

# Teaching Non-Adversarial Practice in the First Year of Law: A Proposed Strategy for Addressing High Levels of Psychological Distress in Law Students

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## Abstract

*In this article we discuss a need for strategic change in the curriculum of the first year of legal education. This need arises due to high levels of psychological distress being experienced by law students. This psychological distress starts in the first year of students' experience of law school. We argue for non-adversarial practice to be taught as a critical component of a curriculum-based strategy that will work to address this issue. We sketch out a model for a possible first year unit on non-adversarial practice for these purposes.*

## Introduction

The study of law can have serious effects on the psychological health of law students, particularly in the first year of law school. The literature in the US has long-established that the mental well-being of law students is a significant concern (Watson, 1968; Benjamin et al, 1986; Daikoff, 2004). In a study in 1986, for example, Benjamin et al. found that symptoms of psychological distress rose significantly for students in their first year of law (compared to levels in the general population at that time), and persisted throughout the degree to post-graduation.

We now know that concern is also justified in Australia. In 2009, the Brain and Mind Research Institute (BMRI) of the University of Sydney established empirically that Australian law students suffer disproportionately high levels of psychological distress (Kelk et al, 2009). The BMRI found that more than one third (35%) of law students suffer high to very high levels of psychological distress (Kelk et al, 2009, p.11). These levels of psychological distress are 17% higher than those recorded for medical students, and more than 20% higher than those found in the general population (Kelk et al, 2009, p.12). Tani and Vines' 2009 analysis of a study at the University of New South Wales also supports the BMRI's finding of high levels of depressive illness in law students (Tani and Vines, 2009); and a study at the Australian National University in 2009-2010 has made some preliminary findings that the first year of legal education contributes to higher stress and distress levels in students of law (Hall, Townes O'Brien, and Tang, 2011).

Certainly, education and information strategies for university staff and students on issues of student mental health and wellbeing already exist in many Australian tertiary institutions through the provision of equity and disability support services (Kelk et al, 2009, pp.44-45). Also, positively, in 2009 the Australian Law Students Association released a *Handbook on depression in Australian law schools* in response to the results of the BMRI research. The handbook provides information for students and student associations about mental health and coping with stress at law school. Other resilience initiatives are also being introduced to a number of law schools around Australia, for example, at Wollongong University, Macquarie

University, the University of Melbourne, and the Queensland University of Technology.

Whilst it is important to educate and inform, and whilst it is also important to build student resilience, we argue that, if the high levels of psychological distress in law students are to be appropriately addressed, curriculum renewal must be strategically harnessed as part of the intentional design of the first year experience (Kift, 2007). In 2010, Field was awarded an ALTC teaching fellowship to work on curriculum strategies to address this issue (Field, 2010). The scope of the fellowship extends to leadership of strategic change in the content, delivery and assessment of legal education. Douglas' recent doctoral study concerned an analysis of the narratives of law teachers as to the content and pedagogies employed in teaching courses on alternative dispute resolution (ADR). Douglas considered in her work how non-adversarial practice can be promoted through the discipline area of ADR, and established that ADR teachers presently have a commitment to promoting non-adversarial approaches to law, particularly through experiential learning techniques (Douglas, 2011). A course on non-adversarial practice in first year might be therefore be appropriately situated in the discipline area of ADR. This paper brings together the reflections of the two authors and provides a model for the development of a non-adversarial course in law in the first year law curriculum.

In this paper we focus on the particular need for strategic change in the legal education curriculum. More specifically, we argue for non-adversarial practice to be taught in the first year of legal education as a critical component of a curriculum-based strategy that will work to address the high levels of psychological distress in law students. First, we briefly discuss the problem of psychological distress in law students. Second, we consider the arguments for the teaching of non-adversarial practice in legal education and establish why it is that increasing non-adversarial content in the first year curriculum can work as a strategy to address psychological distress in law students. Finally, we sketch out a model for a possible first year unit on non-adversarial practice with the aim of assisting staff in law programs to include an ADR course of this type in their curriculum that will assist student mental well-being.

## **Psychological Distress in First Year Law Students**

In both Australia and in the United States, it has been found that symptoms of psychological distress rise significantly for students in their first year of law (compared to levels in the general population) (Kelk et al, 2009; Benjamin et al, 1986; Iijima, 1998). Daikoff's synthesis of the available research in 2004 indicated that whilst "prelaw students appeared almost normal" the mental health of law students "greatly declined by the end of the first year in law school" (2004, p.116). Indeed, the key measures of positive well-being (positive mood, self-actualisation, and life-satisfaction) all decreased in the first year; and the key measures of negative well-being (physical symptoms, negative mood and depression) all increased in the first year (Daikoff, 2004, p.116).

