligence claims by clients against their lawyers.⁷⁷ It may also take the form of costs orders against the lawyer.⁷⁸ Very poor written communication can also result in disciplinary action against lawyers. For example, in *New South Wales Bar Association v Jones*, the New South Wales

68 Ibid [52] (emphasis added).

69 Edwin Tanner, 'The Comprehensibility of Legal Language: Is Plain English the Solution?' (2000) 9(1) *Griffith Law Review* 52.

70 Ibid 59.

71 Ibid 62.

72 Ibid 64.

73 Ibid 67, 71.

74 Ibid 67, 72.

75 Ibid 72–3.

76 *Goldsbrough v Ford Credit Australia Ltd* (1989) ASC ¶155–946; *Houlahan v Australian and New Zealand Banking Group Ltd* (1992) 110 FLR 259.

77 *Day* (n 3); *Hudson Investment Group* (n 3).

78 *Surman* (n 3); *LM* (n 3).

Administrative Decisions Tribunal ('ADT') made a finding of unsatisfactory professional conduct against a barrister after four separate amended cross-claims in relation to a building contract were each dismissed by the District Court.⁷⁹ This occurred in the context of the Court giving the barrister guidance as to how the initial amended cross-claim should be drafted.⁸⁰ The barrister's clients had successfully obtained compensation from the barrister.⁸¹ The ADT ordered that the barrister complete courses on drafting of pleadings conducted by the New South Wales Bar Association.⁸²

E Is There a Technological 'Fix'?

We have entered an era in which the way law is practised is being transformed by changes in technology, and in particular artificial intelligence ('AI').⁸³ This must inevitably lead to the question: does it really matter if lawyers do not possess good writing skills? Can the problem not simply be cured by technology that 'fixes' any issues that might otherwise exist with lawyers' written communication, or replaces lawyers altogether? An associated question is whether law students need law schools to support their writing, particularly given the prevalence of online digital tools that can assist them with their writing.

Products such as LegalZoom, Rocket Lawyer and ContractExpress, which were originally designed to assist lawyers, are increasingly used by non-lawyers to bypass the legal profession altogether.⁸⁴ An argument that is often made in favour of these innovations is that these products facilitate access to justice, and democratise law, by providing machine-generated legal documentation for people who may not be able to afford the services of lawyers.⁸⁵ However, Pasquale argues that AI drafting tools such as LegalZoom, which prepares wills and contracts based on 'computerized interactions with customers',⁸⁶ shift ethical decision-making about the language of law from the lawyers to those who construct these automated products, and that the 'coders' may not be bound by the same ethical framework which governs legal practice.⁸⁷ Rogers and Bell similarly observe that 'AI threatens professional jurisdiction where "tech people", the software developers, knowledge engineers and entrepreneurs, can create and deliver legal services with

79 *New South Wales Bar Association* (n 3) annex.

80 *Ibid* annex, [28].

81 *Ibid* [6].

82 *Ibid* [13].

83 Lyria Bennett Moses, 'Artificial Intelligence in the Courts, Legal Academia and Legal Practice' (2017) 91(7) *Australian Law Journal* 561.

84 Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 1st ed, 2015) 68–9.

85 Frank Pasquale, 'A Rule of Persons, Not Machines: The Limits of Legal Automation' (2019) 87(1) *George Washington Law Review* 1, 4.

86 *Ibid* 5.

87 *Ibid* 29–31, 55.

lesser regulatory burden than lawyers'.⁸⁸ Given that, generally, only qualified legal practitioners can engage in legal practice and provide legal advice,⁸⁹ this calls into question the activities of platforms such as LegalZoom. Pasquale argues that there is a difference between substitutive technology, which purports to 'replace' the lawyer, and complementary technology, such as spellchecking in word processing software and applications such as Grammarly, which 'assists' the lawyer.⁹⁰ Substitutive technology, such as LegalZoom, can 'mislead users about their rights and duties while foreclosing opportunities for compensation for this harm via restrictive terms of service. The language of law is both richer and more treacherous than these simple programs present'.⁹¹ Therefore, it is still important for lawyers to be competent users of language; good legal writing is not something that can be unproblematically outsourced to machine-based systems.

In terms of the impact of technological developments on the support of law student writing, there has been a proliferation of digital third-party products to support student writing in HE in recent years.⁹² In addition, there are now machine-based tools that can mark student essays.⁹³ The emergence of these products suggests that law student writing is something that might be effectively outsourced by Australian law schools, leaving them to get on with the business of teaching law. However, Hyland argues that the general use of these technologies in HE ignores the centrality of student writing to student learning.⁹⁴ Bennett Moses has observed that the use of machine-based marking tools in legal education will 'destroy the process by which students learn to write well' because, at best, they check for surface writing features.⁹⁵ Studies have also demonstrated that these products can be positively misleading for students, primarily due to the fact that the products decouple writing from its discipline context.⁹⁶

Even where this technology is employed in a discipline-specific context, it is clearly not designed to enable law schools to abdicate their responsibility to support the development of law student writing.⁹⁷ Shibani et al's study of the use

88 Justine Rogers and Felicity Bell, 'The Ethical AI Lawyer: What Is Required of Lawyers When They Use Automated Systems?' (2019) 1(1) *Law, Technology and Humans* 80, 81.

89 See *ACT Legal Profession Act* (n 50) s 16; *NSW Uniform Law* (n 50) s 10; *NT Legal Profession Act* (n 50) s 18; *Qld Legal Profession Act* (n 50) s 24; *SA Legal Practitioners Act* (n 50) s 21; *Tas Legal Profession Act* (n 50) s 13; *WA Legal Profession Act* (n 50) ss 11–14.

90 Pasquale (n 85) 5, n 21.

91 *Ibid* 6.

92 Helen Joy Benzie and Rowena Harper, 'Developing Student Writing in Higher Education: Digital Third-Party Products in Distributed Learning Environments' (2020) 25(5) *Teaching in Higher Education* 633.

93 Bennett Moses (n 83) 569.

94 Ken Hyland, 'Writing in the University: Education, Knowledge and Reputation' (2013) 46(1) *Language Teaching* 53, 55.

95 Bennett Moses (n 83) 569.

96 Benzie and Harper (n 92) 643–4.

97 Bennett Moses (n 83) 568–9.

of the Academic Writing Analytics ('AWA') natural language processing tool in Civil Law at the University of Technology, Sydney, to support student essay writing, concluded that students found the static feedback provided by a tutor more useful than the feedback provided by the automated AWA tool.⁹⁸ The authors observe that '[s]ome students were not comfortable in receiving automated feedback and felt that a tool cannot provide context-sensitive feedback like a human. This is a known problem with the incorporation of such tools'.⁹⁹

F Writing in the Australian Law School Curriculum

There is a clear expectation that Australian law students develop communication skills whilst at university, and for law schools to include them in the curriculum. This emphasis on law students' communication skills is reflected in the Threshold Learning Outcomes ('TLOs') for law degrees in Australia, and in particular TLO 5 (Communication and Collaboration), which requires that law graduates must be able to communicate in ways that are 'effective, appropriate and persuasive for legal and non-legal audiences'.¹⁰⁰ However, how law schools support and develop these communication skills is left to each law school.

Law schools have been given guidance as to how to best teach writing to their students. Following the publication of the TLOs for law in 2010, the Law Associate Deans' Network (as it was then known) commissioned a series of *Good Practice Guides* ('GPGs') to support the implementation of TLOs for LLB degrees. One key recommendation of the GPG for TLO 5 is that

[Writing] [i]nstruction should be based on the non-linear process adopted by successful writers that focus on understanding the issues to be discussed, effective communication of that understanding to the reader, and persuading the reader to respond. Writing instruction needs to be embedded within classes with discipline content. Separating writing from knowledge removes context and devalues writing. Instruction should begin early in the degree program and be followed up by advanced classes later in the degree.¹⁰¹

Another is that '[a]n understanding of how students learn literacy skills is required including the role of appropriate instruction, practice and expert feedback'.¹⁰²

98 Antonette Shibani et al, 'Design and Implementation of a Pedagogic Intervention Using Writing Analytics' in Wenli Chen et al (eds), *Main Conference Proceedings: 25th International Conference on Computers in Education* (Asia-Pacific Society for Computers in Education, 2017) 306, 310–14.

99 Ibid 313. But see Knight et al (n 18) 19–21.

100 Kift, Israel and Field (n 34) 20. There are separate TLOs for the Juris Doctor Degree. However, TLO 5 is identical for both the LLB and the Juris Doctor Degrees.

101 Wesley (n 6) 13–14 (citations omitted).

102 Ibid 14.

Both recommendations reflect the exhortations of Bell and Pether from over two decades ago.¹⁰³ The following sections of this article discuss empirical research exploring the extent to which Australian law schools follow the recommendations of the *GPG*.

