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‘What Would Denis Have Done?’ A Critical Reflection Upon 2020’s Rapid and Obligatory Transition to Remote Delivery

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In 2020, the COVID-19 pandemic forced law schools to rapidly transition to remote delivery of their programs and to place a greater emphasis upon technology-enhanced learning. Those legal academics who were unfamiliar with this method of delivery were obliged to very quickly develop their digital skills to facilitate this transition. The outcomes of this transition were mixed: while most law schools managed to continue to deliver their programs during the pandemic, student feedback about the quality of the remote delivery was not always positive. Nevertheless, the emphasis upon remote delivery and technology-enhanced learning is likely to continue and even increase in the coming years. In this paper I interrogate the assumption that the rapid and obligatory transition to remote delivery that took place because of the pandemic will form a stable basis for further development of digital skills by legal academics. Drawing upon the notion of academic resistance as well as the well-known distinctions between surface and deep approaches to learning and intrinsic and extrinsic student motivation, I argue that the impact of the rapid and obligatory transition to remote delivery upon academic motivation, morale, and freedom exposes law schools to the risk that, without mindful intervention, the quality of technology-enhanced learning in law schools will be lower than optimal.

I Introduction

I had the honour and privilege of working with Professor Denis Ong at the Bond University Faculty of Law for the final eight years of Denis’ long academic career. During that period Denis and I had many conversations about teaching. He had an approach to teaching that could best be described as ‘old school’. Denis was not one for experimentation with online assessments, vodcasts or synchronous digital backchannels. Working from a set of handwritten notes and always favouring in person instruction over virtual engagement, Denis relied upon his extraordinarily deep understanding of the subject matters of his courses and his meticulous approach to curriculum design

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and assessment to educate and engage his students. He was generous with his time and more than willing to share his expertise with his students, but he did not suffer fools gladly and he favoured an approach that expected and demanded the best of his students. He pushed them hard to excel. Anyone who took a class with Professor Ong knew that there would be no shortcuts or easy marks. They would have to show up to class prepared, and they would have to work hard to master the content. It was an approach that intimidated some students, particularly those that were used to and preferred the gentler, more nurturing teaching strategies employed by some of Denis' colleagues at Bond. But for other students, it was an approach that they appreciated – if not at the time, then later. I have had several Bond alumni tell me that, with hindsight, it was Denis Ong who made the greatest impression upon them and who had the most lasting impact, teaching them the value of mastering an area of law, of rigorous research and of meticulous attention to detail.

In 2020, the COVID-19 pandemic forced the Bond Faculty of Law, along with many other law schools in Australia and around the world, to rapidly transition to remote delivery of its law programs and to place a greater emphasis upon technology-enhanced learning (TEL). Of course, there were and are law schools for whom remote teaching is the standard model for delivery, and for them the impact of the pandemic was less disruptive. But for law schools accustomed to on campus teaching, like Bond, the shift to remote delivery was a challenging one. Those legal academics who were unfamiliar with this method of delivery were obliged to very quickly develop their digital skills to facilitate this transition. Sadly, by this point Denis was already too unwell to teach and was on an extended leave of absence. If Denis had not been unwell, I am sure that with his usual perseverance, hard work, commitment to the Faculty and exemplary professionalism, Denis would have navigated the transition. But now that the pandemic is coming to an end, would Denis have continued to embrace TEL? Would the rapid transition that took place in 2020 have formed the foundation for an ongoing evolution of his teaching practice in favour of taking advantage of the many benefits technology has to offer? Somehow, I doubt it.

The rapid development by many legal academics of the skills needed to facilitate effective TEL that took place in 2020 has subsequently been perceived and described as a positive outcome of the pandemic. There appears to be an assumption that the pandemic-driven transition to remote teaching and the development of digital skills by academics is a permanent shift, and an acceleration of an inevitable evolution in teaching practices that would have occurred in the absence of the pandemic, albeit much more slowly. But when I think about how Denis would have been far more likely post-pandemic to instead return to his

preferred, ‘low tech’ approach to teaching as quickly as possible, I question whether the 2020 transition really can be assumed to be a stable foundation for future change.

In this essay, I use this questioning as the starting point for a critical consideration of whether the apparent ‘victory’ for law teacher professional development that occurred because of the COVID-19 pandemic was in fact a Pyrrhic victory.¹ Is it possible that the negative consequences of 2020’s rapid and obligatory transition to remote delivery will outweigh the positive consequences? More precisely: is it possible that the rapid and obligatory transition to remote delivery that took place in 2020 will not only fail to form a stable basis for further development of digital skills by legal academics, but actually undermine that further development? The conclusion is that the negative impacts of the 2020 transition to remote delivery upon academic motivation, morale, and freedom have the potential to undermine further development of digital skills by legal academics, and that without mindful intervention, the quality of TEL may in future be lower than optimal.