These high levels of psychological distress are said to arise because many students experience law school as an adversarial, intimidating and competitive environment, and they experience a negative impact on their values and levels of motivation (Hess, 2002; Sheldon & Krieger, 2004; Kreiger 2005; 2008; Hall et al, 2011, p.21). The environment at law school causes first year students to start to feel isolated, inferior, inadequate, anxious, alienated, paranoid and depressed (Benjamin et al, 1986, p.236; Lake, 1999-2000). This has been

identified as relating to the heavy workload at law school, the teaching methods adopted, pressures to keep up and perform, and a lack of life skills to contextualize the learning of law (Howieson & Ford, 2007; Roach, 1994). However, Daikoff also highlights research that suggests that students who choose law may have a predisposition to pessimism and depression (which can be associated with academic high achievers) (2004, p.117). It has also been suggested that many law students wear a 'social mask' that allows them to project an image of being strong, confident, active and enthusiastic, whilst on an intrapersonal level they in fact feel insecure and unsure (Reich, 1976). The adversarial nature of law school and the general lack of a concentration on holistic and reflective practice are considered central to this phenomenon (Reich, 1976, p.874). For this reason the BMRI report recommended a greater emphasis in the legal curriculum on positive and collaborative lawyering through less adversarial approaches to legal problems and problem solving (Kelk et al, 2009, pp.46-47).

### **Non-Adversarial Practice in Legal Education: A Strategy to Address Psychological Distress in the First Year of Law**

Non-adversarial practice is not clearly defined in the literature but can be seen as an approach to legal practice where non-curial options are privileged over litigation, and holistic problem-solving is encouraged. Non-adversarial processes are often referred to as 'alternative dispute resolution' (ADR) (NADRAC, 2009, p.62). They include negotiation, mediation and conciliation processes. Recently, Macfarlane has proposed an approach to "conflict resolution advocacy" that evidences the critical role of lawyers in contemporary practice as dispute analysts, managers and resolvers. The approach requires lawyers to have a thorough understanding of ADR options and a non-adversarial orientation to inform a three-step analysis of a client's dispute: first, an evaluation of the conflict; second, a consideration of the range of appropriate options to resolve or manage the conflict; and third, the provision of appropriate counsel to the client (Macfarlane, 2008). This approach represents both knowledge and also skill sets that Weisbrot (2002, 2004) and Kift (1997, 2008) have long argued should be part of a lawyer's repertoire, and of legal education. Increasingly, ADR is seen as a key site in legal education for the development of a non-adversarial orientation to legal practice (Macfarlane, 2008, pp.30-34; King et al, 2009).

Some writers have argued that ADR is central to the wider project of assisting law students to develop into holistic problem solvers (Kupfer Schneider, 2000; Nolan-Haley, 2002), modifying the traditional adversarial construct of the legal identity. Further, an understanding of ADR for law students is now considered important in Australia due to the continued increase in the use of dispute resolution options in courts and government initiatives (Douglas 2008). The influential report on legal education in the United States, the Carnegie Report, has emphasised both the importance of ADR as a critical legal skill set, and also the value of ADR in the legal curriculum (Sullivan et al, 2007). The Carnegie Report highlighted the opportunity ADR courses provide for law students to engage in active, experiential learning that promotes reflection on "professional identity, responsibility, and conduct" (Sullivan et al, 2007, p.114). Fisher et al (2007) have shown that learning ADR approaches and practices at law school can profoundly shift the conflict orientation of law students from an adversarial to a less adversarial view. Lawyers are said to gain a "standard philosophical map" through their legal education (Riskin, 1982), and therefore educating law students about ADR in the first year of law is a key strategy for establishing a philosophical map that includes non-adversarial approaches.