III THEORETICAL FRAMEWORK

This article employs an AcLits framework to critique law school practices in relation to writing support. Both the *GPG* and Bell and Pether's recommendations are implicitly informed by the AcLits model, originally articulated by Lea and Street.¹⁰⁴ Lea and Street identify three concepts of student writing in HE: the academic skills model, the academic socialisation model and the academic literacies model.¹⁰⁵ Under the academic skills model, 'literacy is a set of atomised skills which students have to learn and which are then transferable to other contexts'.¹⁰⁶ This approach generally adopts a 'deficit model' which 'positions the student as lacking in basic skills', skills which 'are conceptualised as decontextualised'.¹⁰⁷ Writing pedagogy based on this model generally provides optional writing support separated from discipline content, and only for students who are perceived as having difficulties with their academic writing.¹⁰⁸ It focuses on surface writing features, positioning literacy as a neutral technical skill.¹⁰⁹ The academic socialisation model recognises that there is a socio-cultural aspect to academic writing. Proponents of this model argue that, as members of an existing culture within HE, academics are responsible for inducting students into this new culture.¹¹⁰ However, this approach views HE as a 'relatively homogenous culture, whose norms and practices have simply to be learnt to provide access to the whole institution'.¹¹¹

The AcLits model is often described as 'closely allied to the New Literacy Studies' ('NLS'),¹¹² which conceptualises literacy as mastery of a Discourse. This

103 Bell and Pether (n 2).

104 Mary R Lea and Brian V Street, 'Student Writing in Higher Education: An Academic Literacies Approach' (1998) 23(2) *Studies in Higher Education* 157.

105 Ibid 158, 172.

106 Ibid 158.

107 Roz Ivanič and Mary R Lea, 'New Contexts, New Challenges: The Teaching of Writing in UK Higher Education' in Lisa Ganobcsik-Williams (ed), *Teaching Academic Writing in UK Higher Education: Theories, Practices and Models* (Palgrave Macmillan, 2006) 6, 12.

108 Ibid.

109 Brian Street, 'Introduction: The New Literacy Studies' in Brian Street (ed), *Cross-Cultural Approaches to Literacy* (Cambridge University Press, 1993) 1, 5.

110 Lea and Street (n 104) 159.

111 Ibid.

112 Ibid. See also Lynne Flowerdew, 'The Academic Literacies Approach to Scholarly Writing: A View through the Lens of the ESP/Genre Approach' (2020) 45(3) *Studies in Higher Education* 579, 579.

movement deliberately employs the capital ‘D’ to define ‘Discourse’ as ‘a socially accepted association among ways of using language, of thinking, and of acting that can be used to identify oneself as a member of a socially meaningful group or “social network”’.¹¹³ AcLits privileges the study of social practices in HE in relation to writing.¹¹⁴ It draws from the critical stance of NLS to critique practices in Higher Education Institutions (‘HEIs’) based on the academic skills model and the academic socialisation model of writing support.¹¹⁵ AcLits positions writing in HE as characterised by an imbalance of power between discipline academics, who are already members of their particular Discourse community, and students as newcomers to that community.¹¹⁶ It examines the extent to which academics in HE, as discipline experts, make tacit assumptions about the norms of their discipline in terms of how knowledge is constructed through writing, yet fail to make those norms explicit to students.¹¹⁷ It rejects the deficit/skills model of writing instruction in HE, which disempowers and stigmatises students, and challenges the acculturation/assimilationist stance of the academic socialisation model.¹¹⁸

IV METHODOLOGY¹¹⁹

During 2016 the author conducted documentary analysis of publicly available information on HEI and law school websites to determine the extent to which law schools appeared to embed writing instruction and support in their curricula, using Briguglio and Watson’s typology of embedded language support in Australian HEIs.¹²⁰ This dataset consisted of 38 Australian institutions, each of which offered a course of study in law satisfying the academic requirements of admission to legal practice in Australia. Data was collected from web pages describing general student academic skills and writing support provided by the HEI, law school/law faculty home pages, web pages and documents outlining law school curricula at

113 James Paul Gee, ‘What Is Literacy?’ (1989) 171(1) *Journal of Education* 18, 18.

114 Theresa Lillis and Mary Scott, ‘Defining Academic Literacies Research: Issues of Epistemology, Ideology and Strategy’ (2007) 4(1) *Journal of Applied Linguistics* 5.

115 Juliet Henderson, ‘Styling Writing and Being Styled in University Literacy Practices’ (2020) 25(1) *Teaching in Higher Education* 1, 8–10.

116 Tamsin Haggis, ‘Pedagogies for Diversity: Retaining Critical Challenge Amidst Fears of “Dumbing Down”’ (2006) 31(5) *Studies in Higher Education* 521.

117 Ibid 528–9.

118 Theresa Lillis et al, ‘Introduction’ in Theresa Lillis et al (eds), *Working with Academic Literacies: Case Studies Towards Transformative Practice* (WAC Clearinghouse, 2015) 3.

119 Ethics approval was obtained for all aspects of this study involving human subjects: see HE 16/294, University of Wollongong Social Sciences Human Research Ethics Committee for ethics approval.

120 Carmela Briguglio and Shalini Watson, ‘Embedding English Language across the Curriculum in Higher Education: A Continuum of Development Support’ (2014) 37(1) *Australian Journal of Language and Literacy* 67.

the HEI, and web pages and documents describing the content of subjects in the law school curriculum.

A similar methodology is employed by Wingate to review academic literacy support in UK HEIs.¹²¹ However, limitations of website content analysis are acknowledged.¹²² In particular, the limitations of content analysis which are relevant to this study relate to the 'speculative' nature of the inferences which can be drawn from such analysis, and the fact that the content is dynamic, so that content analysis of websites can only ever relate to the particular period during which the data is collected.¹²³ The website analysis conducted in this study can really only confirm that the law schools *claim* to provide the type of writing support to law students described on their websites. It cannot confirm that this is what actually occurs. In addition, the fact that website content analysis does not demonstrate that a particular form of writing support is provided at an HEI is not necessarily indicative that it is not actually provided. It is therefore not suggested that this methodology provides a complete picture of law school practices in relation to writing support. Instead, this analysis was used as a means to obtain a more representative sample of interviewees for a qualitative study concerning how law schools teach writing. This was considered to be particularly important, given James' observations concerning resistance to the discourse of educationalism within Australian law schools.¹²⁴ The author was concerned that inviting all Australian law schools to participate in this study would elicit responses only from those schools with an interest in pedagogy to support law student writing, and would result in qualitative data which was not necessarily representative of the population.¹²⁵ For this reason, it was necessary to first categorise law schools based on some sort of criteria, for the purpose of obtaining a more representative pool of interview participants. The categorisation process also provided a richer description of what appears to be occurring in Australian law schools in terms of how they teach writing to students.

Briguglio and Watson construct a graphical typology of academic language and learning ('ALL') support for students in HEIs in Australia:¹²⁶

121 Ursula Wingate, *Academic Literacy and Student Diversity: The Case for Inclusive Practice* (Multilingual Matters, 2015) 46–9 ('*Academic Literacy and Student Diversity*').

122 See Inhwa Kim and Jasna Kuljis, 'Applying Content Analysis to Web-Based Content' (2010) 18(4) *Journal of Computing and Information Technology* 369.

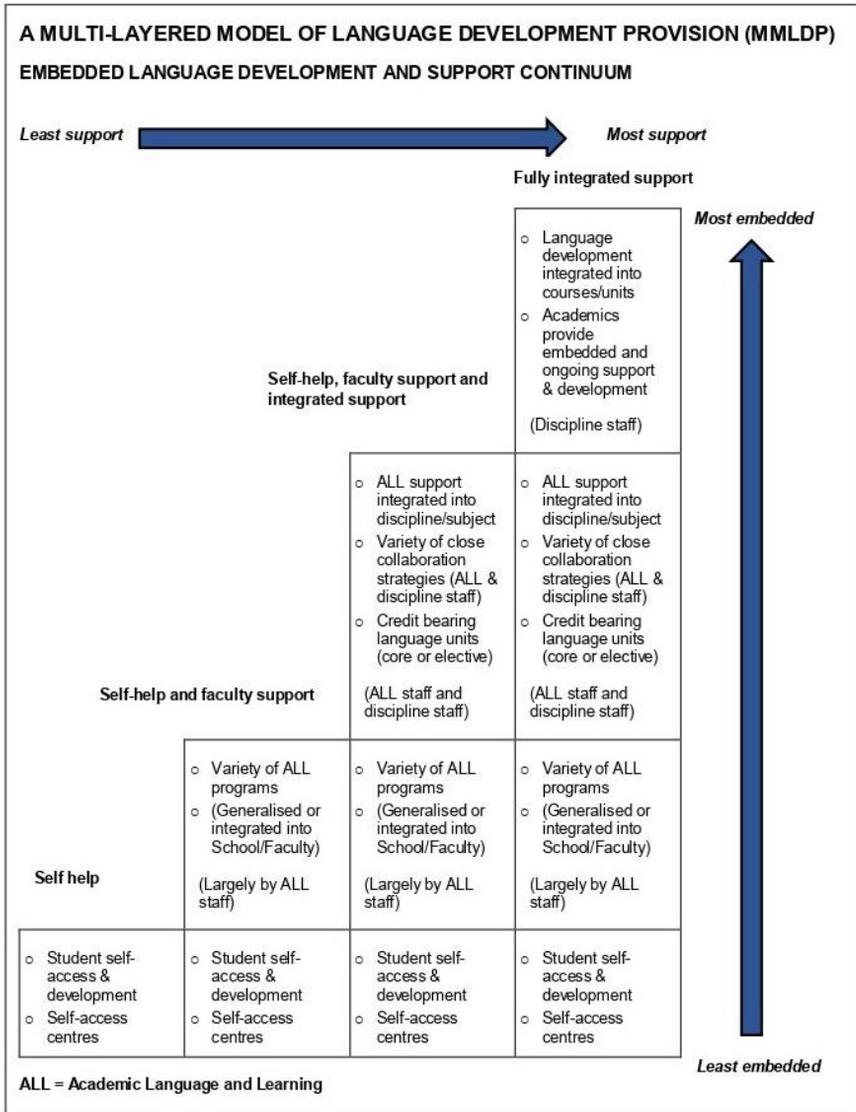
123 Ibid 370.

