

Scholarship of Teaching and Learning and Post-Graduate Legal Education Practice in an (Un)certain World

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Post-graduate practical legal training (PLT) is a mandatory eligibility requirement for those seeking admission to the Australian legal profession. PLT bridges the academic (law school) and practice stages of lawyers' legal education. Individuals teaching PLT (PLT practitioners) are recruited from the practising legal profession—few begin with teaching qualifications or experience.

A paucity of scholarship of teaching and learning (SoTL) in Australian PLT sees little shared knowledge in the field. At the same time, lawyers and legal educators face uncertainty due to changed economic circumstances, internationalisation of legal education and practice, and emergent technologies that subsume legal processes. These changes underscore heightened political and regulatory scrutiny of structures and practices in PLT. The lack of SoTL undermines PLT providers' and practitioners' readiness to inform policy, regulation, theory and practices in PLT.

The author's qualitative research studies individual and extra-individual dimensions of PLT practitioners' engagement SoTL, drawing on Bourdieu's *reflexive sociology* and Certeau's *heterological science*. The data included documents (e.g. laws, policies, speeches, reports, histories) and semi-structured interviews with thirty-six PLT practitioners. Computer-aided qualitative data analysis was used to organise and analyse data, and to visualise and write up insights.

This paper highlights insights concerning obstacles to PLT practitioners' engagements with SoTL. It identifies opportunities to improve engagements with SoTL necessary to better inform providers, practitioners, policy-makers and regulators in responding to change and uncertainty.

Keywords: Scholarship of Teaching and Learning, Practical Legal Training, Practice Research

Introduction

Post-graduate institutional practical legal training ("PLT") is a mandatory eligibility requirement for those seeking admission to the Australian legal profession (States and Territories *Legal Profession Acts*). PLT was introduced to Australian legal education from the early 1970s as the "second stage" of a three-stage approach to lawyers' education and training (Ormrod, 1971). The educative rationale was to bridge foundational intellectual skills taught at law school and the application of professional legal skills in practice. The legislative rationale for mandatory PLT specified additional purposes: to improve lawyers' learning experiences and the quality of legal services; and to protect lawyers' clients and the administration of justice (Hulls, 2008). PLT's effectiveness in achieving these purposes is frequently questioned in

commentary and formal inquiries (e.g. Bowen, 1979; Brown, 1979; Pearce, Campbell, & Harding, 1987; Johnstone & Vignaendra 2003; Campbell, 2006; Roper, 2008; Productivity Commission, 2014). Effective PLT is an important and relevant concern in the face of change and uncertainty for the legal profession and legal education. Here, it is argued that the Australian PLT sector's capability and readiness to respond to commentary and to inform policy, regulation, and practice is constrained by the paucity of Australian research in PLT, specifically scholarship of teaching and learning ("SoTL").

The first two PLT providers were established respectively as an institute and a college in the 1970s. Since then several PLT providers were established at university law schools. PLT providers usually recruit their teachers ("PLT practitioners") from the practising legal profession. Few PLT practitioners commence teaching with educational qualifications or teaching experience (Greaves, 2012). In the present study, analysis of individual and organisational dimensions of engagement with SoTL (Lynch, Sheard, Carbone, & Collins, 2005) disclosed many PLT practitioners were *interested* to engage with SoTL, although few self-assess as *capable* to do so. Although many PLT practitioners stated their institution's *symbolic support* for SoTL was *evident*, this was undermined by perceptions that support was *tokenistic*. A *multi-dimensional analysis* (Trigwell, Martin, Benjamin, & Prosser, 2000) of PLT practitioners' SoTL activities disclosed many PLT practitioners engaged in informal and intra-faculty SoTL activities, but few engaged with general or discipline-specific teaching and learning literature, focused SoTL activities, or externally-directed communications. Analysis of PLT provider statements concerning SoTL, and *bibliometric* analysis of peer-reviewed literature, indicates PLT and SoTL work struggles for *visibility* and *influence*.