The following argument is presented in support of this conclusion:

1. There were several positive outcomes of the 2020 transition to remote delivery.
2. Some potential positive outcomes have not yet been realised.
3. Further development of digital skills by legal academics is desirable and necessary.
4. There were several negative impacts upon academics of the 2020 transition.
5. The negative impacts have the potential to undermine further development of digital skills by legal academics.

Each step in this overall argument will now be examined in detail.

While many of the points made in this paper are supported by recent scholarship regarding the impact of the pandemic upon higher education and legal education, others are either anecdotal or insights I have acquired as a consequence of my role as the Dean of a law school during and since the transition to remote delivery. I hope I can be forgiven for the subjectivity of some of my claims.

¹ A Pyrrhic victory is a victory that is not actually a positive outcome overall because so much is lost to achieve it. The word comes from the name of Pyrrhus, a king of Epirus, who suffered heavy losses defeating the Romans at Asculum in Apulia in 279 BCE. The losses were so substantial, the technical victory of the Romans was no better than a defeat.

II Argument

A. *There Were Several Positive Outcomes of the 2020 Transition*

In 2020, the COVID-19 pandemic forced many law schools to rapidly transition to remote delivery of their programs and to place a greater emphasis upon technology-enhanced learning. Many legal academics had to quickly master the use of learning management systems and distance learning software, as well as adapt their teaching and assessment practices and approaches to communication and engagement with students.² Those legal academics who were unfamiliar with (and even resistant to) TEL were obliged to develop their digital skills very quickly. The global crisis and the fact that most law schools and law teachers no longer had the option of teaching in person meant that academics had to set aside any concerns about or resistance to TEL they may have had previously and cooperate with institutional efforts to radically transform the way programs were delivered.³

Many university leaders and other commentators have pointed to the apparent success of this transition.⁴ My own experience is that most of my colleagues within the Faculty of Law did everything they could to facilitate the rapid transition. They undertook urgent training, made the necessary changes to the way they taught, assessed and engaged with their students, and supported each other as they navigated what was for many an extremely steep learning curve. The levels of collegiality and cooperation demonstrated by academic and professional staff alike during the crisis were gratifying.

Across the sector, there were several positive outcomes of the transition. Most law schools were able to continue to deliver their programs during the pandemic, and most academics were able to successfully substitute online instruction for in person instruction. While most law schools were forced to stop delivering classes and conducting assessments in person, no law schools in Australia had to close their doors. Subjects were still able to be delivered (even if the

² Eric Champagne and Aracelly Denise Granja, 'How the COVID-19 Pandemic May Have Changed University Teaching and Testing for Good', *The Conversation* (Online Article, 7 April 2021) <<https://theconversation.com/how-the-covid-19-pandemic-may-have-changed-university-teaching-and-testing-for-good-158342>>.

³ See eg May Lim, 'Educating Despite the COVID-19 Outbreak: Lessons from Singapore', *Times Higher Education* (Online Article, 20 March 2020) <<https://www.timeshighereducation.com/blog/educating-despite-covid-19-outbreak-lessons-singapore>>.

⁴ See eg T Farnell, A Skledar Matijević, N Šćukanec Schmidt, 'The Impact of COVID-19 on Higher Education: A Review of Emerging Evidence' (2021, Publications Office of the European Union) <<https://op.europa.eu/en/publication-detail/-/publication/e2afcf56-879d-11eb-ac4c-01aa75ed71a1/language-en/format-PDF/source-search>>.

range of elective subjects available to students was smaller), students were still able to progress through their program, and students were still able to graduate.

Education became more flexible and more accessible.⁵ For many law students the transition to remote delivery made it easier for them to attend law school and enrol in classes. Students who in the past would have had to travel interstate or internationally to attend their preferred university were able to do so at considerably less expense and without the usual challenges and stressors associated with leaving home. Even local students found it easier to attend classes because of remote delivery and the removal of the need to commute to campus, and to fit online learning into their still busy schedules. There are some who even insist that the quality of legal education itself was enhanced as a consequence of the shift.⁶

Most universities increased online support for students. It was not only teaching and assessment of students that had to transition to remote delivery. University support services also had to make the transition with the loss of the ability by most students to come to campus, and the online availability of academic assistance, career development, counselling and other student support services made them more accessible to students.⁷

In many instances, the pandemic-driven shift to remote delivery and a greater emphasis upon TEL had a positive impact upon Faculty collegiality because of the shared crisis. Other factors unfortunately undermined academic wellness and morale (as described below), but the shared understanding of the need by the institution and the sector to make radical changes to program delivery methods meant that personal differences and ideological opposition to TEL had to be set aside. Those with stronger digital skills mentored, tutored, and supported the colleagues with weaker abilities, and academic communities came together in ways that in some law schools, including my own, had not been seen for some time.

