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Legal Education Review

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*Recommended citation(APA):*  
Field, R., & Roy Aspro, A. (2017). A compulsory dispute resolution capstone subject: An important inclusion in a 21st century Australian law curriculum. *Legal Education Review*, 27(1), 1-21. Article 11.  
<https://ler.scholasticahq.com/article/6086>

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2017

## A Compulsory Dispute Resolution Capstone Subject: An Important Inclusion in a 21st Century Australian Law Curriculum

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### Recommended Citation

Field, Rachael M. and Roy, Alpana (2017) "A Compulsory Dispute Resolution Capstone Subject: An Important Inclusion in a 21st Century Australian Law Curriculum," *Legal Education Review*: Vol. 27 : Iss. 1 , Article 11.

Available at: <https://epublications.bond.edu.au/ler/vol27/iss1/11>

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# A Compulsory Dispute Resolution Capstone Subject: An Important Inclusion in a 21st Century Australian Law Curriculum

## **Cover Page Footnote**

Associate Professor Alpana Roy, School of Law, Western Sydney University; Professor Rachael Field, Faculty of Law, Bond University.

# A COMPULSORY DISPUTE RESOLUTION CAPSTONE SUBJECT: AN IMPORTANT INCLUSION IN A 21ST CENTURY AUSTRALIAN LAW CURRICULUM

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RACHAEL FIELD\* AND ALPANA ROY\*\*

## I INTRODUCTION

The Australian legal profession, and the Australian legal education landscape, have changed significantly since the ‘Priestley 11’ subjects were first adopted as the minimum academic study requirements for legal practice in 1992.<sup>1</sup> One of the most notable developments in legal practice since that time has been the exponential increase in the use of forms of dispute resolution (DR) other than litigation to resolve legal disputes.<sup>2</sup> A parallel development in legal education has been the evolving focus on the teaching of legal skills and values in the 21<sup>st</sup> century law curriculum, alongside doctrinal knowledge.<sup>3</sup> The Threshold Learning Outcomes for Law (TLOs), which were endorsed by the Council of Australian Law Deans (CALD) in 2010 and incorporated into the CALD Standards in 2013, have supported this shift in Australian law curricula from purely doctrinal content to the teaching of authentic skills and attitudes relevant to the practice of

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<sup>1</sup> See the materials available through the Law Admissions Consultative Committee (LACC) at Law Council of Australia, *Law Admissions Consultative Committee* <<https://www.lawcouncil.asn.au/resources/law-admissions-consultative-committee>>. See also, LACC, *Towards A National Legal Profession — Revised Uniform Admission Rules* (2002), and LACC, ‘Background Paper on Admission Requirements’ (2010): <http://www.lawcouncil.asn.au/LACC/>.

<sup>2</sup> In keeping with recent developments in the dispute resolution literature we prefer the terms ‘dispute resolution’ (DR), or ‘non-litigation DR’ (NLDR) to ‘alternative dispute resolution’ (ADR). See, eg, Laurence Boule and Rachael Field, *Australian Dispute Resolution: Law and Practice* (LexisNexis, 2017), chs 1 and 2.

<sup>3</sup> Sally Kift, ‘21st Century Climate For Change: Curriculum Design For Quality Learning Engagement in Law’ (2008) 18 *Legal Education Review* 1; Mary Keyes and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality, and Prospects for the Future’ (2004) 26 *Sydney Law Review* 537; David Weisbrot, ‘What Lawyers Need to Know, What Lawyers Need to be Able to Do: An Australian Experience’ (2002) 1 *Journal of the Association of Legal Writing Directors* 21; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000); Marlene Le Brun and Richard Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Law Book, 1994).

law.<sup>4</sup> Whilst not compulsory, many law schools have revised their curricula to ensure that they include adequate coverage of the TLOs. Changes such as these cause us to query why the Priestley 11 subjects continue only to pay lip-service to important DR knowledge, skills and attitudes and persist in failing to ensure that every graduating law student in Australia is equipped to deal with the realities and demands of the DR aspects of contemporary legal professional practice.<sup>5</sup>

This article contributes to the extant literature arguing that DR should now be embedded within the LLB and JD core curricula, no longer simply constituting part of the elective choices available to law students.<sup>6</sup> The article begins by considering the recent scholarship on DR in Australian legal education, concurring with the persuasive perspective of the majority of that body of work, and the position of the Threshold Learning Outcomes for Law also, that it is important for every graduating law student to have had an opportunity to engage with DR knowledge and skills as part of their legal education. We then consider how this might best be achieved, proposing that a capstone DR subject has great potential in this regard, and can work

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<sup>4</sup> See Sally Kift, Mark Israel and Rachael Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, 2010) <<http://www.cald.asn.au/media/uploads/KiftetalLTASStandardsStatement2010%20TLOs%20LLB.pdf>>. See also Council of Australian Law Deans, *CALD Standards for Australian Law Schools* (2013) <<http://cald.asn.au/assets/lists/ALSSC%20Resources/CALD%20Standards%20As%20adopted%2017%20November%202009%20and%20Amended%20to%20March%202013.pdf>>. Further, the Australian Law Schools Standards Committee recently conducted an interim certification on the papers exercise which included a Learning and Teaching and Assessment mapping process for the TLOs in relation to all the law schools who participated in that process: see Council of Australian Law Deans, *Australian Law Schools Standards Committee* <<http://cald.asn.au/alssc.html>>.

<sup>5</sup> We acknowledge that there would be value in completely revisiting the Priestley 11 to make it overall a more flexible and applicable curriculum. However, this broader project is beyond the scope of this article. See also Geoff Monahan and Bronwyne Olliffe, 'Competency-Based Education and Training for Law Students' (2001) 3 *University of Technology Sydney Law Review* 181.