This study's insights contribute information and understandings about the paucity of SoTL in PLT. Further insights were derived by conceptualising the study as *practice research* to perform a *reflexive-dialectical study* of PLT practitioners' engagements with SoTL (Kemmis, 2010). In treating these engagements as 'socially and historically constituted... and reconstituted through human agency and social action' (Kemmis, 2010) the research drew on Bourdieu's *reflexive sociology* (Wacquant, 1989; Bourdieu, 1990) and Certeau's *heterological science* (de Certeau, 1986; de Certeau, 1984, p. 161) to explore PLT's structures and practices. This work supplied insights as to how "pedagogical action" (Bourdieu & Passeron, 1990) and *dominant discursive operations* (de Certeau, 1986) inscribe structures into PLT practice that problematise SoTL work.

The next part of this paper briefly identifies issues driving uncertainty and change in PLT, legal education, and legal practice. The third part describes the methodology and methods adopted for the study. The fourth part describes insights about extra-individual and individual dimensions of PLT practitioners' engagements with SoTL, and discusses opportunities to support these engagements. The fifth part concludes the paper.

Certainty and Uncertainty in PLT

Australian legal education and the legal profession face uncertainty, complexity and change. Global and national economic, commercial, and professional conditions are changing (Caenegem & Hiscock, 2014; Susskind, 2013), prompting calls for change

in lawyers' legal education and training. Emergent technologies are subsuming traditional legal practices and processes (Lauritsen, 2015) and prompt the need for lawyers to learn new technological skills (Susskind, 2013).

Australian legal education, and more recently PLT, draws *certainty* from beliefs, practices and conventions underscored by eight hundred years of English legal traditions (Castles, 1963; Chesterman & Weisbrot, 1987). Modern conditions, however, create uncertainty about what 21st century lawyers will look like—what “thinking like a lawyer” will mean in near and distant futures (Arthurs, 2013). Uncertainty provokes different responses—a defensive mentality by some (e.g. Lansdell, 2010; Lansdell, 2009) or calls for investigation and review (e.g. Productivity Commission, 2014). These responses have implications for policy, regulation, and pedagogy in PLT that could be *informed* by SoTL (Healey, 2000; Shulman, 2000; Trigwell & Shale, 2004). Insights from this study confirm there is little local SoTL activity to inform reviews of policy and regulation in Australian PLT, in a time of uncertainty and change.

Methodology and Methods

Methodology

This section briefly summarises working with Bourdieu's *reflexive sociology* and Certeau's *heterological science* as a *methodology of tension*.

PLT is characterised as one stage in the *legal education continuum* (Ormrod Report, 1971). Australian legal education is regulated by written and unwritten laws executed through judicial and statutory power to determine the eligibility, suitability and admission of lawyers. In Certeau's terms (1986, pp. 35–46), these powers perform a *nominative discursive operation* to separate “the Noble” from “the Rotten”. In Bourdieu's terms (1986a), PLT is a sub-field of a “juridical field” constituted by legal and social structures within which organisations and individuals must practice. Sociological field theory—modelled from physical sciences such as electromagnetic theory—treats the field at any position as “a vector of potential force”, in which organisational and individual agents occupy positions that are “neither identical or randomly distributed” (Martin, 2003, p. 4). The positions render visible the effects of field forces – the interactions between states of the field and states of individuals (Martin, 2003, p. 4).

Bourdieu's adaptation of field theory conceptualises these as interactions between field and practice, in which *habitus* and *capitals* constitute practice (Bourdieu, 1984, p. 95). An agent's *habitus* is formed by unconscious internalisation of dispositions and practices via primary and secondary pedagogies—a societal “education system”—*habitus* ensures agents reproduce culturally arbitrary practices that dominate the field (Bourdieu & Passeron, 1990, pp. 31–32). *Capitals* include economic capital, “social capital” and “cultural capital” (Bourdieu, 1986b, 2005). Resources derived from durable institutionalised relations of “mutual acquaintance and recognition”—for example, private school alumni, exclusive social clubs, and professional memberships—operate as “social capital”. Recognised professional experience, thinking and acting like a lawyer, operate as “embodied” cultural capital. Artworks, books, law reports and statutes are examples of “objective” cultural capital. “Institutionalised” cultural capital resides in academic and professional qualifications.