124 Nick James, "'How Dare You Tell Me How to Teach!': Resistance to Educationalism within Australian Law Schools' (2013) 36(3) *University of New South Wales Law Journal* 779.

125 *The SAGE Dictionary of Social Research Methods* (2006) 'Volunteer Sampling'.

126 Briguglio and Watson (n 120) 68. This figure was first published by Briguglio and Watson in the *Australian Journal of Language and Literacy* and has been adapted here with permission from the Australian Literacy Educators' Association.

Figure 1. Briguglio and Watson’s Typology



The author employed directed qualitative content analysis of publicly available information on the websites of the HEIs in the dataset, using the categories of language support from the vertical axis of Briguglio and Watson’s chart.¹²⁷ As set out in the table below, this resulted in the law schools being categorised into six groups, based on commonalities which appeared in the publicly available data. In this article, the categories of support are identified by the uppermost box in each column of Briguglio and Watson’s figure. Type 1 is Self-Help Support, Type 2 is

127 Hsiu-Fang Hsieh and Sarah E Shannon, ‘Three Approaches to Qualitative Content Analysis’ (2005) 15(9) *Qualitative Health Research* 1277, 1281–3.

Faculty Support, Type 3 is Integrated Support and Type 4 is Fully Integrated Support.

Table 1. Law School Categories Based on Briguglio and Watson's Typology of Academic Language and Learning Support

Category	Description	Institutions
1	Appear to provide all four types of support OR appear to provide Types 1, 3 and 4 support, with evidence of comprehensive/ systematic embedding of skills (including writing) across degree.	Edith Cowan University Bond University Flinders University
2	Appear to provide at least three types of support, but less evidence of comprehensive embedding of skills (including writing) across degree in Type 4.	Curtin University Murdoch University Deakin University University of Notre Dame Victoria University University of New South Wales University of the Sunshine Coast
3	Appear to provide Types 1 and 4 support, with evidence that writing supported in Type 4 support.	Australian National University Charles Darwin University Griffith University La Trobe University Monash University University of Newcastle University of Queensland University of Tasmania University of Technology Sydney University of Western Australia Western Sydney University
4	Appear to provide Types 1 and 3 support, with evidence that writing supported in Type 3 support.	Australian Catholic University James Cook University Queensland University of Technology Southern Cross University Canberra University University of New England

		University of Southern Queensland University of Wollongong
5	Appear to provide at least two types of support, but no evidence from publicly available data that writing is supported as part of Types 3 or 4.	RMIT University University of Adelaide University of Melbourne University of South Australia University of Sydney Central Queensland University
6	Appear to provide only one type of support.	Macquarie University Law Extension Committee (LPAB) TOP Education Institute

The author initially selected, at random, two schools from each of the six categories and emailed the academic identified on the law school's website as having responsibility for oversight of teaching and learning in the law school.¹²⁸ The assumption was that this academic was likely to be the most authoritative source of information about how that law school supported student writing or would then be able to direct the author to the person who did have that knowledge. The email included a Participant Information Statement that explained that the purpose of the study was to explore the extent to which Australian law schools adhere to the recommendations of the *GPG* in relation to the implementation of TLO 5 concerning law student writing. The Participant Information Statement also included details of the types of questions that participants might be asked about the practices of their law school in relation to the support of students' writing. Non-responders were followed up once with an email or phone call. If there was no response within a reasonable time frame, another law school was selected at random from the relevant category. This process was repeated until academics from two law schools within each category had been interviewed, or the pool of law schools in the category had been exhausted. This process resulted in interviews with academic staff from two law schools in five of the categories, and one law school in one of the categories.¹²⁹

The author conducted semi-structured interviews during 2017 and early 2018 with 13 academics from 11 different law schools. The interviews were each approximately one hour's duration, and were audio recorded. Interviewees were academic staff members with overall responsibility for the development of

128 This academic had the title of Head of School, Associate Dean, Teaching and Learning, Director of Academic Program, Teaching and Learning Director or similar.

129 The author has deliberately not particularised the categories here to avoid identification of the law schools who were interviewed.

teaching and learning within their law school,¹³⁰ or the person who was nominated by the law school as having some responsibility for writing support and development of students.¹³¹ Their length of time teaching in HE ranged from 3–22 years, with an average of 12 years. Five of the interviewees indicated that their research interests included legal education. The audio recordings were transcribed and coded using NVivo software. Data was again coded using directed qualitative content analysis, but this time the themes were based on the *GPG* recommendations. The validity of the coding system was strengthened through feedback obtained during the presentation of the findings at the Global Legal Skills Conference hosted by the John Marshall Law School at the University of Melbourne in December 2018.¹³²

V ANALYSIS

A *Is Writing Instruction Based on Literacy Theory?*

The *GPG* recommends that, in teaching writing to law students, '[a]n understanding of how students learn literacy skills is required including the role of appropriate instruction, practice and expert feedback'.¹³³ This recommendation echoes that of Bell and Pether, who argued for a 'theoretically-informed approach to literacy and language skills in legal education'.¹³⁴

Interviewees were asked whether writing instruction and support provided to students in their law school was based upon pedagogical theory concerning how students learn literacy. One academic, whose law school had a separate legal academic skills unit within the law school, was confident that the writing support provided to students was based on pedagogical theory. Two other interviewees asserted that writing pedagogy at their law schools was based on theories about how students learn literacy, but, when pressed to describe those theories, drew instead on their own personal experience as students and teachers. The remainder of the interviewees answered this question with an honest, but firm, 'no'. This response is consistent with the findings of Murray who observes that teaching academics 'have very little knowledge of existing scholarship on Academic

130 This was the case with six of the interview participants.

131 In the case of six interview participants, this was the academic responsible for teaching a first-year subject in law and/or oversight of the law school's first-year program of study, and the remaining interview participant was an academic who taught in a later-year legal research and writing subject.

132 Sandra Noakes, 'Why Law Student Writing is Like the Weather: Plenty to Complain about, but What Can We Do about It?' (Presentation, Global Legal Skills Conference, 11 December 2018). A copy of the author's presentation can be made available on request.

133 Wesley (n 6) 14.

134 Bell and Pether (n 2) 113.

Writing'.¹³⁵ Interviewees also exhibited a reluctance to consult with ALL experts within their institutions to develop writing support for their students. It appears that this lack of familiarity with pedagogical theory concerning how students learn literacy has implications for the way writing is taught in Australian law schools, and in particular, where it is located in the curriculum.

B Is Writing Taught to Law Students, and if So, How?

Interviewees were asked whether they thought writing was taught to students in their law school and asked to identify the ways in which this was done. All interviewees thought that students were taught writing, or that students were supported in the development of their writing. This occurred in various forms.

1 Writing Help from the 'Learning Centre'

All but one interviewee identified the provision of what Briguglio and Watson describe as Type 1 support to students, and the website analysis indicated that this type of support appeared to be available in all but two of the institutions in the dataset.¹³⁶ This model of writing support involves student 'self-access and development' and 'self-access centres'.¹³⁷ It is marked by the availability of generic academic skills and language support, provided by a centralised 'learning unit', or 'skills centre' within the HEI. The support includes individual tuition, face-to-face workshops concerning academic writing, self-directed online modules and online and print publications concerning academic writing. Harper and Vered have traced the emergence of the centralised 'study skills' model of academic literacy support in Australian HEIs from centres which also provided 'counselling, health and accommodation' to students.¹³⁸

The interviewees' views about this type of support were not positive. Whilst most were aware that these resources existed, they were not necessarily familiar with the content of the materials provided. Interviewees perceived that the law school needed to 'comply' with the requirements of the centralised learning unit, and they also found the lack of discipline specificity in the support materials frustrating for both themselves and the students. This reflects Tuck's recent findings of the experience of UK discipline academics, that where there are institution-wide

135 Rowena Murray, 'If Not Rhetoric and Composition, Then What: Teaching Teachers to Teach Writing' in Lisa Ganobcsik-Williams (ed), *Teaching Academic Writing in UK Higher Education: Theories, Practices and Models* (Palgrave Macmillan, 2006) 124, 125.

136 With the exception of the Law Extension Committee, which is responsible for the administration of the Legal Profession Admission Board's Diploma in Law, and the Top Institute, all institutions appear to offer self-help student support in the form of access to a central place within the institution which assists students with academic skills development, including writing.