<sup>6</sup> See, eg, Judy Gutman, Tom Fisher and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' (2006) 16 *Legal Education Review* 125; Julie McFarlane, 'The New Lawyer: Moving from Warrior to Conflict Resolver' (2009) 10 *ADR Bulletin* 178 <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1455&context=adr>>; John Lande and Jean R Sternlight, 'The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering' (2010) 25 *Ohio State Journal on Dispute Resolution* 247; Kathy Douglas, 'The Teaching of ADR in Law Schools: Promoting Non-Adversarial Practice in Law' (2011) 22 *Australasian Dispute Resolution Journal* 49; Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23 *Australasian Dispute Resolution Journal* 148; James Duffy and Rachael Field 'Why ADR Must be a Mandatory Subject in a Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer' (2014) 25 *Australasian Dispute Resolution Journal* 9; Kathy Douglas, 'The Evolution of Lawyers' Professional Identity: The Contribution of ADR in Legal Education' (2013) 18 *Deakin Law Review* 315; Boule and Field, above n 2, ch 1.

both to support effective and deep student learning outcomes, as well as student transition out of law school into the world of legal (or other) work.

## II DR IN AUSTRALIAN LEGAL EDUCATION

The history of legal education in Australia reveals a tension between doctrinal legal knowledge, practical skills and professional attitudes.<sup>7</sup> The 20<sup>th</sup> century law curriculum strongly emphasised substantive doctrinal content, ensuring that students learned the law — legislation and case law — and how to apply the law to legal problems.<sup>8</sup> This doctrinal emphasis is reflected in the Priestley 11 subjects — the 11 subjects nationally agreed for the last three decades as the subjects that students must complete to be eligible for admission to legal practice.<sup>9</sup> In 2017, these subjects remain the core compulsory components of all Australian law degrees. DR, whilst now explicitly included as one of the elements of the civil procedure knowledge requirement, is not, however, a core subject in the Priestley 11 in its own right.<sup>10</sup>

The Priestley 11 subjects have been reviewed a number of times, most recently in 2015.<sup>11</sup> Submissions were made to this most recent

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<sup>7</sup> Boule and Field, above n 2.

<sup>8</sup> Keyes and Johnstone noted as long ago as 2004 that ‘there is a great deal of evidence about what constitutes good teaching in higher education. Almost every aspect of that evidence is at odds with the traditional model of legal education’: Keyes and Johnstone, above n 3, 547.

<sup>9</sup> See Law Admissions Consultative Committee’s Uniform Admission Rules 2008, sch 1. See also Law Admissions Consultative Committee, ‘Background Paper on Admission Requirements’ (Background Paper, Law Admissions Consultative Committee, October 2010) <[https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/Background\\_Paper\\_on\\_Admission\\_Requirements-Oct2010.rev2.pdf](https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/Background_Paper_on_Admission_Requirements-Oct2010.rev2.pdf)>; Law Admissions Consultative Committee, ‘Towards a National Legal Profession - Revised Uniform Admission Rules’ (Report, Law Admissions Consultative Committee, February 2002). For a brief history of the Priestley 11 see Rachael Field, James Duffy and Anna Huggins, *Lawyering and Positive Professional Identities* (LexisNexis, 2014) ch 2 – ‘What Lawyers Need to Know and Be Able to Do’. See also Nickolas James and Rachael Field, *The New Lawyer* (Wiley, 2013) 23. The Priestley 11 subjects include: criminal law and procedure, torts, contracts, property law, equity and trusts, company law, administrative law, Federal and State constitutional law, civil procedure, evidence, and professional conduct (including basic trust accounting).

<sup>10</sup> See Law Admissions Consultative Committee, ‘Prescribed Academic Areas of Knowledge’ (Report, Law Admissions Consultative Committee, December 2016) <[https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/243473563\\_1\\_Prescribed\\_Academic\\_Areas\\_of\\_Knowledge.pdf](https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/243473563_1_Prescribed_Academic_Areas_of_Knowledge.pdf)> where ‘alternative dispute resolution’ is included at point 12 as one of the elements of Civil Procedure.

<sup>11</sup> In early 2015, the Council of Chief Justices requested that the Law Admissions Consultative Committee (LACC) conduct a limited Review of Academic Requirements for Admission to the Legal Profession. The call for submissions noted that: ‘The TLOs reflect the entirely reasonable aspiration that a law student should not only acquire a substantive body of knowledge during a law course (to which the Academic Requirements have so far been primarily directed) but should also acquire the intellectual skills and personal attributes that are necessary to process and deploy that knowledge’.

review advocating for the inclusion of a stand-alone DR subject within the required subjects for admission to legal practice. However, there is no evidence of any change at the time of writing, and the Priestley 11 subjects remain the same.<sup>12</sup> As we discuss further in this article, this is problematic because the doctrinal focus of the Priestley 11 means that insufficient attention is paid in many current Australian law degrees to some of the most important legal knowledge, skills, and values relevant to the practice of law. The knowledge and competencies that are demanded by current and future legal practice indicate that DR is worthy of inclusion in the Priestley 11.<sup>13</sup>

Acknowledgement of the inadequacy of a purely doctrinal focus is not new or unique to Australian legal education. For example, David Weisbrot, writing as long ago as 2001, noted that there is a

powerful disconnect that has emerged between the focus of teaching and learning in most law schools in Australia — that is, the mastery of a large number of bodies of doctrinal law — and the generic professional skills and attributes which law graduates require to succeed in the increasingly dynamic work environment in which they find themselves. Although appellate case exegesis (in one field of doctrinal law after another) is one important skill for lawyers, it is by no means the only professional skill which law students and young lawyers need to acquire, nor is it arguably even the most important.<sup>14</sup>

Legal education scholarship in the US also supports this view.<sup>15</sup>

DR knowledge, skills and attitudes are relevant to the spectrum of legal practice from transactional work, to problem-solving, to dispute resolution and conflict management practice. In terms of dispute resolution practice, DR processes other than litigation (or non-

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<sup>12</sup> The Law Admissions Consultative Committee's (LACC) *Model Admission Rules 2015* incorporate the principles generally followed by the various state and territory Admitting Authorities under their respective rules relating to admission. Schedule 1 of the *Model Admission Rules 2015* sets out the academic requirements for admission, and Schedule 2 sets out the Practical Legal Training requirements. It should be noted that while Schedule 1 contains the same 'Priestley 11', the Practical Legal Training requirements in Schedule 2 certainly incorporate DR skills in the compulsory practice area of Civil Litigation Practice and compulsory Lawyer's Skills competency, as well as in the optional practice areas of Employment and Industrial Relations Practice and Family Law Practice. Recently, a new committee of LACC has been initiated – the Assuring Professional Competence Committee which is looking at the accreditation requirements across the whole of the legal education continuum from LLB/JD, through Practical Legal Training (PLT), to admission and then onto Continuing Professional Development (CPD).