A field's boundaries depend on the extent to which specific capitals are valued within it (e.g. networks, experience, qualifications, tastes). The juridical field operates as an "educational system" that inculcates and reproduces rules and practices, in which the judiciary presides as "pedagogical authority" (Bourdieu & Passeron, 1990, pp. 54, 11–12). Arguably, as practice within a juridical education system, PLT is meant to inculcate dispositions and practices within successive generations of lawyers—for example, to recognise their *paramount obligation* to the court, to operationalize the *doctrine of precedent*. As lawyers, PLT practitioners are both products of this system, and part of its pedagogical work. This is one way the structures of the juridical field are inscribed into PLT practice, and individuals *know* which capitals are valuable.

Bourdieu's methodology provides little encouragement for investigating *alterity*, whereas Certeau's approach purposefully interrogates practice for it. Certeau's "heterological" science (1984, p. 161) contemplates ruptures between a discipline's dominant structures and its discursive operations, emerging at particular times and places (de Certeau, 1986). The dominant structures deploy discursive operations, or *strategies*, to maintain their position (de Certeau, 1984, p. xix). The dominated employ *tactics* to practice within those structures, *consuming* dominant operations and transforming them through *appropriations, sleights of hand, diversions, and micro-inventions* (de Certeau, 1984, p. xii). Dominant strategies include "specialization", "historiography", "nomination", and "colonisation" (de Certeau, 1986). *Specialisation* (de Certeau, 1986, p. 206) divides disciplines into territorial specialisms, in which language and practices are specified, admissions and sanctions are controlled, and territory defended against interdisciplinary incursions. The juridical field, and its sub-fields of academic education and practical training, can be conceptualised as strategic specialisations. *Historiography* (de Certeau, 1986, p. 4) produces a continuity of authorised narratives, foregrounding preferred representations so alternatives are nearly invisible. The legal doctrine of *stare decisis*, or precedent, can be conceptualised as a strategic operation, in which precedent forestalls alterity. *Nomination* (de Certeau, 1986, p. 37) involves strategic naming, which occupies (colonises) an object subsuming, or detaching from, other relations, connections, and interpretations. The *nomination* of PLT as a "vocationalist strategy" in legal education (James, 2004, p. 92) for example, univocally obscures agency and alterity in PLT practice, covering over multi-vocal and multi-perspectival qualities.

For Bourdieu (Wacquant, 1989, p. 36) "the dominated, in any social universe, can always exert a certain force, inasmuch as to belong to a field means by definition that one is capable of producing effects in it." Bourdieu's concession contemplates the possibility of agency, but the gaze is drawn to the *field* rather than the individual. Certeau (1984, p. xi) however, approaches the individual "as a locus in which an incoherent (and often contradictory) plurality of ... relational determinations interact". For Certeau, collective *individuals* provide focal points at which field forces intersect; for Bourdieu, the *field of struggles* is the focal point. Certeau's criticism of Bourdieu's concept of *habitus* provides an example of methodological tension. For Bourdieu (1973, p. 67) *habitus* is "a system of [unconscious] durable and transposable dispositions which, integrating all past experiences, functions as a matrix of perceptions, of appreciations and actions". Certeau, however, observed this did not allow for individuals' *conscious* tactical responses to dominant *strategies*—he argued Bourdieu's construction of *habitus* undid itself:

[Bourdieu] affirms, with the concept of habitus, the contrary of what he knows... The discourse that hides what he knows ... would have “theoretical” value precisely insofar as it practices what it knows. It would be the result of a conscious relationship with an outside it cannot eliminate... (de Certeau 1984, p. 60).

Certeau (1984, p. 59) did concede *habitus* had “heuristic value” to displace and renew “possibilities of research”. Working with Bourdieu’s and Certeau’s concepts and theories produced a generative *methodology-of-tension* for studying extra-individual and individual dimensions of PLT practitioners’ engagements of SoTL. It facilitated Certeau-like movements between *birds-eye and kerb-side views* of practice (Buchanan, 1996, p. 490) and Bourdieu’s reflexive “two steps back” in objectifying the study (Jenkins, 1992, p. 42).

Data Collection and Analysis

The study drew on two main categories of data: documents, and semi-structured interviews with Australian PLT practitioners.

Documents included statutory instruments, policy documents, legal education and sociological reports, speeches, histories, case law, websites, media reports and peer-reviewed literature. Documents were sometimes approached as organisational “speech acts” (Cooren, 2004, p. 385) having agency beyond the human actions that produced them. Documents also function as repositories for a discipline’s “mnemic trace” (de Certeau, 1986, p. 3).