Finally, there is the positive outcome of the pandemic-driven shift that has been described earlier. Academic professional development of digital and TEL skills occurred much more quickly than would

⁵ Christian Fischer et al, 'Access to Online College Courses Can Speed Students' Degree Completion' (2021, The Brookings Institution) <<https://www.brookings.edu/blog/brown-center-chalkboard/2021/11/22/access-to-online-college-courses-can-speed-students-degree-completion/>>; Linley Martin, *Foundations for good practice: The student experience of online learning in Australian higher education during the COVID-19 pandemic* (Tertiary Education Quality and Standards Agency, 2020) <<https://www.teqsa.gov.au/sites/default/files/student-experience-of-online-learning-in-australian-he-during-covid-19.pdf>>.

⁶ R Gladwin-Geoghegan and C Thompson, 'Legacy of Lockdown: Exploring the Opportunities for Development in Legal Education as a Consequence of the COVID-19 Pandemic' [2021] *Journal of Ethics and Legal Technologies* <<https://jelt.padovauniversitypress.it/2021/1/2>>.

⁷ Martin (n 5).

otherwise have been the case. The level of emphasis upon TEL has been slowly increasing within legal education and higher education for some time, and the digital skills and levels of familiarity with teaching technologies on the part of academics have been increasing as well.⁸ Of course, levels of digital literacy and competence across the sector are and remain uneven: some academics enthusiastically embrace TEL, some tolerate it and some resist it. But ambivalence and resistance were set aside in those few weeks in 2020 when everyone recognised that we all had little choice but to use whatever means – and technologies – necessary to ensure we could continue to teach and assess our students during lockdown. For some, this meant undertaking within a very short period a degree of professional development that would have taken years in the absence of the pandemic, if it occurred at all. And there are indications that academic attitudes towards online learning generally improved as a consequence of the pandemic.⁹

B. Some Potential Positive Outcomes Have Not Yet Been Realised

The rapid transition to remote delivery was far from perfect. There were many positive outcomes and success stories, but there are also many aspects and consequences of the transition that were problematic. As others have observed, there are notable differences between a considered and planned adoption of technology-enhanced learning, and emergency remote delivery.¹⁰

Student feedback about the quality of the emergency remote delivery was mixed. They complained that the transition impacted their academic performance negatively; in one survey, nearly half of the student respondents believed that their academic performance had declined as a result of online learning during the pandemic, and more than half reported that their workload had increased.¹¹ They reported

⁸ See eg Oliver R Goodenough, 'Developing an E-Curriculum: Reflections on the Future of Legal Education and on the Importance of Digital Expertise' (2013) 88 *Chicago-Kent Law Review* 845; W Warren H Binford, 'Envisioning a Twenty-First Century Legal Education' (2013) 43 *Washington University Journal of Law and Policy* 157; Kate Galloway, 'A Rationale and Framework for Digital Literacies in Legal Education' (2017) 27(1) *Legal Education Review* 9.

⁹ Arrman Kyaw, 'Survey Shows Faculty More Positive About Online Learning Now Than Before Pandemic', *Diverse Issues in Higher Education* (Web Page, 24 March 2021) <<https://www.diverseeducation.com/faculty-staff/article/15108819/survey-shows-faculty-more-positive-about-online-learning-now-than-before-pandemic>>; Anahi Viladrich, 'What's so great about online teaching?', *eCampus news* (Web Page, 10 June 2022) <<https://www.ecampusnews.com/2022/06/10/whats-so-great-about-online-teaching/2/>>.

¹⁰ Charles Hodges et al, 'The Difference Between Emergency Remote Teaching and Online Learning', *Educause Review* (Online Article, 27 March 2020) <<https://er.educause.edu/articles/2020/3/the-difference-between-emergency-remote-teaching-and-online-learning>>.

¹¹ Farnell, Matijević and Schmidt (n 4).

reduced levels of interaction with academics.¹² Interaction between teacher and student is fundamental to both the student's construction of their knowledge and to their empowerment,¹³ and many law teachers found it more difficult to interact effectively with their students in the online environment.

Some students complained about an inability to access TEL tools or expressed their frustration about the unreliability of technology.¹⁴ They expressed concerns about lack of community in online environments, technical problems, and difficulty understanding instructional goals.¹⁵ Despite widespread assumptions to the contrary, not all students have the digital skills to succeed in a digital environment.¹⁶

Of significant concern were the reports of the transition to remote learning impacting student wellbeing, although it is difficult to separate the effect of prolonged periods of remote learning from the many other factors impacting wellbeing during the pandemic. The COVID-19 pandemic 'challenged students' psychological and emotional wellbeing, with students often having to confront boredom, anxiety, frustration and anger'.¹⁷ Students complained about the isolation and reported a lack of engagement and reduced motivation.¹⁸ Student dissatisfaction with the pandemic-driven shift to remote learning has in the US been so strong that it has triggered a spate of litigation, with students suing their institutions over the poor quality of their learning experience.¹⁹

At least some of this negative feedback is due to a lack of academic expertise with TEL.²⁰ While some of the student concerns relate to matters beyond the control of individual instructors – access to technology, unreliable technology – there are many concerns that could have been addressed or at least minimised if academic expertise with

¹² Martin (n 5).