<sup>13</sup> See above n 3.

<sup>14</sup> Weisbrot, above n 3, 48.

<sup>15</sup> See, eg, Susan Daicoff, 'The Future of the Legal Profession' (2011) 37(1) *Monash University Law Review* 7; Susan Daicoff, 'On Butlers, Architects, and Lawyers: The Professionalism of *The Remains of the Day* and *The Fountainhead*' (2011) 17 *Journal of Law, Business and Ethics* 23; Susan Swaim Daicoff, *Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses* (American Psychological Association, 2004). See also Stephen Gerst and Gerald Hess, 'Professional Skills and Values in Legal Education: The GPS Model' (2009) 43 *Valparaiso University Law Review* 513 reporting on empirical studies of lawyers in Chicago, Minnesota, Montana and Arizona.

litigation dispute resolution (NLDR)),<sup>16</sup> are broadly perceived to offer many benefits to clients because they can potentially provide increased autonomy, self-determination and satisfaction for the parties.<sup>17</sup> NLDR processes have the potential to offer flexible, mutually beneficial solutions based on the parties' needs and interests, and are noted for being able to preserve relationships and deliver outcomes efficiently.<sup>18</sup> They are also far more widely accessible than the court system, and can address many of the problematic aspects of going to court — such as issues relating to cost, delay and complexity.<sup>19</sup> As a result, and as we discuss further below, DR is increasingly becoming institutionalised in the Australian legal system.

It is on this basis that the Priestley 11 subjects can legitimately be questioned as to whether they 'realistically equip students with the capacity to manage the dynamic nature of developments in the substance of Australian law'.<sup>20</sup> Indeed it could even be said that the current admission requirements, and consequently the Australian law degree, remain substantially inadequate until DR is included. It is only when DR is a core compulsory subject in the law degree that all Australian law students will graduate with the necessary knowledge, skills and attitudes for the real world of practice. The 2014 Productivity Commission's push for the inclusion of a compulsory core subject on DR in the law curriculum is further testament to this.<sup>21</sup>

As noted earlier, in addition to the Priestley 11, Australian legal educators are now also guided by the six TLOs which provide some direction on the appropriate standards, content and structure of Australian undergraduate and JD law degrees.<sup>22</sup> The TLOs were developed in 2010 as part of a national project funded by the then Australian Learning and Teaching Council. When they were introduced, CALD and other stakeholders recommended their adoption as the academic requirements for admission in the place of the Priestley 11.<sup>23</sup>

Of the six TLOs the first relates to knowledge (it is in fact possible that all the Priestley 11 subjects could fall under the banner of TLO 1). The remaining five TLOs relate to ethics and professional responsibility, thinking skills, research skills, communication and collaboration skills and self-management skills. The TLOs are now

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<sup>16</sup> See Boule and Field, above n 2.

<sup>17</sup> Sourdin, above n 6, 31.

<sup>18</sup> Ibid.

<sup>19</sup> See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).

<sup>20</sup> Field, Duffy and Huggins above n 9, ch 2.

<sup>21</sup> Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, Productivity Commission, 5 September 2014) 228.

<sup>22</sup> Kift, Israel and Field, above n 4.

<sup>23</sup> Ibid 4. See also Duffy and Field, 'Why ADR Must be a Mandatory Subject in a Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer', above n 6, 14.



said to ‘represent the most contemporary and “vitaly important” set of measures for Australian law schools’.<sup>24</sup>

DR subjects can make a significant contribution to achieving the learning and teaching requirements of the TLOs. Indeed, Duffy and Field argue that ‘without ADR as a mandatory subject, a law school cannot meaningfully establish its compliance with all of the TLOs.’<sup>25</sup> In particular, TLO 3 — *Thinking skills*, requires that graduates of law are able to ‘think creatively in approaching legal issues and generating appropriate responses’, which in turn is said to require ‘graduates to be familiar with a range of alternative dispute resolution processes’.<sup>26</sup> Also, DR subjects are particularly well suited to teaching TLO5 — *Communication and collaboration skills*, as well as TLO6 — *Self-management skills*. For these reasons alone, law schools ‘should give serious consideration to compulsory ADR instruction as a strategy for satisfying the requirements of the TLOs’.<sup>27</sup>

In a 2011 discussion paper, LACC considered whether there was a case for the TLOs to be integrated with the Priestley 11.<sup>28</sup> However, the Committee noted that there was not ‘widespread discontent among law schools’ with the Priestley 11, and thus the TLOs did not become an admission requirement.<sup>29</sup> As noted above, in 2015 LACC held a review of the academic requirements. Submissions to this review suggested that the current Academic Requirements should be harmonised with the TLOs. However, whilst the TLOs have become an important standards-guide for legal education in Australia, this is yet to occur.

Consequently, many Australian law schools still offer DR only as an elective subject. This means that students must have the acumen to recognise the importance and relevance of DR knowledge, skills and attitudes in order to decide to include it among their limited elective subject choices.<sup>30</sup> A study by the National Alternative Dispute

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<sup>24</sup> See, eg, the submission to the 2015 LACC Review by the University of Queensland Law School: University of Queensland Pro Bono Centre, Submission No 5 to Law Admissions Consultative Committee, *Review of Academic Requirements*, 11 March 2015.

<sup>25</sup> Duffy and Field, ‘Why ADR Must be a Mandatory Subject in a Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer’, above n 6, 14.

<sup>26</sup> Ibid 14-15.

<sup>27</sup> Ibid 15.