137 Briguglio and Watson (n 120) 68.

138 Rowena Harper and Karen Orr Vered, 'Developing Communication as a Graduate Outcome: Using "Writing Across the Curriculum" as a Whole-Of-Institution Approach to Curriculum and Pedagogy' (2017) 36(4) *Higher Education Research and Development* 688, 691, citing DS Anderson and E Eaton, 'Australian Higher Education Research and Society: Part I' (1982) 1(1) *Higher Education Research and Development* 5, 22.

initiatives to support student writing, academics felt distanced from them.¹³⁹ Like the law academics in this study, the academics in Tuck's study perceived that they had limited agency in the services that were provided to students by the centralised academic skills unit.¹⁴⁰ However, in Tuck's study, academics expressed scepticism about institution-wide initiatives.¹⁴¹ In this study, some of the law academics expressed quite negative views toward them, finding the centralised learning centre to be positively *unhelpful* for law students:

[T]here is something but I think it's kind of rubbish. We have for instance, I can't even remember what it is, but with students with English as a second language, I'm pretty sure [the HEI at which Law School 3 was located] has a Writing Centre ... There are language learning workshops that students can go to, but that is university-wide. That's one of the reasons why we've tried to be more intensive in a couple of our courses on writing is because it's just not adequate for law students ... [W]hen a student accidentally submitted a track changes version of their paper last year and I saw the tracks, the person who commented on, and it was very generic and didn't really understand what we would be targeting in law writing. Things like the conciseness, that everything is driven towards your thesis ... and that your paragraph evidence has to be around how you're applying legal reasoning, how you engage with the Judge's reasons, and these sorts of things. So to my mind it's pedagogically wrong to separate out what people are writing about from how they're writing.¹⁴²

Interviewees were also asked whether their law school referred students to the centralised learning centre for assistance with their writing. A common theme was that this was a 'last resort', utilised when a student was 'failing', and things were 'desperate'.

Murray and Nallaya note that the centralised academic skills centre in HE, which usually relies on self-help support, tends to be based on the academic skills model.¹⁴³ As discussed above, this approach generally adopts a 'deficit model' of students, who are perceived as lacking in certain decontextualised, basic skills.¹⁴⁴ This deficit model of language support is exclusionary and tends to marginalise students from non-traditional backgrounds,¹⁴⁵ as it situates as 'the norm' those students who, through prior educational opportunities, have already had access to

139 Jackie Tuck, *Academics Engaging with Student Writing: Working at the Higher Education Textface* (Routledge, 2018) 129–30.

140 Ibid.

141 Ibid 119.

142 Interview with Academic D, Law School 3 (Interviewer's name omitted, Skype, 23 January 2017).

143 Neil Murray and Shashi Nallaya, 'Embedding Academic Literacies in University Programme Curricula: A Case Study' (2016) 41(7) *Studies in Higher Education* 1296, 1299.

144 Ivanič and Lea (n 107) 12.

145 Theresa M Lillis, *Student Writing: Access, Regulation, Desire* (Routledge, 2001) 39–40; Marcia Devlin et al, *Effective Teaching and Support of Students from Low Socioeconomic Status Backgrounds: Resources for Australian Higher Education* (Final Report, 2012) 7–8; Jade McKay and Marcia Devlin, "'Uni Has a Different Language ... to the Real World': Demystifying Academic Culture and Discourse for Students from Low Socioeconomic Backgrounds' (2014) 33(5) *Higher Education Research and Development* 949, 952–3, 959.

the literacies required in HE, whilst those who have not are positioned as ‘other’. The approach lacks an appreciation that students bring with them a variety of ‘cultural and social experiences to their acts of meaning making in their academic writing’.¹⁴⁶

This model also tends to focus on surface writing features such as spelling and grammar,¹⁴⁷ and provides generic material concerning the types of text structures which students may be required to produce in HE. It also tends to position writing as a set of ‘tips’ which can be acquired in a decontextualised way. This fosters an approach to academic writing in which students are ‘surface learners’;¹⁴⁸ they learn a few ‘tricks’ in terms of writing techniques, but they are unable to transfer these skills, because the skills are decoupled from discipline content. Hathaway observes that, where these materials are in the form of self-help online modules, ‘[u]ptake is elective, individual and episodic so what they offer is positioned as an “extra”, rather than as integral and central. Crucially, they “tell” or “show” what is to be done, leaving application and practice entirely to the student’.¹⁴⁹

Despite attempts to alter this centralised ‘study skills’ model of support, it remains dominant in Australian HEIs,¹⁵⁰ and the utilisation of this model has occurred ‘at the expense of discipline specificity’.¹⁵¹ This reflects the experience of the law academics in this study, particularly that the centralised support lacked discipline-specificity, and that, as it tended to separate out writing from content, it was at best providing guidance on surface writing features, and not necessarily explaining to students what they really wanted to know.

2 Law-Specific Self-Help

The website analysis revealed that some law schools appear to offer a version of the self-help model of writing support in the form of law-specific materials concerning writing, most commonly in the form of materials on essay writing in law and answering problem-style questions. Several interviewees nominated these types of materials as a method of teaching writing to law students. In one case, this consisted of resources developed by a law-specific academic skills unit within their institution and made available to students through that unit. However, in the

146 Lillis (n 145) 6.

147 See Murray and Nallaya (n 143) 1299, citing David R Russell et al, ‘Exploring Notions of Genre in “Academic Literacies” and “Writing across the Curriculum”’: Approaches across Countries and Contexts’ in Charles Bazerman, Adair Bonini and Débora Figueiredo (eds), *Genre in a Changing World* (WAC Clearinghouse, 2009) 399, 404.

148 Warren (n 12) 90.

149 Julia Hathaway, ‘Developing That Voice: Locating Academic Writing Tuition in the Mainstream of Higher Education’ (2015) 20(5) *Teaching in Higher Education* 506, 510.

150 Harper and Vered (n 138); Simon Evans, Ariana Henderson and Sally Ashton-Hay, ‘Defining the Dynamic Role of Australian Academic Skills Advisors’ (2019) 38(6) *Higher Education Research and Development* 1121.

151 Olivier Buzzi, Susan Grimes and Alistair Rolls, ‘Writing for the Discipline in the Discipline?’ (2012) 17(4) *Teaching in Higher Education* 479, 481.

majority of cases it consisted of online materials developed by the law school. These law-specific self-help materials tended to be developed at subject level, and then adopted on an ad hoc basis. The development of writing materials in 'silos' meant that there was a concern about consistency:

They are too targeted to particular [subjects] and that's my concern and I think that's where we're giving the wrong impression, that 'this is Contracts'. So I think we may need to make 'law-generic' resources that very clearly say 'this is the approach you take in responding'.¹⁵²

The development of writing support materials in subject silos and the consequent lack of consistency is also noted by Tuck in her study.¹⁵³ Tuck positions this as an issue of academic autonomy and academic resistance to standardisation within HE, noting a perception amongst the academics in her study that, because everyone is 'doing their own thing', it is the *students* who have to adjust to this variation, rather than academics having to compromise or collaborate.¹⁵⁴ Academic G's comment at least indicates that there may be a role for the law school to play in standardising its approach to writing support for students.¹⁵⁵

Whilst interview participants indicated that the availability of self-help materials afforded them peace of mind that at least some support was provided to students, they also expressed scepticism about whether law students accessed the self-help material, regardless of whether it was generic or law-specific. This illustrates that the self-help model in *any form* is voluntary. Research has demonstrated that where language support in HE is optional for students, those who need the most support are the *least* likely to access assistance.¹⁵⁶ Instead, optional support is often accessed by students who already have a reasonable mastery of academic writing but want to further improve their capabilities.¹⁵⁷

3 In-Faculty Support

According to Briguglio and Watson, Faculty, or Type 2 Support, is characterised by a '[v]ariety of ALL programs' which are '[g]eneralised or integrated into

152 Interview with Academic G, Law School 6 (Sandra Noakes, Skype, 23 January 2018).

153 Tuck (n 139) 124–5. See also Angie Cassar et al, 'Student Transitions: Evaluation of an Embedded Skills Approach to Scaffolded Learning in the Nursing Curriculum' (2012) 3(1) *International Journal of the First Year in Higher Education* 35, whose study noted a preference by the teaching academics to remain in their 'silos': at 44.

154 Tuck (n 139) 125–6.

155 See above n 152 and accompanying text.

156 Warren (n 12) 89–90; Ursula Wingate, 'Doing Away with "Study Skills"' (2006) 11(4) *Teaching in Higher Education* 457, 458; Sophie Arkoudis and Lachlan Doughney, *Good Practice Report: English Language Proficiency* (Report, 2014) 12–13, citing Arkoudis, Baik and Richardson (n 28) 42.

157 Ursula Wingate, 'A Comparison of "Additional" and "Embedded" Approaches to Teaching Writing in the Disciplines' in Mary Deane and Peter O'Neill (eds), *Writing in the Disciplines* (Palgrave Macmillan, 2011) 65, 67 ("Additional" and "Embedded").

School/Faculty’,¹⁵⁸ and normally delivered by literacy experts. The website analysis indicated that there appear to be a small number of law schools that provide language support to students which is faculty or school-specific.

The versions of this model in Australian HEIs include assigning literacy experts to particular disciplines, including law. The website analysis indicated that this appears to be the model at Edith Cowan University (‘ECU’). At ECU, each school has staff dedicated to providing ALL support for students within that school.¹⁵⁹ Another model is a ‘skills centre’ located within a law school. For example, Curtin University Business School, in which law is located, has a Communication Skills Centre situated within the Business School. This Centre provides ‘specialised workshops, skills development short courses, targeted “in-class” skills development and assignment guidance sessions, print resources to support [students’] study, and online support ...’.¹⁶⁰ The University of Melbourne also has a well-established Legal Academic Skills Centre.¹⁶¹

Of the institutions interviewed, one identified having a dedicated ‘legal skills’ unit that was staffed by literacy experts. At this law school, the in-faculty support primarily took the form of staff from the support unit teaching in first-year law subjects, conducting writing-related instruction within those subjects, and also conducting optional legal writing workshops for all students. Two other interviewees identified that they had specialised learning advisors who delivered discipline-specific writing instruction to students. In the case of one interviewee, this occurred in the form of optional writing workshops that were organised at a time when students were on campus to undertake other law subjects. In another case, it was in the form of the literacy expert delivering writing instruction to students which related to a particular assignment.