The semi-structured interviews involved thirty-six PLT practitioners affiliated with fourteen different PLT courses and practising in six Australian jurisdictions. Interviews lasting one hour were conducted face-to-face, with some undertaken using Skype, one by telephone, and one by email exchange. Ethics approval was obtained from the Deakin University Human Research Ethics Committee before commencing recruitment of interviewees by email—thirty-six participants recruited from one hundred invitations—and interviews were conducted on condition of anonymity. The author personally transcribed the interviews and copy transcripts were supplied to interviewees for verification and corrections.

NVivo10 computer-aided qualitative data analysis software was used to store, organise, classify, and analyse the data. The software expedited coding, analysis, and visualisation of data, concepts, and themes. The approach adopted for coding borrowed the grounded theory concept of “theoretical sensitivity” (Kelle, 2005) in using *explicit* (Corbin & Strauss, 1990) and *emergent* (Glaser, 1992) approaches. Explicit approaches drew on Bourdieu’s and Certeau’s concepts, Lynch et al’s (2005) *four critical questions*, and Trigwell et al’s (2000) *multi-dimensional model* for studying practitioners’ engagements with SoTL. The emergent approach involved sensitivity to unexpected concepts and themes prompted by Corbin and Strauss’ (2008) data analysis strategies. Analytical tools, such as word frequency searches, matrix coding queries, framework matrices, and cluster analysis for word similarity in sources and codes do not substitute for intellectual engagement with data, but proved to be powerful tools for generating inquiries and comparisons. For example, Figure 1 shows a cluster analysis of all interviewee statements for word similarity.