<sup>28</sup> Law Admissions Consultative Committee, ‘Reconciling Academic Requirements and Threshold Learning Outcomes’ (Discussion Paper, Law Council of Australia, 24 June 2011) <<https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/20110624-ReconcilingAcademicRequirementsandThresholdLearningOutcomes-DiscussionPaper.pdf>>.

<sup>29</sup> Ibid.

<sup>30</sup> The experience of Field and Duffy at QUT was that many students possessed such acumen: Rachael Field and James Duffy, ‘Better to Light a Single Candle than to Curse the Darkness: Promoting Law Student Well-Being through a First Year Law Subject’ (2012) 12(1) *Queensland University of Technology Law and Justice Journal* 133.

Resolution Advisory Council (NADRAC)<sup>31</sup> in 2012 found that only eight law schools at that time included a mandatory subject in their curriculum where 50 per cent or more of the teaching focused on DR.<sup>32</sup> Of the 27 law schools which responded to NADRAC's survey, 25 had elective subjects available for students that focused on DR.<sup>33</sup> NADRAC commented that 'the amount of ADR teaching that currently occurs in the majority of Australian law schools is not sufficient in light of the increasing role that lawyers will play in advising clients about and assisting them in ADR processes'.<sup>34</sup> The need for accurate, up-to-date nation-wide data about the presence of DR subjects in Australian law schools is important. The Australian Dispute Resolution Advisory Council (ADRAC) recognises this. At the time of writing ADRAC has just initiated a follow up project to the 2012 NADRAC Report to be led by Dr Kathy Douglas of RMIT.

Law schools that include DR in their compulsory curriculum will indicate to prospective students that they understand what is required to adequately prepare students for contemporary and future legal practice. As Boule and Field contend: 'They will become the law schools that students look to for legal qualifications that are relevant, and that will support their employability prospects'.<sup>35</sup>

In the next section, we explore in more detail the reality of the position of DR in 21<sup>st</sup> century legal practice and acknowledge the depth and breadth of the extant scholarly literature on this topic, and on the logical consequential position that DR could justifiably now be included in the core requirements of the Australian law curriculum.

### III JUSTIFICATIONS FOR A COMPULSORY DR SUBJECT IN AUSTRALIAN LEGAL EDUCATION

There is now a well-established body of literature in Australia (and internationally) that advocates for the inclusion of DR in the law curriculum.<sup>36</sup> This section explores the key themes of this literature to

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<sup>31</sup> See National Alternative Dispute Resolution Advisory Council (NADRAC), *Teaching Alternative Dispute Resolution in Australian Law Schools* (Commonwealth Government, 2012). NADRAC, the peak ADR policy body in Australia was abolished by the Federal Government on 8 November 2013 as part of its decision to 'streamline' a number of non-statutory bodies. It has been replaced by the Australian Dispute Resolution Advisory Council (ADRAC) which is a voluntary, unaligned, independent council of 11 individuals, chaired by Jeremy Gormly SC. This Council does not receive government funding as yet: ADRAC, *Home* <<http://www.adrac.org.au/>>.

<sup>32</sup> NADRAC, above n 31, 9. We acknowledge that this data is five years old, and is almost certainly no longer accurate.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* 12.

<sup>35</sup> Boule and Field, above n 2.

<sup>36</sup> See, eg, Jennifer David, 'Training Issues in Dispute Resolution: Three Perspectives, Part 1: Integrating Alternative Dispute Resolution (ADR) in Law Schools' (1991) 2 *Australasian Dispute Resolution Journal* 5; Matthew Osborne, 'Alternative Dispute Resolution and Clinical Legal Education in Australian Law Schools: Convergent, Antagonistic or Running in Parallel?' (1996) 14 *Journal of Professional Legal*

demonstrate why it is now appropriate for Australian law degrees to include instruction in DR. These themes include: the institutionalisation of DR in legal practice, the ethical duty to advise clients of alternatives to an adjudicated process for their matter, the efficacy of the law degree in the context of contemporary employability issues, and finally, issues of psychological well-being for law students and lawyers.

### *A Contemporary Legal Practice in Australia and the Institutionalisation of DR*

The institutionalisation of DR in the practice of Australian law is resulting in a high proportion of disputes being resolved through processes other than determinative or court-related processes. Both regulators and the legal profession have recognised that in the 21<sup>st</sup> century, the role of the courts as ‘the central supplier of justice’ is increasingly diminishing.<sup>37</sup> At the same time, DR processes are continuously developing, as are the ways in which legal practitioners appreciate and participate in them. There has been particularly significant legislative change in the last decade or so to make participation in DR processes mandatory in some circumstances, to impose duties upon lawyers to advise their clients about the

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*Education 97*; Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Legal Education and Training*, Issues Paper No 21 (1997); Judy Gutman, Tom Fisher and Erika Martens, ‘Teaching ADR to Australian Law Students: Implications for Legal Practice in Australia’ (2008) 19 *Australasian Dispute Resolution Journal* 42; Judith McNamara, Rachael Field and Catherine Brown, ‘Learning to Reflect in the First Year of Legal Education: The Key to Surviving Legal Education and Legal Practice’ (Paper presented at the First Year in Higher Education Conference, Townsville, 29 June 2009); Rachael Field and Sally Kift, ‘Addressing the High Levels of Psychological Distress in Law Students Through Intentional Assessment and Feedback Design in the First Year Law Curriculum’ (2010) 1(1) *International Journal of the First Year in Higher Education* 65; Rachael Field and Kathy Douglas, ‘Teaching Non-Adversarial Practice in the First Year of Law: A Proposed Strategy for Addressing High Levels of Psychological Distress in Law Students’ (Paper presented at the First Year in Higher Education Conference, Fremantle, 30 June 2011); Rachael Field and James Duffy, ‘Law Student Psychological Distress, ADR and Sweet-Minded, Sweet-Eyed Hope’ (2012) 23 *Australasian Dispute Resolution Journal* 195; Rachael Field and James Duffy, ‘Better to Light a Single Candle than to Curse the Darkness: Promoting Law Student Well-Being through a First Year Law Subject’, above n 30; Rachael Field, James Duffy and Anna Huggins, ‘Supporting Transition to Law School and Student Well-Being: The Role of Professional Legal Identity’ (2013) 4(2) *International Journal of the First Year in Higher Education Journal* 15; Boulle and Field, above n 2. See also Frank E A Sander, ‘Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles’ (1984) 34 *Journal of Legal Education* 229; Albert M Sacks, ‘Legal Education and the Changing Role of Lawyers in Dispute Resolution’ (1984) 34 *Journal of Legal Education* 237; Leonard L Riskin and James E Westbrook, ‘Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan’ (1989) 39 *Journal of Legal Education* 509.