Most importantly for the purposes of this paper, Howieson and Ford have shown that teaching ADR at law school can also contribute to the mental well-being of students (2007). In their study Howieson and Ford evidenced that students at the University of Western Australia Law School who completed an ADR unit had a heightened sense of belonging to the school which was linked to higher levels of student engagement. Howieson (2011) conducted further research into the effect of ADR learning and teaching on student mental health and found that the experiential nature of the learning and teaching strategies, through the use of role-plays, contributed to student well-being. ADR is a discipline area where emotion, and strategies to deal with emotion in conflict, can be freely discussed and analyzed. Students and teachers engage in dialogue about emotion largely in debriefing role-plays (Douglas and Batagol, 2010, pp.115-116). Thus ADR has much to offer academics seeking to address student mental well-being in that ADR teachers adopt both content and pedagogy that is developed in engaging with emotional concerns. In Australia, many universities already include ADR as part of their law programs. They do so in a variety of ways such as stand-alone academic subjects (Gutman et al, 2006), or skills programs that deal with ADR. ADR may be taught as either a compulsory or elective subject, as a module in a subject; as part of an integrated skills program; or through a clinic approach (Giddings, 1999) and the most common focus of these courses or modules are the ADR options of negotiation and mediation (Douglas 2008; 2011). ADR can be combined with civil procedure (Mack, 1998), but in this approach the experiential learning commonly associated with ADR (Douglas 2011) and the dialogue dealing with emotion (Douglas and Batagol, 2010) may not be included, or alternatively sufficiently emphasised. ADR education is also provided in post-graduate programs, pre-admission training in practical legal training courses and through continuing professional development programs for lawyers (Brabazon & Frisby, 1999).

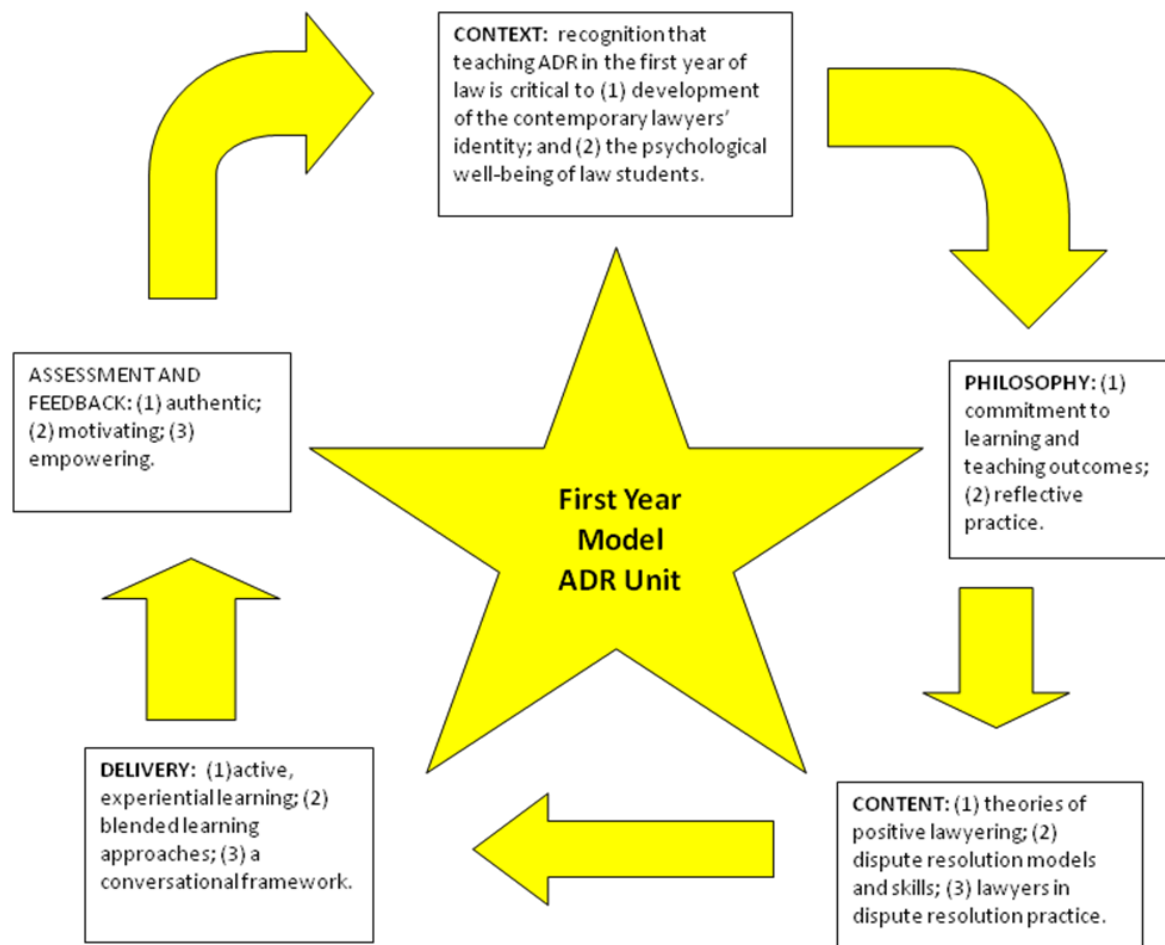
However, currently, the study of ADR is not amongst the core subjects required for students to be eligible for admission to practice as a lawyer. Also, the law curriculum continues to be dominated by legal content knowledge established by appellate decisions, and the use of case-based teaching delivery methodologies. These approaches have been said to promote a philosophical map that is oriented towards adversarial processes (Riskin & Westbrook, 1989). This has led to a recent call from the National Alternative Dispute Resolution Advisory Council (NADRAC) for the stronger integration of ADR in legal education (2009). A similar call has also come from Australian States, such as Victoria (Victorian Law Reform Committee, 2009, p.161) and New South Wales (Hatzistergos, 2010).