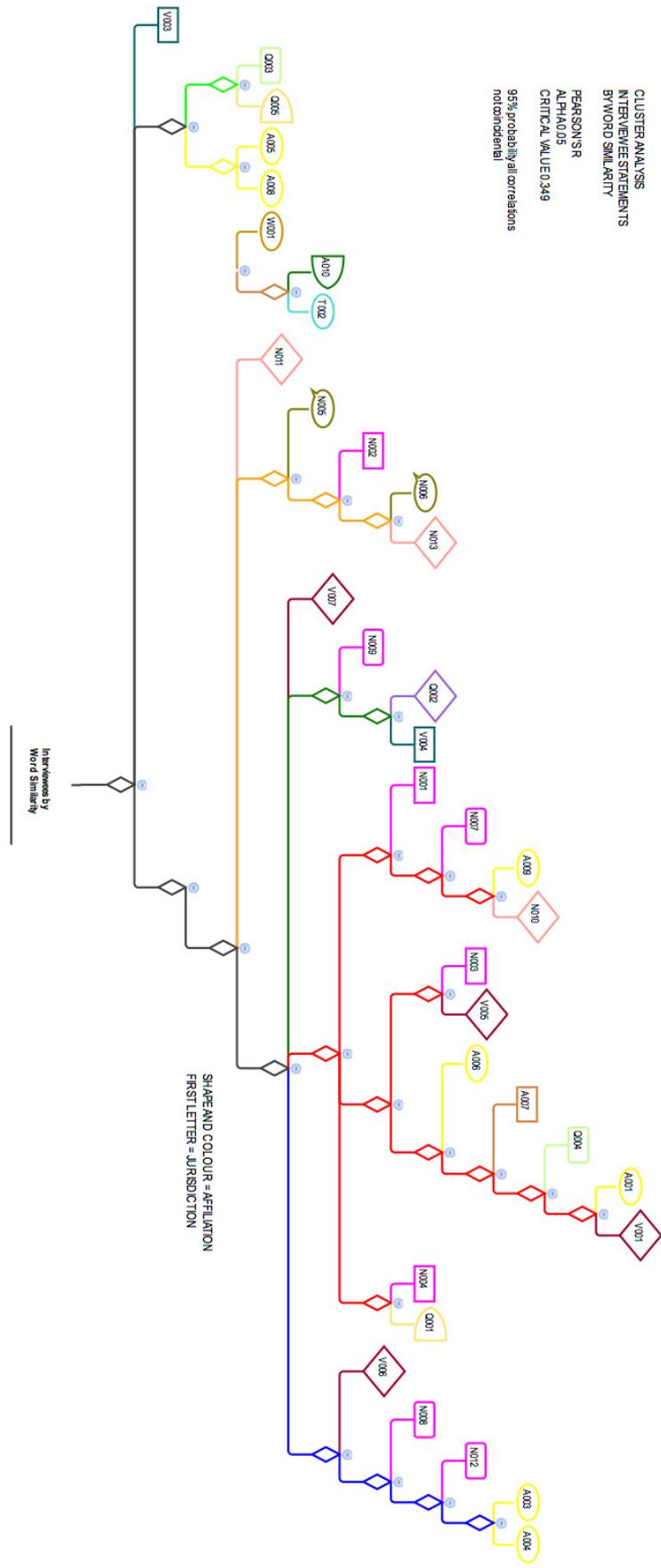


Figure 1: Cluster Analysis of Transcripts for Word Similarity

Here, cluster analysis involved comparison of each individual’s interview transcript with other transcripts, to generate a table of correlation coefficients (Pearson’s R). These were used to generate a dendrogram (by continuing linkage algorithm) to visualise highly correlated pairs and closely correlated items in clusters. Items with low correlation are shown spaced apart or in separate clusters. Items shown as a pair at the uppermost end of a cluster were the most correlated; however, these were correlated with other items in the cluster to a lesser degree. Figure 1 is an adaptation—individual attributes such as *jurisdiction* and *affiliation* are added and represented by colours and shapes, to help identify how themes and concepts might be shared or distinguished between these attributes. Cluster analysis is a quantitative method used here as a generative tool to aid comparison of qualitative material, not as a statistical proof (Bazeley, 2007, p. 135). Here, for example, it highlighted similar statements and words used by individuals with different affiliations—a useful insight when several interviewee statements identified other individuals and institutions as holding different views or values. In other words, many individuals shared more with perceived competitors than they realised.

Obstacles and Opportunities for SoTL in PLT

This part summarises the insights gleaned from the study, and discusses them in terms of obstacles and opportunities for SoTL in PLT – where there are obstacles, it is contended these are opportunities for further investigation and change. Study of PLT practitioners’ engagements with SoTL generated many insights. Figure 2 organises these insights into eight categories: PLT field; PLT provider SoTL Statements; SoTL literature in PLT; Professional Stratification; Practitioner Attributes; SoTL Supports and Engagements; SoTL Activities; and Practitioner Narratives.

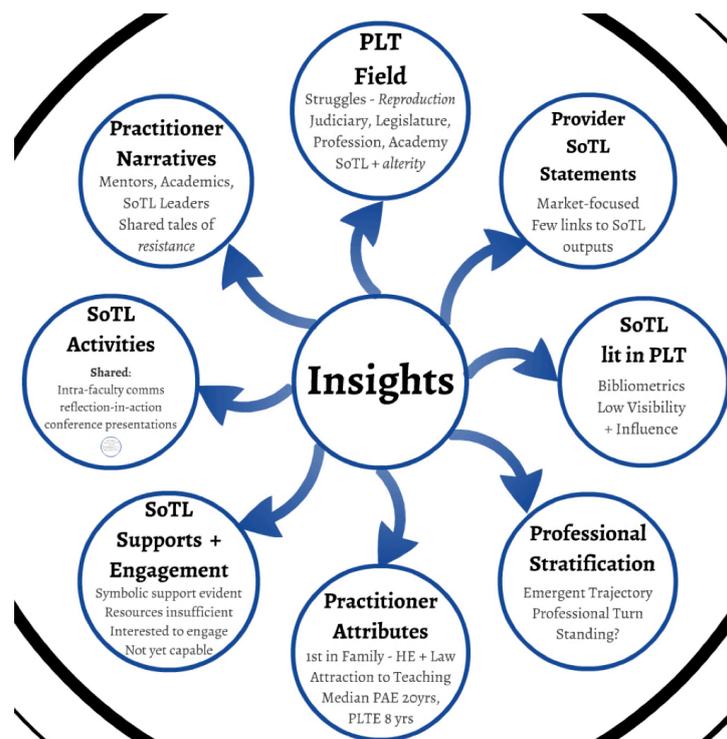


Figure 2: Eight Categories of Insights

Space does not permit discussion of all categories here—Professional Stratification, Practitioner Attributes, and Practitioner Narratives are omitted from the following discussion.