<sup>37</sup> NADRAC, above n 31, 5 citing Attorney-General’s Department Access to Justice Taskforce, ‘A Strategic Framework for Access to Justice in the Federal Civil Justice System’ (Report, Access to Justice Taskforce Attorney-General’s Department, September 2009) 3.

availability of DR, and to provide judicial officers with the option of referring appropriate matters to DR processes.

There are now numerous examples, across all Australian jurisdictions, of legislation that mandates engagement in DR as a pre-filing requirement.<sup>38</sup> That is, increasingly applications to have a matter heard in a court will not be accepted unless the parties first provide evidence that they have taken genuine steps to resolve the matter through non-litigation DR approaches.

A notable example of such legislation is the *Civil Dispute Resolution Act 2011* (Cth). The object of this Act 'is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted'.<sup>39</sup> The legislation provides further incentive to engage in DR by stipulating that a court can take into account compliance with the Act when imposing costs orders.<sup>40</sup> With respect to specific obligations, the *Civil Dispute Resolution Act 2011* (Cth) requires both the applicant and the respondent to demonstrate the steps they have taken by filing 'genuine steps statements'.<sup>41</sup> Section 9 of the *Civil Dispute Resolution Act 2011* (Cth) provides that: 'A lawyer acting for a person who is required to file a genuine steps statement must: (a) advise the person of the requirement; and (b) assist the person to comply with the requirement'. The *Civil Dispute Resolution Act 2011* (Cth) also specifically states that: 'If a lawyer is ordered to bear costs personally because of a failure to comply... the lawyer must not recover the costs from the lawyer's client'.<sup>42</sup>

A further example of a pre-filing requirement to first take genuine steps to resolve a matter using negotiation or an assisted DR process is found in the *Uniform Civil Procedure Rules 1999* (Qld). Similar pre-filing requirements are also now part of pre-trial processes in a range of legal contexts such as family law (through the *Family Law Act 1975* (Cth), section 60I), and in personal injuries law through, for example, the *Personal Injuries Proceedings Act 2002* (Qld). In other legal contexts, such as anti-discrimination law, processes such as conciliation are mandated if they are deemed to be appropriate.<sup>43</sup> In administrative and small claims contexts, parties are encouraged to engage with DR processes to support efficient and mutually acceptable outcomes.<sup>44</sup>

Australian courts also have wide-ranging powers to refer matters to DR processes. The Federal Court and all the state Supreme Courts

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<sup>38</sup> For further discussion, see Duffy and Field, 'Why ADR Must be a Mandatory Subject in a Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer', above n 6, 10-11.

<sup>39</sup> *Civil Dispute Resolution Act 2011* (Cth) s 3.

<sup>40</sup> *Ibid* s 12.

<sup>41</sup> *Ibid* ss 6-7.

<sup>42</sup> *Ibid* s 12(3).

<sup>43</sup> For example, s 158 of the *Anti-Discrimination Act 1991* (Qld) provides that '[i]f the commissioner believes that a complaint may be resolved by conciliation, the commissioner must try to resolve it in that way'.

<sup>44</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 75.

have the power to refer matters to arbitration or mediation.<sup>45</sup> For example, the Supreme Court of Victoria website states: ‘the Supreme Court may, at any stage of a proceeding, order parties to undergo mediation. Similarly, parties may ask the Court, at any stage of a proceeding, to refer them to a mediator.’<sup>46</sup>

The growing institutionalisation of DR through legislative requirements such as these reflects an increasing appreciation of the value and efficacy of DR approaches for the resolution of legal problems. It also possibly reflects an increased client demand for efficient and effective problem-solving methods other than litigation, and also possibly a greater client emphasis on the preservation of relationships. Nevertheless, the current compulsory law curriculum continues to teach within a 20<sup>th</sup> century paradigm that elevates the adversarial system, unrealistically treating litigation as if it were the most commonly used form of DR, when in fact that this is simply not the case.

It is self-evident that the institutionalisation of DR means that lawyers need DR knowledge skills and attitudes if they are to be able to represent, advise and advocate for their clients with efficacy. Logically, this means law students must be taught DR knowledge, skills and attitudes at law school. Currently, many practising lawyers work without these required aspects of legal knowledge and skills, and they therefore often engage with DR processes from unworkable and inappropriate perspectives — such as adversarial and rights-based perspectives.<sup>47</sup> Douglas argues that the pressure to settle and the strong influence of lawyers’ competitive, adversarial styles continue to result in an emphasis on positional bargaining in legal negotiations.<sup>48</sup> Consequently, the benefits of interests-based, self-determination and party-empowerment focused processes like mediation are lost.<sup>49</sup> This is unsurprising because legal education has not equipped lawyers for appropriate DR practice. It is troubling, however, because it means that the client’s best interests are likely to be compromised. Graduate lawyers who have been taught DR as part of their law degree will be able to represent their clients with greater effect because they will understand and be able to diagnose when an adversarial stance is appropriate and when a non-adversarial stance is more suited to meeting the client’s needs and to best serving their interests. It is therefore now the appropriate time to include DR as a compulsory element of all Australian law degrees.

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<sup>45</sup> *Federal Court of Australia Act 1976* (Cth) s 53A.

<sup>46</sup> See Supreme Court of Victoria, *Mediation* <<https://www.supremecourt.vic.gov.au/forms-fees-and-services/mediation>> citing *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 50.07.