¹³ Alison Holland, 'Effective Principles of Informal Online Learning Design: A Theory-Building Metasynthesis of Qualitative Research' [2019] *Computers & Education* 128, 214-226.

¹⁴ Martin (n 5).

¹⁵ Liyann Song et al, 'Improving Online Learning: Student Perceptions of Useful and Challenging Characteristics' (2004) 7(1) *The Internet and Higher Education* 59.

¹⁶ Koen Aesaert et al, 'Accuracy and Bias of ICT Self-Efficacy: An Empirical Study Into Students' Over and Underestimation of Their ICT Competences' [2017] *Computers in Human Behaviour* 75, 92-102.

¹⁷ Farnell, Matijević and Schmidt (n 4).

¹⁸ Martin (n 5).

¹⁹ One source reports more than 200 lawsuits by US university students: Paul Basken, 'US Students Make Gains in Lawsuits Over Online Teaching', *Times Higher Education* (Web Page, 2 June 2022) <<https://www.timeshighereducation.com/news/us-students-make-gains-lawsuits-over-online-teaching>>.

²⁰ David Thomson, 'The Future is Hybrid: Actually, It Already Is' (Conference Paper, UNSW Legal Education Research Conference: Pedagogies of the Pandemic, 26-27 November 2021).

TEL was better.²¹ This is not intended to criticise or downplay the enormous improvement in academic digital skills that occurred during the pandemic, but is instead intended to emphasise the fact that there is still room for improvement. And not only is such improvement possible, it is essential.

C. Further Development of Digital Skills by Legal Academics is Essential

Legal education was already becoming increasingly reliant upon technology well before the advent of the pandemic.²² That trajectory is unlikely to change. There are several reasons why legal academics will be called upon to continue to enhance and improve their digital skills.

In the previous section I described the existing shortfall between student expectations and academic abilities, and this shortfall needs to be addressed if low levels of student satisfaction with the quality of their learning experience are of concern. Further, the emphasis upon remote delivery and technology-enhanced learning is likely to increase in the coming years.

Most everyone wants a return to vibrant campus life, not in the least because human interaction is so important to learning and personal growth, and universities are where students build friendships and networks that last lifetimes. At the same time, we know that many students value the diversity of resources that are now digitally available, as well as the flexibility offered by on-line learning and teaching environments and experiences. Universities must also reduce dependency on large lecture classes in preparation for the possibility of future COVID variants triggering a return of public health restrictions. If we do it right, by incorporating inclusive and purposeful design and providing support, digitalisation can improve equal access to higher education. For all these reasons, digital transformation is here to stay.²³

As Thomson recently explained, we are moving towards a 'hybrid' future in legal education, one where all law teachers will utilise a mixture of analogue and digital teaching methods. He describes a four-step journey towards this hybrid future: (1) substitution of analogue with digital, (2) augmentation of analogue with digital, (3) modification of analogue to be more digital, and (4) redefinition of our teaching to combine analogue and digital methods. At present, many legal

²¹ Martin (n 5).

²² Stephen Colbran and Anthony Gilding, 'E-Learning in Australian Law Schools' (2013) 23 *Legal Education Review* 201.

²³ Theo Farrell and Alyce Mason, 'Australian Universities Need to Digitally Transform AND Return Courses to Campus', *Campus Morning Mail* (Web Page, 21 November 2021) <<https://campusmorningmail.com.au/news/australian-universities-need-to-digitally-transform-and-return-courses-to-campus/>>.

academics are stuck at the ‘substitution’ stage, when we should be aspiring to ‘redefinition’.²⁴

Law teachers and law schools also have an obligation to prepare law students for contemporary legal practice. Lawyers are increasingly reliant upon technology, and there is an expectation that law schools will meet the digital literacy needs of future practitioners.²⁵ If the ‘metaverse’ becomes a reality, as seems increasingly to be the case, legal academics will need to be far more comfortable and competent with new teaching technologies, and law student expectations regarding TEL are likely to increase.²⁶

Digital transformation is about much more than changes and improvements in technology. Technological change won’t make much difference unless the humans using that technology also change: ‘digital transformation is human transformation’.²⁷ TEL is going to become an even more important feature of legal education and law teachers are going to have to continue to develop their digital skills.

D. There Were Several Negative Impacts Upon Academics of the 2020 Transition

Are legal academics ready to continue to develop their digital skills in response to these pressures and expectations? Anecdotally, many observers appear to assume that the rapid adoption of TEL in 2020 will form the foundation for further development of digital skills by academics,²⁸ but in this section of the paper this assumption will be interrogated.