### **A Curriculum Design Model for ADR in the First Year of Legal Education**

Field's ALTC Fellowship program proposes two curriculum content-oriented strategies to use the teaching of ADR in law schools to address the high psychological distress levels in law students (2010). The first is to develop a model stand-alone first year ADR unit that can be introduced in law schools relatively quickly and simply. The second is to develop a series of ADR motifs for integration into the core law curriculum. This second approach reflects a concern in the literature to integrate ADR into the legal curriculum as a whole, not merely to offer it as an optional 'add on' (Menkel-Meadow, 1993; Riskin and Westbrook, 1989). Recently, Lande and Sternlight have particularly advocated for ADR to be integrated into the first year curriculum of law (2010). In the United States some universities have adopted this approach, but ADR cannot be said to be routinely included in law programs.

In this paper our focus is on sketching out a possible model for a first year ADR unit – briefly

articulating its key components: its context, philosophy, content and delivery design, and assessment and feedback approaches. The aim is to provide a framework to encourage the adoption of an ADR unit in first year that will contribute to student mental well-being. The authors seek the iterative feedback and input of conference participants in developing the model further. The model (as it is drafted to date) is pictured and then articulated below. It aims to encourage the creation of a motivating, engaging and supportive environment in the first year of law school, one which will work towards addressing the high psychological distress levels in students, and one which can be achieved through the implementation of a range of simple, yet strategic, approaches to intentional curriculum design.



**Context:** The first element of the model requires those who adopt and implement it to recognize explicitly that teaching ADR in the first year of law is critical both to addressing the high levels of psychological distress in law students, and also to the development of the professional identity and skill sets of contemporary lawyers. Hall has written of the high levels of cognitive dissonance and also the rationalization tendencies of law teachers about the impact of the legal curriculum on the issue of law student mental health (Hall, 2009). The legal academy is reluctant to acknowledge that our practices cause psychological harm to our students. However, the cognitive dissonance must be overcome, and the important contextual factors that create the need for an ADR unit in the first year must be accepted, if the model is to be successfully implemented. Additionally, teachers themselves must engage in self-reflection and with humility consider how they can best assist students to engage with mental well-being (Krieger, 2008).

**Philosophy:** The second element of the model is an underpinning teaching philosophy that involves, first, a commitment to key learning and teaching outcomes; and second, a commitment to reflective practice. Kift et al recently developed six threshold learning outcomes for law as a part of the ALTC Learning and Teaching Academic Standards Project (Kift et al, 2011). The learning outcomes developed by Kift et al identify what law students need to know, and be able to do, as graduates of the Bachelor of Laws. They are adapted for this first year model unit as critical *foundation* learning outcomes of the positive learning of law in the first year. The teaching and learning outcomes that are particularly important to the learning and teaching philosophy of this model unit relate to ADR knowledge, thinking skills, communication and collaboration, and self management.

The first key learning outcome for the unit concerns the development of knowledge of both ADR theory and practice. The second learning outcome then concerns the ability to use this knowledge to analyse disputes, to *think creatively* in approaching disputes and generating *appropriate responses* to disputes, and to engage in critical analysis in order to make a *reasoned choice amongst alternatives* (Kift et al, 2011). The third learning outcome concerns the development of communication and collaboration skills so that students can communicate in ways that are *effective, appropriate and persuasive*, and so that they can *collaborate effectively* in teams or groups (Kift et al, 2011). The fourth learning outcome concerns self management skills such that students can learn and work independently; and develop skills to reflect on and assess their own capabilities and performance, and to use feedback appropriately in order to develop personally and professionally.