<sup>47</sup> Douglas, ‘The Evolution of Lawyers’ Professional Identity: The Contribution of ADR in Legal Education’, above n 6, 319–21.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid* 157–8. See also Olivia Rundle, ‘Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 77; Samantha Hardy and Olivia Rundle, *Mediation for Lawyers* (CCH, 2010).

### B *Ethical Duty to Advise about Alternatives to Litigation*

Another compelling justification for including DR in the law curriculum is that legal practitioners are also now ethically required to inform their clients about the availability of DR as an alternative to a contested adjudication in a court.

From an ethical professional practice perspective, the *Australian Solicitors Conduct Rules* (2012) rule 7.2 provides:

A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

This provision is also mirrored throughout Australia in the various state and territory barristers' rules. Duffy and Field make the point that the existence of these duties means that 'if a lawyer has not been previously exposed to ADR instruction, it becomes impossible for him or her to meaningfully discharge this duty'.<sup>50</sup>

Certainly, not all disputes are suitable for resolution using DR processes. However, law students who are taught at law school about the various forms of DR, and when it is appropriate to use a form of DR, are less likely as practitioners to recommend an inappropriate process.<sup>51</sup> Therefore, lawyers need to be prepared through their legal education to have the necessary DR knowledge, skills and attitudes so that they can appropriately advise, represent and advocate for their clients.

### C *The Efficacy of the Law Degree and Employability*

An additional reason as to why it is now appropriate to make DR a core compulsory subject in the Australian law degree, and an issue that is given less attention in the legal education literature, is the relevance of the content of the degree for people who intend to use their learning from law school in professions other than law. There has recently been significant media coverage about the lack of jobs for law graduates. In 2015, the *Australian Financial Review* reported that 'the number of law graduates has reached a record high with 14 600 graduates entering a legal jobs market comprising just 66 000 solicitors'.<sup>52</sup> Further,

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<sup>50</sup> Duffy and Field, 'Why ADR Must be a Mandatory Subject in a Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer', above n 6, 11.

<sup>51</sup> Susan Carr-Gregg, 'Alternative Dispute Resolution in Practical Legal Training – Too Little, Too Late?' (1992) 10 *Journal of Professional Legal Education* 23, 26.

<sup>52</sup> Edmund Tadros and Katie Walsh, 'Too Many Law Graduates and Not Enough Jobs', *Australian Financial Review* (online), 22 October 2015 <<http://www.afr.com/business/legal/too-many-law-graduates-and-not-enough-jobs-20151020-gkdbyx>>.

the number of domestic bachelor and post-graduate law finishers in 2014 was up by more than 1200, or nine per cent, year-on-year... This outstripped the average four per cent growth in the number of practicing solicitors across the country.<sup>53</sup>

It is indisputable that the number of law graduates far exceeds the number of available jobs in the legal profession.<sup>54</sup>

Including DR in the core compulsory subjects of the law degree is one way of ensuring that law graduates who do not go on to join the legal profession are equipped with knowledge, skills and attitudes that have relevance more generally to the world of work and to other professional practice contexts, as well as personal contexts.<sup>55</sup> DR content also has the potential to extend the appeal of the law degree beyond the numbers of students who intend to enter the legal profession. It is worth noting that Fisher and Ury's seminal DR text, *Getting to Yes*,<sup>56</sup> is broadly applicable across a range of professions and industries. This work is used in diverse professional contexts such as business, engineering and education to promote positive and principled approaches to disputes.<sup>57</sup>

From an international perspective, Susan Daicoff, in an article on the US legal profession's future written in 2011, argued that the current content of law degrees is largely irrelevant to the realities of legal practice, and cites this as a key reason for legal education reform. She refers to Gerst and Hess's empirical studies of lawyers in the US which confirm that legal education fails to inculcate in students the skills that are needed to actually practice law.<sup>58</sup> It is not hyperbole to assert that an absence of compulsory DR instruction in the Australian law degree means that some law graduates (for example, those who have not chosen DR as an elective) will not be satisfactorily equipped 'with the capacity to manage the dynamic nature of developments in the substance of Australian law'.<sup>59</sup>

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid. See also Stefanie Garber, 'Law Students Question Value of their Degree', *Lawyers Weekly* (online), 4 August 2015 <<http://www.lawyersweekly.com.au/news/16923-law-students-question-the-value-of-degree>>; Felicity Nelson, 'Law Graduate Unemployment Hits Record High', *Lawyers Weekly* (online), 9 January 2015 <<http://www.lawyersweekly.com.au/news/16023-law-graduate-unemployment-hits-record-high>>; Law Society of New South Wales, *Future Prospects of Law Graduates: Report and Recommendations* (Law Society of New South Wales, 2015) <<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/980877.pdf>>.

<sup>55</sup> For recent statistics of legal practitioners and law graduates in NSW, see Law Society of New South Wales, above n 54.

<sup>56</sup> Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin, 1981).

<sup>57</sup> Sourdin, above n 6, 41-6.

<sup>58</sup> Gerst and Hess, above n 15, reporting on studies of empirical studies of lawyers in Chicago, Minnesota, Montana and Arizona.

<sup>59</sup> Field, Duffy and Huggins, above n 9, ch 2.

### D Psychological Well-Being Issues

The Brain and Mind Research Institute's (BMRI) ground-breaking Australian empirical study published in 2009, found high incidences of psychological distress amongst law students and lawyers.<sup>60</sup> Subsequent studies confirm this finding,<sup>61</sup> consistently indicating that the psychological well-being of one-third of law students has declined by the end of their first year of law school.<sup>62</sup> Since the BMRI study, research has been conducted into the impact of specific components of law school curricula on psychological well-being, and subjects focusing on non-adversarial practices have found to have a positive

<sup>60</sup> Norm Kelk et al, 'Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers', (Report, Brain & Mind Research Institute, January 2009)

<<http://www.cald.asn.au/docs/Law%20Report%20Website%20version%204%20May%202009.pdf>>; see also Norm Kelk, Sharon Medlow and Ian Hickie, 'Distress and Depression among Australian Law Students: Incidence, Attitudes and the Role of Universities' (2010) 32 *Sydney Law Review* 113; G Andrew H Benjamin et al, 'The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers' (1986) 11 *American Bar Foundation Research Journal* 225, 236; Ann L Iijima, 'Lessons Learned: Legal Education and Law Student Dysfunction' (1998) 48 *Journal of Legal Education* 524; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149.