The starting point for this interrogation is the observation that the increased use of TEL in 2020 was largely the result of necessity rather than the individual choices of academic instructors.²⁹ In the previous sections, I have described how the improvement in digital skills of academics was largely – although not entirely – successful. But the fact

²⁴ Thomson (n 20).

²⁵ Galloway (n 8).

²⁶ Rebecca Koenig, ‘With Money from Facebook, 10 Colleges Turn Their Campuses into ‘Metaversities’’, *EdSurge* (Web Page, 1 June 2022) <<https://www.edsurge.com/news/2022-06-01-with-money-from-facebook-10-colleges-turn-their-campuses-into-metaversities>>; Andy Miah, ‘The metaverse is much more than a virtual copy of your campus’, *Times Higher Education* (Web Page, 15 June 2022) <<https://www.timeshighereducation.com/campus/metaverse-much-more-virtual-copy-your-campus>>.

²⁷ Greg Satell, ‘Digital Transformation is Human Transformation’ (Blog Post, 2 February 2019) <<https://greg-satell.medium.com/digital-transformation-is-human-transformation-1729f8ed416c>>.

²⁸ See eg Shivangi Dhawan, 2020. ‘Online Learning: A Panacea in the Time of Covid-19 Crisis’ (2020) 49(1) *Journal of Educational Technology Systems* 5, 15 <<https://doi.org/10.1177/0047239520934018>>.

²⁹ Ibid.

that the change was driven by extrinsic rather than intrinsic factors is likely to have consequences for the long-term stability and sustainability of the change. The negative consequences for academics of the rapid transition have the potential to undermine the positive outcomes of the transition and contribute to resistance by academics to efforts to facilitate further change.

1 *Academic Motivation*

The distinction between surface and deep approaches to learning is well known to most educators. When a student adopts a surface approach to learning, they tend to focus on external goals such as getting a particular grade or award. They tend to learn by rote and not to question the assumptions which underpin the material or to relate it to context. They only do the work that is absolutely necessary, and they do the work as quickly as possible, without really being interested in the subject matter or enjoying the learning process. They do just enough to be able to recall and repeat what they have learned without actually understanding and absorbing the material. On the other hand, when a student adopts a deep approach to learning, they immerse themselves in the subject matter, often enthusiastically. They tend to examine arguments critically, to question the assumptions on which they are based, and to relate them to previous knowledge and understanding. They are motivated by their internal desire to know and understand the material. They often go beyond what is required, and do extra work because they are genuinely interested.³⁰

Better students tend to favour a deep approach to learning. Or rather, students who are able to adopt a deep approach to learning tend to be better students. They usually achieve better grades and they retain the learned content longer and in more detail.³¹ And they tend to be happier students because they actually enjoy what they are doing.

This distinction is relevant to the rapid transition to remote learning that took place in 2020. Most law teachers did not choose to embrace TEL, they were compelled to do so, whether by the circumstances in which they found themselves or by the institution itself. They were focussed upon an external goal – ensuring the continued ability to deliver programs – rather than a genuine interest in TEL or a desire to

³⁰ Marton and Saljo created the distinction between ‘surface’ and ‘deep’ approaches to learning: F Marton and R Saljo, ‘On Qualitative Differences in Learning - 2: Outcomes as a Function of the Learner’s Conception of the Risk’ (1976) 46 *British Journal of Educational Psychology* 115.

³¹ Noel Entwistle, ‘Approaches to Learning and Forms of Understanding’ in B Dart and G Boulton-Lewis (eds) *Teaching and Learning in Higher Education* (Australian Council for Educational Research, 1998); Noel Entwistle, ‘Improving Teaching Through Research on Student Learning’ in JF Forest (ed), *University Teaching: International Perspectives* (Garland, 1998); John Biggs, *Teaching for Quality Learning at University* (Open University Press, 1999).

enhance their skills. They did not have time to reflect critically upon what they were learning, and they had to develop new skills so quickly it is likely that many of them did not have time to genuinely draw connections between this new approach to teaching and their previous approach. Their goal was usually instrumental – just get it done – rather than an understanding of the ways in which TEL could enhance their approach to teaching. In other words, the approach to learning adopted by many law teachers during the rapid transition had all the hallmarks of being a surface, rather than a deep, approach to learning, and as such it is unlikely to be rigorous or critical or lasting.³²

This is also consistent with the well-known distinction between intrinsic motivation and extrinsic motivation.³³ If a person is doing something – whether it is learning or working or indeed any activity – because of a reason that is outside of themselves, we say that they are extrinsically motivated. If they are instead doing something because of an inner desire, passion or drive, we say that they are intrinsically motivated. Of course, the reality is that a person will have a combination of extrinsic and intrinsic motivations that change over time, but the research clearly shows that students who are primarily intrinsically motivated to learn are more likely to adopt a deep approach to learning and perform better academically, and tend to have higher levels of wellbeing and resilience.³⁴

Many academics were extrinsically rather than intrinsically motivated to adopt TEL during the rapid transition, with implications for the quality of their learning ... and their wellbeing.