There has been considerable research in relation to the in-faculty model of ALL support in South Africa. Jacobs’ extensive case study of the effects of locating ALL experts within disciplines at the Cape Peninsula University of Technology in South Africa examines the effects of institutional restructuring so that literacy experts

158 Briguglio and Watson (n 120) 68.

159 ‘Learning Consultants’, *Student Intranet: My Studies* (Web Page, 2016) <<http://intranet.ecu.edu.au/student/my-studies/study-assistance/learning-consultants>>. This web page has now been archived; a screenshot of the old web page can be made available by the author on request. An updated version of the web page can be found here: ‘Academic Skills’, *Student Intranet: My Studies* (Web Page, 9 August 2021) <<https://intranet.ecu.edu.au/student/my-studies/study-assistance/academic-skills-centre>>. See also Harris (n 28).

160 ‘Communication Skills Centre’, *Curtin Business School* (Web Page, 12 May 2016) <<http://business.curtin.edu.au/studying-business/student-services/communication-skills-centre/>>. Note that this web link is outdated and now leads to a different web page. A screenshot of the old web page can be made available by the author on request. Note, also, that the Communication Skills Centre at Curtin University has now been replaced by the Academic Communication Development team which continues to offer most of the same resources to students: ‘Business and Law Skills Development Programs’, *Current Students* (Web Page) <<https://students.curtin.edu.au/study-support/skills/business-law/>>.

161 ‘Legal Academic Skills Centre’, *The University of Melbourne* (Web Page) <<http://law.unimelb.edu.au/students/lasc>>.

moved from a centrally located learning unit to faculties.¹⁶² This study found that locating ALL support within the faculty or school overcomes some of the problems of the de-contextualised support provided by the more generic 'self-help' model.¹⁶³ The main benefit identified for students is that this model is more likely to be informed by sociocultural understanding of academic literacy as opposed to an autonomous, skills-based approach.¹⁶⁴ It encourages students to be aware of the 'practices privileged by their disciplines, [so that they] are able to develop a deeper understanding of how to take part in these, and how to demonstrate these in disciplinary communication'.¹⁶⁵

However, this model is most effective when the in-faculty support is provided to *teaching academics* within the discipline, rather than to individual students, and where literacy experts and teaching academics co-design programs to support student writing.¹⁶⁶ Where in-faculty support for writing is provided by literacy experts directly to students, it is less cost-effective, because it reaches fewer students than a program which is available to all students.¹⁶⁷ It also tends to result in the support operating on the periphery of the discipline, rather than being perceived as part of the core business of the discipline.¹⁶⁸

The website analysis indicated that, even where law schools adopt a model of in-faculty support, the programs are still aimed at students, rather than teaching academics. This appears to be the situation even in the case of ECU, which has

162 Cecilia Jacobs, 'On Being an Insider on the Outside: New Spaces for Integrating Academic Literacies' (2005) 10(4) *Teaching in Higher Education* 475; Cecilia Jacobs, 'Towards a Critical Understanding of the Teaching of Discipline-Specific Academic Literacies: Making the Tacit Explicit' (2007) 41(1) *Journal of Education* 59 ('Critical Understanding'); Cecilia Jacobs, 'Collaboration as Pedagogy: Consequences and Implications for Partnerships between Communication and Disciplinary Specialists' (2010) 28(3) *Southern African Linguistics and Applied Language Studies* 227; Cecilia Jacobs, 'Opening Up the Curriculum: Moving from the Normative to the Transformative in Teachers' Understandings of Disciplinary Literacy Practices' in Theresa Lillis et al (eds), *Working with Academic Literacies: Case Studies Towards Transformative Practice* (WAC Clearinghouse, 2015) 131.

163 Jacobs, 'Critical Understanding' (n 162) 59–60.

164 Ibid 75–7.

165 Glenda Crosling and Anne V Wilson, 'Creating a Rich Environment: Co-operation between Academic Support and Disciplinary Teaching Staff' (Conference Paper, Language and Academic Skills in Higher Education Conference, 2005) 6. See also Elaine Evans et al, 'Collaborative Teaching in a Linguistically and Culturally Diverse Higher Education Setting: A Case Study of a Postgraduate Accounting Program' (2009) 28(6) *Higher Education Research and Development* 597.

166 Jan Skillen, 'Teaching Academic Writing from the "Centre" in Australian Universities' in Lisa Ganobcsik-Williams (ed), *Teaching Academic Writing in UK Higher Education: Theories, Practices and Models* (Palgrave Macmillan, 2006) 140, 144–5; Harris (n 28) 294–5; Carolyn Malkin and Kate Chanock, 'Academic Language and Learning (ALL) in Australia: An Endangered or Evolving Species?' (2018) 12(1) *Journal of Academic Language and Learning* A15, A27.

167 Skillen (n 166) 141.

168 Ibid 151; Pat Strauss, "'I Don't Think We're Seen as a Nuisance": The Positioning of Postgraduate Learning Advisors in New Zealand Universities' (2013) 17 (Special Issue 21) *TEXT* 1–15, 2.

undertaken extensive research in relation to the integration of writing support in the disciplines.¹⁶⁹ Only two of the interviewees identified that literacy experts were utilised to help law academics develop programs that assisted students with their writing.

There may be several reasons why in-faculty literacy expertise may not be taken up by law academics in the manner proposed by Jacobs as best practice. First, teaching academics are unaware of the work performed by literacy experts.¹⁷⁰ Discipline academics can also feel that they do not have the expertise to teach writing, and so are reluctant to collaborate to build it into their subjects.¹⁷¹ Teaching academics do not necessarily see it as their role to support student writing.¹⁷² Clughen and Connell have documented academic resistance to discipline-based writing programs in UK HE.¹⁷³ However, research by James suggests a broader reason why Australian law academics might resist in-faculty ALL support for themselves rather than individual students. James posits that there is a resistance in Australian law schools to what he describes as the discourse of ‘*educationalism*’, which he defines as ‘a higher education discourse characterised by an emphasis upon student learning and upon teaching by academics in a manner informed by orthodox educational scholarship’.¹⁷⁴ A central tenet of this discourse of educationalism is that teaching academics should focus on teaching effectively rather than simply relying on their expertise in discipline knowledge — that they should be familiar with educational theory and literature.¹⁷⁵ Given this resistance, it is unsurprising that the in-faculty model of writing support aimed at teaching academics does not appear to be a feature of many Australian law schools.

169 Harris (n 28).

170 Arkoudis and Doughney (n 156) 13; L Gurney and V Grossi, ‘Performing Support in Higher Education: Negotiating Conflicting Agendas in Academic Language and Learning Advisory Work’ (2019) 38(5) *Higher Education Research and Development* 940, 948.

171 Kate Chanock et al, ‘Collaborating to Embed Academic Literacies and Personal Support in First Year Discipline Subjects’ (2012) 9(3) *Journal of University Teaching and Learning Practice* 1–13, 4; Richard Bailey, ‘The Role and Efficacy of Generic Learning and Study Support: What Is the Experience and Perspective of Academic Teaching Staff?’ [2010] (2) *Journal of Learning Development in Higher Education* 1–14, 5; Wingate, *Academic Literacy and Student Diversity* (n 121) 45.

172 Wingate, ‘Doing Away with “Study Skills”’ (n 156) 459; Rebecca Bell, Sarah Broadberry and Julius Ayodeji, ‘From WAC to WiD: Trialling Writing-Intensive Pedagogies with Academic Staff in UK Higher Education’ in Mary Deane and Peter O’Neill (eds), *Writing in the Disciplines* (Palgrave MacMillan, 2011) 198, 200; Briguglio and Watson (n 120) 70; Arkoudis, Baik and Richardson (n 28) 84; Rowena Harper, ‘From Principles to Practice: Implementing an English Language Proficiency Model at UniSA’ (2013) 7(2) *Journal of Academic Language and Learning* A150, A151–3; Wingate, *Academic Literacy and Student Diversity* (n 121) 44.

173 Lisa Clughen and Matt Connell, ‘Writing and Resistance: Reflections on the Practice of Embedding Writing in the Curriculum’ (2012) 11(4) *Arts and Humanities in Higher Education* 333.

174 James (n 124) 783.

175 *Ibid* 786.

4 Writing Support as Part of the Law Degree

It was possible to identify from the website analysis that writing was supported in most of the law schools via what Briguglio and Watson characterise as Type 3 (Integrated Support) and/or Type 4 (Fully Integrated Support). According to Briguglio and Watson, Type 3 support involves 'ALL support integrated into [the] discipline/subject', a '[v]ariety of close collaboration' between 'ALL & discipline staff', and '[c]redit bearing language units'.¹⁷⁶ Type 4 Support is characterised by language support 'integrated into courses/units' of study, and the discipline academic having carriage of them.¹⁷⁷

(a) Writing Support as Part of the 'Skills' Subject

In terms of Type 3 support, it was not possible to discern from the website analysis whether the law schools that adopt this model closely collaborate with literacy experts. However, it was possible from the data to determine whether there are language-based subjects integrated within the discipline of law, and whether those subjects are credit-bearing.