Reflective practice is also an important philosophical foundational concept for the model ADR unit and builds on the fourth learning outcome of self-management. McNamara et al argue that law schools can better prepare students for the stresses and rigours of both legal education and legal practice by encouraging them to engage in reflective practice, particularly in the first year (McNamara et al, 2009). They outline a proposed framework to embed reflective practice in teaching and assessment practice as a tool for overcoming the confusion, self-doubt and uncertainty that is part of the first year experience for many law students. McNamara et al acknowledge that whilst there are a number of teaching activities to assist students to develop reflective skills, such as self and peer assessment, problem-based learning, reflective essays and journals and personal development portfolios, it is important not to use reflective activities in an ad hoc way (2009). The framework therefore involves four steps of intentional curriculum design: first, providing students with instruction on reflection; second, intervening in the student's reflective practice by creating structures and protocols to help students to reflect; third, using criterion referenced assessment to enhance the design of reflective assessment, and fourth, providing feedback on the students' reflection (McNamara et al, 2008). ePortfolio can also be harnessed as a tool for students to organise their reflection and to ensure that their journal entries are available for future reference (McAllister, Hallam & Harpur, 2008).

**Content design:** The proposed content of the unit involves three areas of focus. The first area of content focus is on theories of positive lawyering. These include the positive role of the lawyer in upholding the rule of law by contributing to the peaceful and orderly resolution of disputes in society; the role of lawyers in preventative practice; and the role of lawyers in restorative and therapeutic practice (King et al, 2009; Macfarlane 2008). The second area of content focus involves the development of an understanding of the spectrum of dispute

resolution approaches and the positive communication and negotiation skills necessary for their effective practice. A final area of content focus concerns an appreciation of the specific role lawyers can play to best advocate for their client's interests in the range of ADR options. A unit that provides students with knowledge and skills across these three areas will establish a positive and non-adversarial foundation for the development of the students' professional identity as lawyers (Hall et al, 2011).

***Delivery design:*** It is proposed that the model unit would be delivered with an emphasis on active and experiential learning; blended learning approaches; and a conversational framework (Laurillard, 2002). Experiential learning is widely accepted as a key teaching delivery strategy for ADR subjects (Conley Tyler & Cukier, 2005; Gutman 2006). The most common learning and teaching strategy currently utilised by ADR teachers in Australia (Douglas 2011), and proposed for this model unit, is the role-play. Other suggested learning and teaching approaches include interactive lectorials, small group workshops incorporating practical workbooks and skills exercises, training DVDs, the use of popular culture movies to generate discussion in relation to conflict, and the integration of online learning approaches to provide a blended, flexible and motivating learning environment (Oliver, 2000; Salmon, 2000; Oliver, 2004). Some law schools may be concerned about the financial and human resource costs of the implementation of some of these delivery strategies. Therefore the model will articulate a range of appropriate approaches, including some less resource intensive options, to accommodate the various circumstances of law schools around Australia that may want to implement this model.

***Assessment and feedback design:*** The model proposes a focus on assessment and feedback design on authentic, motivating, and empowering approaches. Field and Kift (2010) have proposed approaches to intentional *assessment* design as ways of addressing psychological distress levels in the first year of legal education. These approaches promote the use of assessment and feedback as an important first year learning intervention. The three key assessment design strategies offered include: designing assessment that is clear about what is expected of students; designing assessment that engages students by scaffolding and integrating assessment within the curriculum; and designing assessment to encourage students to be independent learners. These approaches would be integrated into the model.

Field and Kift also propose approaches to intentional feedback design as a strategy for addressing psychological distress levels in the first year of legal education. Feedback is central to supporting positive student learning because it can work to clarify expectations and reassure students who doubt their ability to succeed (Yorke, 2005). Intentionally designed feedback to support psychological well-being in first year students must provide them with early and regular formative commentary on their progress; and it must assist students to understand 'what feedback is' and how to use it productively (Field & Kift, 2010). Student feedback to the teacher can also assist in finding the appropriate learning and teaching strategies to support student well-being.

## **Conclusion**

In this article we have sketched out a possible model for a first year ADR unit as a specific strategy for change in the legal education curriculum which will address the high levels of psychological distress experienced by first year law students. It is critical that the problem of psychological distress in law students is tackled, if effective learning and teaching of law in

the first year is to be possible. Whilst the legal academy may feel reluctant to engage with a notion that our curriculum and pedagogy cause students to experience psychological distress, it is our ethical obligation as legal educators to 'do no harm'. For this reason the teaching of non-adversarial practice in the first year of legal education is argued as necessary to address psychological distress in law students.

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