2 *Academic Morale and Wellbeing*

Many academics reported experiencing a decrease in morale and wellbeing during the pandemic.³⁵ This is in part due to the increase in academic workloads resulting from the rapid transition to remote delivery. Basic teaching tasks took longer because of unfamiliarity with operating in an online environment and using new teaching tools. Many academics had increased teaching allocations as part of cost saving measures implemented by their institutions. This often left less time for

³² Keith Trigwell and Michael Prosser, 'Improving the Quality of Student Learning: The Influence of Learning Context and Student Approaches to Learning on Learning Outcomes' (1991) 22 *Higher Education* 251–266.

³³ RM Ryan and EL Deci, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions' (2000) 25(1) *Contemporary Educational Psychology* 54–67.

³⁴ Ibid; Kennon M Sheldon, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating changes in motivation, values, and well-being' (2004) 22(2) *Behavioural Sciences and the Law* 261.

³⁵ Pradeep Sahu, 'Closure of Universities Due to Coronavirus Disease 2019 (COVID-19): Impact on Education and Mental Health of Students and Academic Staff' (2020)12(4) *Cureus* <<https://www.cureus.com/articles/30110-closure-of-universities-due-to-coronavirus-disease-2019-covid-19-impact-on-education-and-mental-health-of-students-and-academic-staff>>.

research, which contributed to the stress and anxiety experienced by many academics. Some academics were given additional responsibilities by their institutions because of reductions in staffing and because of the need to contribute to the transition, such as teaching-focussed academics being expected to lead professional development sessions for their more research-focussed colleagues.³⁶ Some academics struggled with working from home and maintaining a healthy ‘work-life balance’. Academics experienced change fatigue, digital fatigue, and COVID fatigue, and the perception that they were bearing the bulk of the responsibility for ensuring the ongoing viability and financial sustainability of their institution contributed to higher levels of distrust of management. Crucially, all of this took place during a period of ‘work intensification, work casualisation and precarity’ that had already existed prior to the pandemic.³⁷

One recent study of the impact of working in an Australian university during the pandemic and its aftermath – ‘a time of crisis, change and complexity’ – revealed perceptions by academics of their universities as ‘exploitative, oppressive, toxic and fiscally driven’.³⁸ Academics described themselves as feeling dehumanised and demoralised by management as well as burnt out, and as experiencing anxiety, cynicism, depression, and exhaustion.³⁹ Another study involved a survey of academic staff in Australia and their experiences and predictions of the impact of the pandemic on their wellbeing. Respondents reported work-related stress, digital fatigue, and a negative impact on work-life balance, and concerns about the potential longer-term changes to academia as a result of the pandemic. Trust in university administrations had weakened significantly, and one academic claimed that staff were so desperate to keep their jobs ‘that they are too scared to say ‘no’ to the staggering increase in workload that wholly online learning brings’.⁴⁰ A third study, conducted in the UK, found that academics saw online migration as engendering

³⁶ Elisa Bone, ‘Teaching Academics are Shouldering the Load to Transform the University Experience’, *National Tertiary Education Union* (Web Page, 19 August 2021) <<http://www.nteu.org.au/article/Teaching-academics-are-shouldering-the-load-to-transform-the-university-experience-%28Sentry-02-05%29-22905%29>>.

³⁷ EC Fein, N Skinner and MA Machin, ‘Work Intensification, Work–Life Interference, Stress, and Well-Being in Australian Workers’ (2017) 47(4) *International Studies of Management & Organization* 360–371.

³⁸ Craig Whitsed and Antonia Girardi, ‘Where Has the Joy of Working in Australian Universities Gone?’ in *The Conversation* (Web Page, 7 June 2022) <<https://theconversation.com/where-has-the-joy-of-working-in-australian-universities-gone-184251>>.

³⁹ *Ibid.*

⁴⁰ Fiona McGaughey et al, ‘This Can’t Be the New Norm’: Academics’ Perspectives on the COVID-19 Crisis for the Australian University Sector’, *Higher Education Research & Development* (2021) <<https://www.tandfonline.com/doi/full/10.1080/07294360.2021.1973384>>.

significant dysfunctionality and disturbance to their pedagogical roles and their personal lives.⁴¹

All of this contributes to the negative perception by many academics of the 2020 transition to remote delivery.

3 *Academic Freedom*

The fact that the 2020 transition to remote delivery was primarily the result of circumstances and institutional pressure rather than individual choice contributed to a sense of loss of autonomy and freedom by many academics. ‘Academic freedom’ is of course a highly valued notion within universities.⁴² There is a wide range of views about the nature and scope of academic freedom, from the ideological impartiality of institutions to individual academics’ freedom from excessive managerial intervention into their teaching and research.⁴³ It is not immediately clear whether ‘academic freedom’ extends beyond freedom from interference into *what* academics teach to include freedom from interference into *how* academics teach. Nevertheless, many academics bristled at the perceived seizure of control over their teaching practices and were frustrated by their reduced input into institutional decision-making.