The website analysis indicated that a common model of Type 3 writing support for law students was the standalone credit-bearing communication skills subject, with 18 law schools adopting some version of this model. It typically takes the form of a first-year standalone subject devoted to legal skills — for example, legal research, statutory interpretation, case analysis, problem solving and legal writing. This model appears to be adopted in 13 law schools. Four law schools appear to have a later year law-specific standalone skills subject which includes a writing component.

One of the advantages of this method of writing support is that, as these subjects are credit-bearing, they are compulsory for all students. This avoids the deficit model of writing support and has the potential to capture the students who most need this support without marginalising them.¹⁷⁸ The law-specific standalone skills subject also embraces, to some extent, a sociocultural understanding of literacy, in that there is an acknowledgement by the law schools that writing for law is different to writing for arts or medicine — that students need to be apprenticed in the writing requirements of the discipline of law. Given that these legal skills subjects often entail teaching of legal research, case analysis and statutory interpretation, it is likely that they are delivered by law academics. This means that writing skills are acquired via an enculturation in the discipline led by experts within the discipline. This form of enculturation has the potential to allow student

176 Briguglio and Watson (n 120) 68.

177 Ibid.

178 Chanock et al (n 171) 1–2.

writing to move from the '[n]ovice approximations of particular disciplinary ways of making knowledge' to the use of '[e]xpert, insider prose'.¹⁷⁹

However, the 'legal skills' model of writing support, whilst integrated within the discipline of law, is nevertheless closer to an 'additional' rather than an 'embedded' approach to writing support.¹⁸⁰ It is a less engaging model for law students, because the teaching of writing is still separated from subject matter content.¹⁸¹ Writing is taught as a de-contextualised skill, underpinned by the assumption that students will then be able to transfer this skill to their substantive subjects.

In their critique of this model of writing support in Australian law schools, Bell and Pether note that this approach 'runs the risk of reproducing all of the problems associated with legal writing education in many US law schools'.¹⁸² Rideout and Ramsfield's work indicates that the US model of standalone legal writing skills classes is based on what Lea and Street would describe as an academic skills or, at best, an academic socialisation model of writing support.¹⁸³ It results in both students and academics viewing legal writing as a skill which is separate from the 'real law'.¹⁸⁴ This engenders an anti-intellectual stance on the teaching of writing, underpinned by a perception that teaching legal writing to students at all involves 'spoon feeding' or 'dumbing down'.¹⁸⁵ Research concerning this model of writing support for law students in the US demonstrates that it has a number of disadvantages, including that legal writing is accorded low status,¹⁸⁶ and instruction is narrowly focused on a limited range of genres¹⁸⁷ and lacks integration with legal method,¹⁸⁸ perpetuating a dichotomy between legal writing and the study of legal doctrine.¹⁸⁹

179 John Bean, 'Backward Design: Towards an Effective Model of Staff Development in Writing in the Disciplines' in Mary Deane and Peter O'Neill (eds), *Writing in the Disciplines* (Palgrave Macmillan, 2011) 215, 217, quoting Susan Peck MacDonald, *Professional Academic Writing in the Humanities and Social Sciences* (Southern Illinois University Press, 1994) 187.

180 Wingate, "'Additional'" and "'Embedded'" (n 157).

181 Patricia Hughes, Kay Tucker and Caroline Knaggs, 'Sitting on the Same Bench: Complementing Law Learning Outcomes' (2011) 5(2) *Journal of Academic Language and Learning* A50, A53.

182 Bell and Pether (n 2) 134.

183 J Christopher Rideout and Jill J Ramsfield, 'Legal Writing: The View from Within' (2010) 61(3) *Mercer Law Review* 705, 720–2 ('The View from Within'), citing Lea and Street (n 104) 158–9.

184 J Christopher Rideout and Jill J Ramsfield, 'Legal Writing: A Revised View' (1994) 69(1) *Washington Law Review* 35, 44–5 ('A Revised View'). See also J Christopher Rideout, 'Knowing What We Already Know: On the Doctrine of Legal Writing' (2014) 1(1) *Savannah Law Review* 103, 108–9; Hardy (n 18) 34.

185 Haggis (n 116) 532–3; Rideout and Ramsfield, 'A Revised View' (n 184) 47.

186 Emily Grant, 'Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession' (2003) 27(2) *Vermont Law Review* 371, 373, 377.

187 Adam G Todd, 'Writing Lessons from Abroad: A Comparative Perspective on the Teaching of Legal Writing' (2014) 53(2) *Washburn Law Journal* 295, 310–11.

188 Linda H Edwards, 'Legal Writing: A Doctrinal Course' (2014) 1(1) *Savannah Law Review* 1, 15.

189 Rideout (n 184) 108.

In addition, one effect of standalone communications skills subjects in HE is that teaching academics misconceive academic literacy; they fail to understand that academic literacy involves 'making explicit and giving students access to the workings of disciplinary discourses'.¹⁹⁰ Teaching writing as a skill separated from subject matter content, even where it is being taught as a *specialised* skill, ignores the fact that '[w]riting legal prose entails a good deal of insider knowledge about legal discourse'.¹⁹¹

Four of the academics interviewed reported that their law school adopted the 'legal skills subject' model of writing support. All four had a first-year skills subject including writing instruction, and one also had a compulsory later year standalone skills subject incorporating a writing component.

Several of the issues identified above were reflected in the interviewees' observations. A common theme where writing was taught in a standalone skills subject was what to get students to write *about*. This has been identified as a concern in credit-bearing language subjects that are not tied to discipline content.¹⁹² Studies have also demonstrated that law students see limited benefit in engaging in writing activities when they are unfamiliar with the subject matter content.¹⁹³

These challenges were recognised by two of the interviewees whose law schools had a first-year standalone legal skills subject. However, other interviewees perceived that it was an *advantage* to have a choice of topics about which students could write in their first-year legal skills subject. In all cases, however, the academics used very simple subject material; interviewees used topics from popular culture, scenarios involving straightforward pieces of legislation and legal problems that did not require much (if any) knowledge of substantive law:

So in terms of engaging with content when they haven't learnt the content and getting them to think through skills — one of the aims of doing this is to get them to start to think about these skills as generalised skills, so things that are applicable, theoretically, to any area of law. Clearly we can't spend too much time talking about the intricacies of intellectual property, basic crim, so basic assault, theft, basic tort, steer clear of negligence but look at some of the more intentional torts. It's stuff that some are familiar with through popular culture, so they have an entry way, and you then provide them with structure to work with it.¹⁹⁴

I choose a range of general topics that happen to be topical at the relevant time that I'm running this unit so the students can find some stuff about it and I try to also not make it too technical because it's really their first essay in law school. ... The recent

190 Jacobs, 'Critical Understanding' (n 162) 71.

191 Rideout and Ramsfield, 'The View from Within' (n 183) 736.

192 Andrew G Johnson, 'Content Matters: Curriculum Development Challenges in Academic Writing Programs' (2018) 12(1) *Journal of Academic Language and Learning* A193.

193 See, eg, Shibani et al (n 98) 312.

194 Interview with Academic B, Law School 1 (Sandra Noakes, Skype, 17 January 2017).

topics we've had have been [sic] discussing the changes to, for example, the *Racial Discrimination Act*, which has been one of the political hot potato issues. We've also talked about the terrorism legislation; we've also talked about very basic legal essay but for a new student there's a bit of legal jargon and there's some legal concepts to get across that they might not be familiar with.¹⁹⁵

My favourite topic at the moment to give them assessment on is the *Dog and Cat Management Act* that we have in [our jurisdiction] and the reason for that is because it's easy enough to understand the legislation, but we also have a handful of cases that we can give them with that. At the time of writing that assignment, which is a memo to a supervisor, they haven't yet learned how to research so we give them all of the research and then expect them to analyse it and write and then later on they do some stuff on family law.¹⁹⁶

I think it's easy. I mean you take ... a basic statute from a state and then about four cases on dog bites. There was a statute that said something like if you provoke the dog then you can't sue them for a dog bite. So I think you match legal writing at that point with case law reasoning and so you don't have to teach them all of torts. You may just pick a very basic tort, like the tort of passing off or something like that, and I think you could do it like that. ... So definitely writing skills should be translated more across but I don't think it's too difficult to take a very basic thing, like I was saying we used dog bites. Another option was slipping on banana peels and when you can sue someone for that. People wrote their legal memorandums, and we went through their writing and away we go.¹⁹⁷

The concern with this approach is that it may oversimplify curriculum in a manner that is criticised by academics who resist the explicit teaching of writing to law students, because it is perceived as 'spoon feeding' or 'dumbing down'.¹⁹⁸ Haggis argues that, in the context of an increasingly diverse student population in HE, students struggle with the nature of *process* in their particular discipline. What she means by this, in relation to student writing, is the ways in which 'disciplinary aims may be realised' through the use of language in the discipline.¹⁹⁹ The perception of discipline academics is that having to explain this disciplinary process to students necessitates 'dumbing down' the curriculum, making assessment tasks simpler, and assigned readings shorter and more superficial. However, Haggis argues that there is a clear difference between, for example, making an assignment really straightforward or telling students what to write in an assignment, and unpacking an essay question, helping students to think about the modality of vocabulary used in the question and requiring students to think about the assumptions implicit in the question.²⁰⁰ Whereas the former is 'spoon feeding', the latter is not. The *GPG* observes that writing instruction in law school should

195 Interview with Academic H, Law School 7 (Sandra Noakes, Skype, 10 May 2017).

196 Interview with Academic K, Law School 10 (Sandra Noakes, Skype, 9 March 2018).

197 Interview with Academic D, Law School 3 (n 142).

198 Haggis (n 116) 523, 532–3.

199 Ibid 533.

200 Ibid 532.

embed the 'importance of critical thinking'.²⁰¹ It appears that the approach to writing tasks in these standalone legal skills subjects involves some degree of 'spoon feeding', perhaps to the extent that it restricts students' engagement in critical thinking.