<sup>61</sup> See Catherine M Leahy et al, 'Distress Levels and Self-Reported Treatment Rates for Medicine, Law, Psychology and Mechanical Engineering Students: Cross-Sectional Study' (2010) 44 *Australian and New Zealand Journal of Psychiatry* 608; Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law Schools: A View from Australia' (2010) 4 *Phoenix Law Review* 21; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'No Time to Lose: Negative Impact on Law Student Well-Being May Begin in Year One' (2011) 2(2) *International Journal of the First Year in Higher Education* 49; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149; Anthony Lester, Lloyd England and Natalia Antolak-Saper, 'Health and Wellbeing in the First Year: The Law School Experience' (2011) 36 *Alternative Law Journal* 47; Beaton Research & Consulting, '2011 Annual Business and Professions Study' (Research Report, Beyond Blue, 2011)

<<https://www.bspg.com.au/dam/bspg/product?client=BEYONDBLUE&prodid=BL/0903&type=file>>; Wendy Larcombe et al, 'Does an Improved Experience of Law School Protect Students Against Depression, Anxiety and Stress? An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students' (2013) 35 *Sydney Law Review* 407; Wendy Larcombe and Katherine Fethers, 'Schooling the Blues? An Investigation of Factors Associated with Psychological Distress Among Law Students' (2013) 36 *University of New South Wales Law Journal* 390; Wendy Larcombe, Ian Malkin and Pip Nicholson, 'Law Students' Motivations, Expectations and Levels of Psychological Distress: Evidence of Connections' (2012) 22 *Legal Education Review* 71; Adele Bergin and Kenneth Pakenham, 'Law Student Stress: Relationships Between Academic Demands, Social Isolation, Career Pressure, Study/Life Imbalance and Adjustment Outcomes in Law Students' (2014) 22 *Psychiatry, Psychology and Law* 388.

<sup>62</sup> See Kelk, Medlow and Hickie, above n 60; Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016).



impact on mental health.<sup>63</sup> For example, Howieson's research at the University of Western Australia found that participating in DR subjects can increase a sense of belonging and well-being in students.<sup>64</sup> Further, Duffy and Field designed a DR subject at the Queensland University of Technology (QUT) Law School,<sup>65</sup> which drew on the field of positive psychology and the work of scholars such as Abraham Maslow<sup>66</sup> and Martin Seligman.<sup>67</sup> The prospect of contributing to the promotion of law student well-being by teaching DR is certainly a further compelling reason for ensuring that a DR subject is included in the core compulsory subjects studied at law school.

#### IV DR IN THE CORE COMPULSORY LAW CURRICULUM: OPPORTUNITIES OFFERED BY A CAPSTONE SUBJECT

It is clear that a strong case exists for the inclusion of DR in the Australian law curriculum, so the question then arises as to the best way to enact such curriculum reform. Field and Duffy's work at QUT Law School in recent years, referred to above, has centred on the development of a core compulsory *first year* DR subject.<sup>68</sup> In this article, we explore the potential of curriculum reform at the other end of the law degree by proposing a core compulsory DR capstone subject.

A long tradition exists in many disciplines other than law of using a capstone subject in the final year of a degree to prepare students for the real world of work and to support them as they negotiate their transition out of university.<sup>69</sup> Capstone subjects assist students with

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<sup>63</sup> Field and Duffy, 'Law Student Psychological Distress, ADR and Sweet-Minded, Sweet-Eyed Hope', above n 36.

<sup>64</sup> Jill Howieson, 'ADR Education: Creating Engagement and Increasing Mental Well-being Through an Interactive and Constructive Approach' (2011) 22 *Australasian Journal of Dispute Resolution* 58. See also Duffy and Field, 'Why ADR Must be a Mandatory Subject in a Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer', above n 6, 13-14.

<sup>65</sup> Duffy and Field, 'Why ADR Must be a Mandatory Subject in a Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer', above n 6.

<sup>66</sup> Abraham Maslow, *Motivation and Personality* (Harper, 1954).

<sup>67</sup> Martin E P Seligman, 'Positive Psychology, Positive Prevention, and Positive Therapy' in C R Snyder and Shane J Lopez (eds), *Handbook of Positive Psychology* (Oxford University Press, 2002) 3.

<sup>68</sup> See Queensland University of Technology, *LLB103: Dispute Resolution* <<https://www.qut.edu.au/study/unit?unitCode=LLB103>>. Field and Duffy, 'Law Student Psychological Distress, ADR and Sweet-Minded, Sweet-Eyed Hope', above n 36; Field and Duffy, 'Better to Light a Single Candle than to Curse the Darkness: Promoting Law Student Well-Being through a First Year Law Subject', above n 30.

<sup>69</sup> See, eg, Ryan Daniel and Mandy Shircore, 'Transitioning Undergraduate Students from Law, Business, and Creative Arts Towards Work Integrated Learning Capstone Exercises' (Paper presented at the Australian Collaborative Education Network National Conference, Geelong, 2012) <[http://acen.edu.au/2012conference/wp-content/uploads/2012/11/98\\_Transitioning-undergraduate-students-from-Law.pdf](http://acen.edu.au/2012conference/wp-content/uploads/2012/11/98_Transitioning-undergraduate-students-from-Law.pdf)>; Mandy Shircore et al, 'From the First Year to the Final Year Experience: Embedding Reflection for Work Integrated Learning

integrating knowledge developed across their degree into a cohesive whole. Capstone subjects also have the potential to provide a level of closure on a student's learning experience, and can assist with transition out of university to the world of professional work.<sup>70</sup> Capstone subjects support students to 'look back over their academic learning', to 'make sense of what they have accomplished', and also to look 'forward to their professional and personal futures that build on that foundational learning'.<sup>71</sup> Australian law schools have been slow to use capstone subjects in this way, although in recent years, momentum has been growing, and the legal academy is now showing a greater appreciation of capstone culminating experiences that 'cap-off a university education'.<sup>72</sup>