E. *The Negative Impacts Have the Potential to Undermine Further Development of Digital Skills by Legal Academics*

Extrinsic rather than intrinsic motivation of academics to develop their digital skills and the impact of the forced transition to remote delivery upon academic morale, wellbeing and freedom have the potential to undermine institutional efforts to further embrace TEL in law schools and in higher education generally.

A useful notion here is the relationship between power and resistance. I do not wish to go into too much detail here; I have written about academic resistance to regulation of teaching elsewhere.⁴⁴ But the relevant idea here is a simple one: whenever power is exercised, resistance will arise.⁴⁵ It is like physics: movement always encounters friction in some form. Education, and the endeavour to teach another

⁴¹ R Watermeyer et al, ‘COVID-19 and Digital Disruption in UK Universities: Afflictions and Affordances of Emergency Online Migration’ (2021) 81(3) *Higher Education* 623–641 <<https://link.springer.com/article/10.1007%2Fs10734-020-00561-y>>.

⁴² See eg Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech of Australia* (Black Inc, 2021).

⁴³ James D Gordon, ‘Individual and Institutional Academic Freedom’ (2010) 49(2) *Brigham Young University Studies* 43–47.

⁴⁴ Nick James, ‘“How Dare You Tell Me How to Teach!”: Resistance to Educationalism within Australian Law Schools’ [2013] *UNSW Law Journal* 30.

⁴⁵ ‘Where there is power there is resistance.’ Michel Foucault, *The Will to Knowledge: The History of Sexuality I* (Penguin, 1998), 67, 96.

person, is an exercise of power, and because power always provokes resistance, teaching is never straightforward. Every teacher knows this: if a student sees learning as something they participate in willingly, they will learn happily and joyfully. But if they see learning as something that is being forced upon them, they will resist - perhaps passively by deliberately doing the bare minimum, by complaining about the experience or by criticising the teacher or the course or the content, and perhaps actively by refusing to participate.

The effort by institutions to educate academics about remote delivery and teach them how to engage in TEL is an exercise of power over those academics that is inevitably resisted. During the rapid transition to remote delivery provoked by the pandemic, this resistance was minimal because of the widespread recognition of the need for the transition, but post-pandemic we can expect that resistance to return and to manifest in a variety of ways. Of course, some academics will accept further changes ... but others will not.⁴⁶

The resistance is likely to be both active and passive. Active forms of resistance can include public resistance, direct resistance and refusal. Public resistance takes place in public fora, such as a verbal protest about university policies to senior university administrators in a large meeting. Direct resistance includes direct protests by academics to administrators about specific instances of regulation, such as responding to an administrative request for information about online assessment by asking difficult questions about the reasons for the request. Refusal is resistance in the form of a direct refusal by the academic to comply or cooperate with administrative directives, such as a refusal to engage in a TEL focussed professional development workshop. Passive forms of resistance include avoidance and qualified compliance. Avoidance is resistance in the form of a failure to comply with administrative directives without directly refusing to do so, such as ignoring administrative requests, claiming to be too busy or to have forgotten about the request. Qualified compliance is resistance in the form of compliance with administrative directives in minimal, pragmatic, or strategic ways.⁴⁷

My own experience, as well as that of my decanal colleagues, is that we are already seeing academic resistance to efforts to persist with development of academic digital skills and TEL. Academics are justifying their refusal to participate in a variety of ways.

'I have done enough' – Some academics seem to be of the view that the need to engage in remote delivery and embrace TEL was a

⁴⁶ MM Kogel, 'Acceptance Versus Passive Resistance: How Academics in a Higher Education Institution Make Sense of Strategic Change' (Online Essay, 2021) <<http://essay.utwente.nl/88219/>>.

⁴⁷ James (n 44).

temporary measure and that as the pandemic passes and students return to campus, the digital skills they have developed over the past few years can be set aside, and teaching can ‘return to normal’. TEL can return to being something that academics might choose to do if they so wish, and those academics who prior to the pandemic favoured a more ‘low tech’ approach to teaching expect to be free to never have to facilitate a Collaborate session, create a video or design an online quiz again. This response is informed by a misunderstanding of the need for ongoing change in favour of further digital transformation (see above) and resistance to the continuation of mandatory professional development in digital skills.

‘I can’t do any more’ – As explained earlier, many academics are experiencing lower morale and wellbeing as a consequence of the pandemic and feel too exhausted to engage in more innovation and transformation. The sense of urgency and collegial commitment to supporting reform that existed in 2020 couldn’t last; academics couldn’t stay in crisis mode forever.