(b) Writing Support as Part of a 'Substantive' Law Subject

Briguglio and Watson characterise Type 4 (Fully Integrated) Support as language support 'integrated into courses/units' of study, and the discipline academic having carriage of them.²⁰² The website analysis indicated that the model of embedding writing into substantive law subjects is a model of writing support adopted by 20 law schools. The most common form of integration of writing skills support with subject matter content in law is a skills component within a first-year 'foundations of law' subject. A less common approach is the integration of the teaching of writing within other substantive law subjects. Of the interviewees, eight law schools identified that writing instruction was embedded into a substantive law subject. In seven of these instances, this embedded writing instruction occurred in a first-year law subject. In one instance it was identified as occurring in a later year elective subject.

This is the model of writing support recommended by the *GPG*. Briguglio and Watson note that '[e]mbedded language development is ... lauded as the best or perhaps most efficient model to reach the greatest number of students'.²⁰³ It is also supported by NLS theory, because it positions writing as 'embedded in and constructed from social and cultural practices',²⁰⁴ rather than as a de-contextualised skill.

Like Type 3 support, this model is inclusive, and moves away from the deficit model, as it is taught to all students, not only those who are perceived as having difficulties with their writing.²⁰⁵ Given the increasing recognition that literacy support needs to be provided for all Australian HE students, a model of writing support for all students recognises their novice status in the discipline, regardless of their backgrounds.²⁰⁶

201 Wesley (n 6) 14.

202 Briguglio and Watson (n 120) 68.

203 Ibid 67.

204 McKay and Devlin (n 145) 953, quoting James Paul Gee, 'Reflections on Reading Cope and Kalantzis' "'Multiliteracies': New Literacies, New Learning" (2009) 4(3) *Pedagogies* 196, 198.

205 Wingate, "'Additional" and "Embedded"' (n 157) 82–3.

206 Kerry Hunter and Harry Tse, 'Student Perceptions of Embedded Writing Programs Taught by Disciplinary Academics' (2013) 7(2) *Journal of Academic Language and Learning* A95, A95, citing Ursula Wingate and Christopher Tribble, 'The Best of Both Worlds: Towards an English for Academic Purposes/Academic Literacies Writing Pedagogy' (2012) 37(4) *Studies in Higher Education* 481, 481.

More importantly, however, it emphasises literacy in context,²⁰⁷ recognising that students need different literacies for different contexts in HE, and that what is required of law students is mastery of a particular, specialist Discourse — the Discourse of law in HE. If it is accepted that literacy is the mastery of this Discourse, then law academics, as subject matter experts, are best placed to apprentice students to the language requirements of their discipline. Writing support embedded in subject matter content classes ensures that this occurs. When writing is taught by teaching academics as subject matter experts, students perceive it as more relevant and having greater status.²⁰⁸

The interviewees identified several benefits of teaching writing embedded in subject matter content classes. These included that it facilitated the framing of clear written communication as an ethical responsibility for lawyers and enabled the tailoring of writing instruction to the particular type of writing required in the substantive subject.

Despite the fact that this type of writing support is considered best practice, studies acknowledge the challenges of the embedded model. Studies of embedded writing programs in HE have demonstrated a resistance on the part of teaching academics to implement such programs within their subjects,²⁰⁹ even where there is support for this approach from the executive of the HEI.²¹⁰ This resistance may derive from a perception that it is not the role of the subject matter expert to teach writing,²¹¹ a concern that teaching academics do not possess the requisite skills to teach writing,²¹² and anxiety that the teaching of writing will ‘crowd out’ subject matter content and add to academic workload.²¹³

207 Wingate, ““Additional” and “Embedded”” (n 157).

208 Buzzi, Grimes and Rolls (n 151) 482; Crocker (n 23) 9.

209 Wingate, ‘Doing Away with “Study Skills”’ (n 156) 459, citing John Biggs, ‘Assessing Learning Quality: Reconciling Institutional, Staff and Educational Demands’ (1996) 21(1) *Assessment and Evaluation in Higher Education* 5, 5; Harris (n 28) 296.

210 Murray and Nallaya (n 143) 1304–5.

211 Bell and Pether (n 2) 133–4; Bell, Broadberry and Ayodeji (n 172) 200; Murray and Nallaya (n 143) 1305–6; Harper (n 172) A151; Arkoudis, Baik and Richardson (n 28) 84; Karyn Gonano and Peter Nelson, ‘Developing Students’ Writing at Queensland University of Technology’ in Chris Thaiss et al (eds), *Writing Programs Worldwide: Profiles of Academic Writing in Many Places* (WAC Clearinghouse, 2012) 43, 44.

212 Arkoudis, *Options and Strategies* (n 29) 11, citing Baik (n 29) 116–17 and O’Loughlin and Arkoudis (n 29) vol 10, 95, 127–8; Murray and Nallaya (n 143) 1305; Helen Basturkmen, ‘Developing Writing Courses for Specific Academic Purposes’ in John Flowerdew and Tracey Costley (eds), *Discipline-Specific Writing: Theory into Practice* (Routledge, 2017) 31, 31; Lotta Bergman, ‘Supporting Academic Literacies: University Teachers in Collaboration for Change’ (2016) 21(5) *Teaching in Higher Education* 516, 517; Bailey (n 171) 5; Amanda French, ‘Through a Glass Darkly: A Post-Qualitative Case Study into Lecturers’ Perceptions of Academic Writing Practices in Higher Education’ (PhD Thesis, Birmingham City University, 2014) 55.

213 Murray and Nallaya (n 143) 1305; Reem Al-Mahmood and Paul Gruba, ‘Approaches to the Implementation of Generic Graduate Attributes in Australian ICT Undergraduate Education’ (2007) 17(3) *Computer Science Education* 171, 179; Kate Chanock, ‘Teaching Subject Literacies through Blended Learning: Reflections on a Collaboration between Academic Learning Staff and Teachers in the Disciplines’ (2013) 7(2) *Journal of Academic Language and Learning* A106,

Another challenge for the implementation of the embedded model of writing support in HE is that successful embedded programs tend to be very labour-intensive and require a significant level of commitment on the part of teaching academics and the literacy experts. Wingate, Andon and Cogo's study of an embedded writing program in HE demonstrates that, whilst the teaching academics who delivered the program considered that it was effective in improving student performance, it had considerable workload implications for the teaching academics.²¹⁴ Their study shows that such programs can be successfully delivered without 'crowding out' subject matter content. However, this requires some redesign of subject delivery, rather than simply adding in a 'writing component' to the subject.²¹⁵ The challenge of embedding writing support adding to already content-laden law subjects was expressed by several interview participants, who also indicated that the 'writing component' of a substantive law subject is one of the first aspects to be jettisoned in place of content. This may explain why, of the 20 law schools that appear to have a fully embedded approach to writing support, six also maintain a standalone legal skills subject incorporating writing. The maintenance of a standalone skills subject at least ensures that writing is supported somewhere in the curriculum.

C When Is Writing Taught to Law Students?

The *GPG* recommends that writing '[i]nstruction should begin early in the degree program and be followed up by advanced classes later in the degree'.²¹⁶ A similar recommendation is made by Bell and Pether.²¹⁷

Regardless of whether the writing support provided by the law school was Type 3 or Type 4 support, there was a consistent theme in the interviews that writing instruction was perceived as the province of those teaching first-year law subjects.²¹⁸ As discussed above, the author's methodology in approaching law schools to participate in this study was to contact the academic at the law school who appeared to be responsible for the oversight of learning and teaching within the law school. In total, initial contact was made with 21 law schools, and the author received responses from 12 law schools indicating a willingness to participate in interviews. However, of those 12 responses, six advised that the appropriate contact person was a teaching academic involved in first-year teaching.

A108–9, citing Ursula Wingate, 'A Framework for Transition: Supporting "Learning to Learn" in Higher Education' (2007) 61(3) *Higher Education Quarterly* 391, 396; French (n 212) 56; Anna Magyar, Daniel McAvoy and Kathrin Forstner, "'If Only We Knew What They Wanted": Bridging the Gap between Student Uncertainty and Lecturers' Expectations' [2011] (3) *Journal of Learning Development in Higher Education* 1–18, 4.

214 Ursula Wingate, Nick Andon and Alessia Cogo, 'Embedding Academic Writing Instruction into Subject Teaching: A Case Study' (2011) 12(1) *Active Learning in Higher Education* 69, 77.

215 Ibid 71–3.

216 Wesley (n 6) 14.

217 Bell and Pether (n 2) 132.

218 This is consistent with Hardy's findings in 2005: see Hardy (n 18) 19.

The website analysis also indicates that writing instruction is perceived as a ‘first-year gig’ in law, with the majority of law subjects, entailing any teaching of writing, conducted in the first year.