PLT Field

Drawing on Bourdieu and Passeron's (1990) theory of *reproduction* in education, society and culture, the study found the dominant players struggling to influence legal education and PLT were the judiciary, the legislature, the profession, and academia.

The *judiciary* sought to preserve its influence over legal education by favouring a *19th century conceptualisation* of lawyers, preponderantly inherited from English, Welsh and Irish common law traditions (Castles, 1963; Chesterman & Weisbrot, 1987). The doctrine of precedent, the expectation of lawyers' paramount obligations to the court, and the discursive operation of the *majesty of the law* (Warren, 2011) and its *medieval mysteries* (Windeyer, 1961), serve to minimise potential critique and reproduce the traditional conceptualisation through legal education.

The *profession* sought to promote a *vocationalised* approach to legal education, directed to the production of “work-ready lawyers” (Tang, 2012), at times suspicious of academic intellectualisation or non-doctrinal scholarship in legal education (Meagher, 1983). The *legislature* worked to constrain judicial and professional autonomy, introducing statutory *regulation* of legal education and legal practice, and focused on *consumer protections* for lawyers' clients and law students (Hulls, 2008). The *academy*, a relatively recent arrival to the juridical field (numbers of full-time Australian legal academics escalated from 1950s onward) was keen to establish and maintain its *intellectual preserve* and right to critique. Other players' moves to *vocationalise* law school – which some legal academics saw as *dumbing down* the academy (Johnstone & Vignaendra 2003) – continue to be resisted (James, 2004).

Institutional PLT—first introduced during the 1970s—was shaped by the dominant players' struggles to preserve their interests and arguably evolved as a vocationalist, critique-free, and non-academic space within the juridical field—not fertile ground for SoTL practice. Indeed, to pursue SoTL in PLT is *alterity*—it foreshadows a break or a turn from the techno-rationalist *doxa* and pedagogy of reproduction, which pervade the juridical field (Bourdieu, 1986). In this context, SoTL work does not share standing with professional practice experience or doctrinal research—it is perceived as a low status activity with little cultural capital.

PLT Providers' SoTL Statements

PLT provider websites were searched for statements that explicitly involved SoTL as a topic, or indirectly referred to SoTL through statements about teaching, learning, and research. Eighty-nine documents were collected from nine PLT provider websites and analysed. Few providers explicitly referred to SoTL—those that did usually directed such statements *externally* to prospective students and their employers. In some instances, SoTL statements were directed *internally* to faculty as a professional development topic. Similarly, statements about *teaching, learning, and research* were directed externally, enjoining terms such as *excellence, quality, and expertise* to emphasise the institution's *prestige* and promise. As to *symbolic support*, provider statements rarely linked to specific SoTL activities or outputs, and few featured individual PLT practitioners in this context.

SoTL in PLT Literature

The study searched for peer-reviewed articles with SoTL and PLT topics produced by Australian PLT practitioners and analysed these using bibliometrics. Bibliometrics involve 'methods and measures for studying the structure and process of scholarly communication' (Borgman & Furner, 2002, p. 2). The period 2006–2013 was searched because it encompassed the national expansion of PLT in substitution for traditional articles of clerkship, and journal articles published after 2013 were unlikely to have accrued bibliometric data. Bibliometrics are convenient, not holistic, and are subject to error (Harzing & Van der Wal, 2007). Anecdotally, however, institutions use bibliometrics to measure institutional and faculty academic visibility and influence (Harzing, 2010).

Ten articles were located (“sample articles”). Connection to PLT was slight in some sample articles but an inclusionary approach was adopted given the paucity of literature. Each article appeared in one of four legal education journals—two were Australian and two were international. Few legal education journals are ranked by proprietary databases such as SCImago SJR and Scopus JCR—one of the international journals in the sample, *The Law Teacher*, was ranked (SJR). Searches on Google Scholar, Web of Science, and Scopus found two articles in the sample (same author) had citation counts as at June 2014.