‘This is the wrong way forward’ – Many academics are used to working in an environment where they are consulted about, or at least informed about, significant strategic innovations and operational changes before they occur. This did not happen during the rapid transition, and while that may have been tolerated in 2020, non-participation in institutional decision making is something that is likely to now be opposed more actively. This means that there is a greater likelihood of alternative ways forward being advocated by individuals and groups of academics, undermining or at least slowing down institutional reforms.

‘It’s time to get back to research’ – We are seeing a divergence of views about the most appropriate focus for collective and individual academic effort going forward. The transition to remote delivery during the pandemic and the consequent increase in academic teaching loads had a negative impact upon academic research productivity.⁴⁸ Some academics are now voicing their intention to focus upon their research, and expressing annoyance at any suggestion that further development of their digital skills is required or expected.

In light of the above, without mindful intervention, the quality of technology-enhanced learning is in future likely to be lower than optimal.

⁴⁸ In 2020 it was claimed that more than half of scientific research projects were at risk of non-completion globally as a consequence of the pandemic. G Marinoni, H van’t Land, and T Jensen, ‘The Impact of COVID-19 on Higher Education Around the World’, IAU Global Survey Report (International Association of Universities, 2020) <https://www.unibasq.eus/wp-content/uploads/2020/06/iau_covid19_and_he_survey_report_final_may_2020.pdf>.

III Mindful Intervention

Resistance is a pervasive and unavoidable phenomenon within all organisations, including the legal academy. The physics analogy was referred to earlier: movement within the organisational machine is the result of power, and friction or resistance is an unavoidable aspect of that process. On the other hand, just as friction can be minimised, so too can steps be taken to reduce the level of resistance.

Possible interventions include the following:

1. Law school leaders can endeavour to reframe the discourse around TEL and academic digital skills as a collaborative endeavour with collective benefits. A good starting point would be helping academic colleagues to understand and appreciate why ongoing development of digital skills is essential (see above).
2. Law school leaders can facilitate collective, honest and critical reflection upon 2020's rapid transition to remote delivery, including acknowledgement of both the successes and the flaws. This will help to highlight the need for ongoing development of academic digital skills.
3. The 'top down' approach to teaching reform in 2020 was tolerated because of the crisis. It is an approach that cannot be sustained. It is time now to re-engage academics in decision-making regarding remote delivery and TEL. As Farrell and Mason recently explained, 'the best approach to digital transformation is one that inspires and empowers academics to make strategic choices around the development of blended learning in their courses.'⁴⁹
4. Where possible, law schools should disengage (or lobby for the disengagement of) TEL initiatives from compulsion, and return to endeavouring to persuade rather than compel academics to develop their digital skills. Law school leaders can explain the reasons for the TEL initiatives in which academics are being asked to participate and the possible benefits for students. They can strive to replace academics' extrinsic motivations with intrinsic motivations. And where that isn't feasible, they can encourage cooperation by pointing to the practical benefits of digital skills development for individual academics (eg better student feedback, better promotion prospects, or a lighter workload) or for the law school (eg better results in performance measures, better support or funding from the university, or being 'left alone' by university administrators).

⁴⁹ Farrell and Mason (n 23).

5. Concerns about the need to focus instead upon research can be at least partly addressed by emphasising the teaching-research nexus and exploring ways in which research productivity can be improved rather than undermined by ongoing development of digital skills. Law school leaders can challenge the assumption that teaching and research are two separate fields of endeavour and that individual academics must choose between one or the other by highlighting the potential connections between the two.⁵⁰
6. Law schools can and must be mindful of the impact of the past few years upon academic wellbeing and morale, and any future initiatives must take this into account. A 2021 EU report into the impact of the pandemic upon higher education identified the areas that will need to be urgently addressed if one of the impacts of the pandemic is a permanent movement of more study programmes to online/remote platforms. Tellingly, the top two areas identified were ‘supporting teaching staff in adapting their curriculum and methods to online teaching’ and ‘ensuring the well-being of teaching staff and administrative staff in such turbulent changes’.⁵¹

The impact of the COVID-19 pandemic presents an opportunity to rethink and reconceptualise the nature and methods of teaching and learning in legal education, and to better realise the potential for TEL to enhance the learning experience of law students. However, the negative impact of the rapid and obligatory transition to remote delivery upon academic motivation, wellbeing, morale, and freedom has the potential to undermine further development of digital skills by legal academics, and without the kind of mindful intervention described above, the quality of technology-enhanced learning in law schools will be lower than optimal. For me, imagining how I might have supported Denis Ong to move into what will certainly be a more digital future for legal education helps me to be a more effective and sympathetic law school leader, and for that I am grateful to Denis.

⁵⁰ See eg Marina Nehme, ‘The Nexus Between Teaching and Research: Easier Said Than Done’ (2012) 22(2) *Legal Education Review* 241.

⁵¹ Farnell, Matijević and Schmidt (n 4).