One interviewee expressed a preference for ‘front-loading’ students with the skills they might need to succeed in the remainder of their law degree, including writing. Whilst the rationale underpinning this ‘front-loading’ mode of support may be that students then have the skills that will better equip them to engage with subject matter content in their other law subjects, sociocultural understandings of literacy emphasise the importance of students acquiring literacy skills *simultaneously* with subject matter content.²¹⁹ This allows students to employ writing as a means of constructing subject matter knowledge, as well as facilitating ‘explicit connections between the discourse variables of their subject’ and the writing requirements of the subject.²²⁰

Interviewees expressed frustration at the perception within their law school that writing support was something ‘done’ in the first year, and that, once students had been ‘taught’ how to write in their first year, they should have mastered this skill:

[T]here’s this great assumption: ‘Oh, that’s taught in year one. I’m not going to go over that again’. ... We can’t just assume that this has happened. We all have to say: ‘We’ve got a new class here, and to a certain extent we’re finding out what level that they’re at’.²²¹

[Later year academics remark] ‘Oh, I can’t believe the students got this far. How did they get past these other subjects?’ ... I think there is a perception, certainly in more senior levels, in the intermediate and advanced levels, that subject coordinators take the view that ‘well you should have learnt it by now. If you haven’t, I’ve got too much content’.²²²

Because you have the constant discussion of ‘oh, I have this student in third year. Why don’t they know how [to write]? ... What are you doing in first year?’ and my response to that is ‘yes, but you have to scaffold it. Just because you teach something once doesn’t mean that everybody miraculously remembers it’.²²³

I don’t really know what my colleagues who are teaching substantive legal subjects [in later years] are doing in terms of writing skills.²²⁴

219 Robyn McWilliams and Quentin Allan, ‘Embedding Academic Literacy Skills: Towards a Best Practice Model’ (2014) 11(3) *Journal of University Teaching and Learning Practice* 1–20, 1.

220 Ibid.

221 Interview with Academic G, Law School 6 (n 152).

222 Interview with Academic I, Law School 8 (Sandra Noakes, Skype, 10 May 2017).

223 Interview with Academic J, Law School 9 (Sandra Noakes, Skype, 30 April 2018).

224 Interview with Academic A, Law School 1 (Sandra Noakes, Skype 18 January 2017).

The GPG observes that good writing programs '[view] writing as a recursive rather than linear process',²²⁵ and recommends that '[i]nstruction should be based on the non-linear process adopted by successful writers'.²²⁶ A perception that writing is 'taught' to students in the first year, and beyond that need not be revisited, tends to adopt a *linear* view of what it means to learn to write. A similar perception is noted in Thies et al's study of embedded academic literacy programs at Deakin University.²²⁷ When academic staff were given a choice about where to embed academic literacy support into discipline subjects, they opted for core first-year subjects. Thies et al observe that, whilst this had the advantage that these were compulsory subjects, and the academic literacy initiatives therefore supported a large number of students, 'focusing on these [subjects] ... negated the value of viewing embedded academic literacies curriculum as part of a developmental or staged process, planned at a course level'.²²⁸

The idea that writing is a 'first-year gig' perpetuates the idea that teaching writing is teaching 'the basics' and therefore something that is distanced from teaching 'the discipline'.²²⁹ Tuck argues that the view that writing is 'someone else's issue' engenders an attitude that 'writing can and should be mastered and sorted out early on and then left to itself, while academics get on with their "real" work'.²³⁰ The idea that writing is a 'first-year gig' in Australian law schools is also contrary to the holistic approach to transition pedagogy, recommended by Kift, that successful transition pedagogy should embrace a shared vision of the first-year experience as 'everybody's business'.²³¹

The benefits of scaffolding the development of students' academic literacy across a degree program has been demonstrated in other disciplines.²³² Two interviewees observed that mapping academic literacies across the law course was a worthwhile exercise but was yet to occur at their law school in a comprehensive way. Other interviewees further noted that, even where mapping had occurred, it was difficult to maintain the development of academic literacy skills, including writing, across the law degree, as teaching academics tended to work in their subject matter 'silos':

225 Wesley (n 6) 7, citing Hardy (n 18) 43.

226 Ibid 13.

227 Linda Thies et al, 'Embedded Academic Literacies Curricula: The Challenges of Measuring Success' (2014) 8(2) *Journal of Academic Language and Learning* A43.

228 Ibid A46.

229 Tuck (n 139) 114, 131.

230 Ibid 146.

231 Sally Kift, *Articulating a Transition Pedagogy to Scaffold and to Enhance the First Year Student Learning Experience in Australian Higher Education: Final Report for ALTC Senior Fellowship Program* (Report, August 2009) 13, citing Sally Kift, 'The Next, Great First Year Challenge: Sustaining, Coordinating and Embedding Coherent Institution-Wide Approaches to Enact the FYE as "Everybody's Business"' (Conference Paper, Pacific Rim First Year in Higher Education Conference, 30 June 2008).

232 Linda Devereux and Kate Wilson, 'Scaffolding Literacies across the Bachelor of Education Program: An Argument for a Course-Wide Approach' (2008) 36(2) *Asia-Pacific Journal of Teacher Education* 121.

So I think it [consistent writing support across the degree] probably happens a little bit less now than what it used to, but other people have also said: ‘Well we need to stop that. We need to make sure we are getting the actual support in again’.²³³

I think we now have a very good standard at the first year but the way that then is developed through the cores needs a lot more attention.²³⁴

This siloed approach to writing support has been noted in disciplines other than law.²³⁵ Where attempts are made to embed literacy in HE beyond the subject level, research demonstrates that this requires a wholesale ‘rethink’ of course design and assessment regimes, rather than simply adding in a writing component,²³⁶ and ‘setting up writing-intensive degree programmes is an impossible goal for lone figures’.²³⁷ Institutional support is required. However, Murray and Nallaya’s study of an institution-wide approach to embedded academic literacy at the University of South Australia found that, whilst this initiative was supported at Deputy Vice-Chancellor level, there were no ‘clear directives from senior management regarding the significance of undertaking the embedding process’ and no consequences if ‘those responsible for [the] implementation fail[ed] to bring about — or attempt[ed] to bring about the required change’.²³⁸ It is therefore unsurprising that embedded initiatives to support student writing occur at a ‘grassroots’ level and in individual subjects.²³⁹ However, this ‘grassroots’ model means that writing support is more vulnerable to the siloed approach reflected in the experiences of the law school interviewees.

VI CONCLUSION

In an era of widening participation in HE, Australian law schools need to devote more attention to how they support and develop their students’ writing skills, to ensure that all students can succeed at law school. This requires an understanding

233 Interview with Academic F, Law School 5 (Sandra Noakes, Skype, 5 April 2017).

234 Interview with Academic L, Law School 11 (Sandra Noakes, In-Person, 2 March 2018).

235 French (n 212) 52–3.

236 Sally Mitchell and Alan Evison, ‘Exploiting the Potential of Writing for Educational Change at Queen Mary, University of London’ in Lisa Ganobcsik-Williams (ed), *Teaching Academic Writing in UK Higher Education: Theories, Practices and Models* (Palgrave Macmillan, 2006) 68.

237 Tory Young and Simon Avery, ‘Teaching Writing within a Discipline: The Speak–Write Project’ in Lisa Ganobcsik-Williams (ed), *Teaching Academic Writing in UK Higher Education: Theories, Practices and Models* (Palgrave Macmillan, 2006) 85, 95. See also Rena Frohman, ‘Collaborative Efforts Work: Reflections on a Two-Year Relationship between Faculty of Health and International Student Services-Language and Learning Unit’ (2012) 6(3) *Journal of Academic Language and Learning* A47, who argues that academic literacy programs require a ‘[f]aculty [c]hampion’ to ensure that they succeed — someone within the discipline who is willing to support academic literacy initiatives, because otherwise they falter: at A55.

238 Murray and Nallaya (n 143) 1306.

239 Hunter and Tse (n 206).

of how students learn academic literacy, so that models of support avoid 'othering' students from non-traditional backgrounds, teach writing in context and do not 'dumb down' the curriculum by separating writing from content. All of these are aspects of good practice.

However, as was the case in the late 1990s, Australian law schools' adherence to theoretically informed good practice can at best be described as partial. This is despite evidence that the legal profession considers that law schools could do more in this space, and that poor written communication causes problems for clients and lawyers.

Australian law schools have been provided with a road map as to how to implement TLO 5, in the form of the *GPG*. This study demonstrates that law academics believe that students are taught writing at law school. However, the extent to which writing is supported in the manner suggested by the *GPG* is less clear. Even where writing support is discipline-specific, it is not necessarily embedded, in the sense that it is taught in the context of discipline content. There still appears to be considerable use of the standalone, 'legal skills' model of writing support. This inevitably separates writing from discipline content and may lead to the 'dumbing down' of writing instruction in legal education. There does seem to be compliance with the recommendation that writing instruction begin early in the degree, but the focus on supporting student writing seems to decline after the first year. Writing is positioned as a 'first-year gig', and responsibility for teaching writing rests with law academics teaching first-year subjects. This positions writing as teaching 'the basics' and inhibits scaffolding throughout the degree. In addition, even where there are attempts to map and embed writing support beyond the first year, the siloed nature of the way law programs are structured is an impediment to the maintenance of these initiatives.

These issues stem from lack of understanding on the part of law schools about how students learn literacy. Whilst this is common in academia generally, it is particularly problematic in law, where language is so central to the discipline.