Examination of sources (171 sources) cited within the sample disclosed peer-reviewed articles and books were the most common sources. Most sources were previously cited works (89%; median=15 citations). Of the sources, twenty-five were from SoTL literature and the remaining sources were mostly drawn from legal education and general legal literature. SCImago ranked 23%, and Scopus JCR ranked 17% of the sources. Publishers of proprietary databases argue that highly ranked and cited sources confer *prestige* or *status* to works that cite them (Anon, 2012, 2014). If this is accepted, the status and prestige of SoTL in PLT articles are implicitly diminished in bibliometric terms, by the quality of their sources.

SoTL Supports and Engagements

Four “critical questions” (Lynch et al., 2005) were adapted to study individual and organisational dimensions of SoTL:

1. What are PLT practitioners’ interests to engage with SoTL?
2. What are their capabilities to do so?
3. What symbolic support do PLT practitioners’ organisations give to PLT practitioners’ engagement with SoTL?
4. What resources do the organisations allocate to SoTL?

Interviews disclosed a majority were *interested* to engage with SoTL, but most of these self-assessed as *not yet capable* to do so. Most interviewees indicated their institution gave *symbolic support* to SoTL, but a substantial minority indicated symbolic support was *tokenistic*. Interviewees overwhelmingly indicated there were *insufficient resources* allocated to SoTL work, particularly time, together with funding and personnel. Some interviewees spoke of being actively discouraged from engaging with SoTL, and directed to focus on instruction and assessment.

SoTL Activities

The study drew on a “multi-dimensional model” created by Trigwell et al (2000), to analyse interviewees’ SoTL activities. The model involves four dimensions: *information, communication, reflection, and conceptualisation* (of teaching). Each dimension accommodates qualitative variations of activity—for example, activities in the communication dimension range through *nil communication, intra-institutional communication with peers, extra-institutional communication* such as conference presentations, and *writing for peer-reviewed scholarly journals*. The analysis drew on interviews and online search results for conference presentations and published material.

The most *common* or shared activities were: intra-institutional peer-to-peer communications (water cooler moments, post-teaching debriefs, faculty meetings); reflection-in-action following teaching and assessment activities; and conference presentations. Most conference presentations were not peer-reviewed, and few progressed to publication in peer-reviewed journals.

Rare activities included engagement with general or discipline-specific teaching and learning literature, focused reflection or reflexivity, and writing for peer-reviewed publications.

Almost all interviewees appeared to conceptualise teaching as learner-centred rather than teacher-centred. Further research is needed to elicit more detailed insights about how these conceptualisations are theorised and practised.

Opportunities

The insights summarised here disclose manifold institutional and individual opportunities to support PLT practitioners’ engagements with SoTL. Cultural and social initiatives could identify, explore, and articulate PLT practice as an emergent professional trajectory for lawyers and educators. Institutional change could encourage dominant players in the juridical field to recognise that perpetual reproduction of the *medieval mystery* of legal professional practice, and exclusion of contemporary knowledge and innovative ideas about teaching and learning, impedes legal educators’ readiness to respond to change and uncertainty. Institutions can operationalise *symbolic support* for SoTL by allocating to it the necessary resources, and provide recognition, training and support to PLT practitioners for SoTL work. Institutions could recognise the importance of sharing such work through publication for external scrutiny and application. Institutions and PLT practitioners engaged in SoTL work could explore strategies to improve the *invisibility* and *influence* of their work by regard to support for scholarly writing, selection of journals, citation practices, and use of social media and alt metrics. Of course, PLT practitioners can act on their interest in SoTL as well.

Conclusion

The *methodology of tension* adopted for this study provided ways to move between birds-eye and kerb-side views of Australian practitioner’s engagements with SoTL and generated novel insights. Insights summarised in this paper illuminate forces in extra-individual and individual dimensions of PLT that obstruct SoTL work. Identifying these obstacles help to identify opportunities to encourage, support, and

advance SoTL work in PLT. On the basis of these insights, I contend that political, regulatory, and operational decisions about future teaching and learning in PLT will be ill informed unless SoTL in PLT is properly supported, resourced, and energetically pursued to overcome the *doxa* of reproduction, to raise the status of PLT practice, and improve the visibility and influence of scholarship of teaching and learning in PLT.

Acknowledgements

The author acknowledges and thanks the conference organisers and the peer reviewers for their feedback and advice. The author especially thanks his principal supervisor, Dr Julianne Lynch, and associate supervisors, Dr Shaun Rawolle and Dr Michael McShane.

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