The proposal we make here draws on the work of the *Curriculum Renewal in Legal Education* project.<sup>73</sup> That project, which synthesised a range of final year curriculum innovations from other disciplines nationally and internationally, adapted the *First Year Transition Pedagogy*<sup>74</sup> to the capstone context by developing a principled framework for capstone subject design in the final year of the law curriculum. The *Curriculum Renewal in Legal Education* project also developed a toolkit which provides suggestions for subject models for law, one of which is a capstone subject focused on DR. Our suggestion for a DR capstone adopts and adapts that subject proposal.<sup>75</sup>

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in a Holistic Curriculum Framework. A Practice Report' (2013) 4(1) *International Journal of the First Year in Higher Education* 125.

<sup>70</sup> See, eg, Theresa Castor and Wendy Leeds-Hurwitz, 'Capstone as Stepping Stone' (2004) 18 *Communication Teacher* 61; Ira Gerhardt and Kathryn Weld, 'One Size Can Fit All: A Problem-Solving Capstone Course' (2013) 23 *PRIMUS* 326; Ariff Kachra and Karen Schnietz, 'The Capstone Strategy Course: What Might Real Integration Look Like?' (2008) 32 *Journal of Management Education* 476; Liz van Acker et al, 'Capping Them Off! Exploring and Explaining the Patterns in Undergraduate Capstone Subjects in Australian Business Schools' (2014) 33 *Higher Education Research & Development* 1049; Carol A Maritz, Gregory Thielman and Marc Campolo, 'Using a Capstone Project to Prepare Students to Become Evidence-Based Practitioners' (2011) 25(2) *Journal of Faculty Development* 12.

<sup>71</sup> Sally Kift et al, 'Curriculum Renewal in Legal Education: Final Report' (Report, Office for Learning and Teaching, 2013) 40. See also Judith McNamara et al, 'Work-Integrated Learning as a Component of the Capstone Experience in Undergraduate Law' (2012) 13 *Asia-Pacific Journal of Cooperative Education* 1.

<sup>72</sup> Judith McNamara et al, 'Capstones as Transitional Experiences' (2015) 25 *Legal Education Review* 7, 10.

<sup>73</sup> Kift et al, above n 71. See also McNamara et al, 'Capstones as Transitional Experiences', above n 72.

<sup>74</sup> Sally Kift and Karen Nelson, 'Beyond Curriculum Reform: Embedding the Transition Experience in Higher Education in a Changing World' (Paper presented at the Higher Education Research and Development Society of Australia Annual Conference, Sydney, 3-6 July 2005) 28; Karen Nelson, Sally Kift and Wendy Harper, "'First Portal in a Storm": A Virtual Space for Transition Students' (Paper presented at the Australian Society for Computers in Learning in Tertiary Education Conference, Queensland University of Technology, 7 December 2005).

<sup>75</sup> Kift, et al, above n 71, 60-5.

### *A Suggested Approaches to a Law Capstone DR Subject*

The content of a capstone DR subject in the law curriculum would cover DR knowledge (including the theory of disputes and conflict, the psychology of conflict, and the processes available on the DR matrix), DR skills (including communication skills, analysis skills, problem-solving skills, and preventative law skills) and DR attitudes (the values and goals of DR such as procedural justice, party autonomy, community, as well as DR ethics).<sup>76</sup> These ideas are consistent with and draw from the curriculum design work led by Professor Leonard Riskin at the University of Missouri-Columbia to integrate DR into the law curriculum, and also draw on existing practices and literature which can be found in the Capstone Principles Commentary and the Toolkit.<sup>77</sup>

It is important that the content and design of a DR capstone subject provides students with an engaging and authentic learning experience that is relevant to the real-world of legal professional practice that the students will be entering.<sup>78</sup> The subject could require students to analyse a number of legal disputes, or a single multi-faceted complex dispute. The dispute(s) to be analysed would effectively draw together learned substantive knowledge from a range of core areas of study across the degree. Students could be asked to analyse the legal dispute(s), provide legal advice about the substantive law matters they raise, diagnose an appropriate dispute resolution process for the resolution of the issues in the client's best interests, and then possibly also implement the chosen process (most likely a negotiation or mediation process).<sup>79</sup>

It is appropriate for the learning outcomes for the subject to build on students' abilities to analyse and give reasoned opinions in a client's best interests in the context of a complex legal dispute. Learning outcomes could appropriately also relate to communication, group work and legal drafting skills.

At the completion of the subject students should be able to:

1. Identify, research, synthesise and evaluate relevant factual and legal issues (TLO4).
2. Analyse relevant law for the purposes of providing a well-reasoned advice to a client in the context of a complex and

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<sup>76</sup> See, eg, Boule and Field, above n 2.

<sup>77</sup> See, eg, Leonard L Riskin, 'Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools' (1998) 50 *Florida Law Review* 589; Riskin and Westbrook, above n 36; Ronald M Pipkin, 'Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia' (1998) 50 *Florida Law Review* 609; Leonard L Riskin, 'A Response to Professor Pipkin' (1998) 50 *Florida Law Review* 757. See also Leonard L Riskin, 'Mediation in the Law Schools' (1984) 34 *Journal of Legal Education* 259.

<sup>78</sup> See Kift et al, above n 71, 60-5.

<sup>79</sup> See Kift et al, above n 71, 60-5.

multi-faceted legal dispute that includes a range of doctrinal subject areas (TLO1; TLO3).

3. Diagnose a relevant dispute resolution process that will enable the dispute to be resolved in a way that addresses the best interests of the client (TLO3).
4. Communicate practical legal advice, including offering creative solutions, for the resolution of a multi-faceted, complex legal dispute (TLO5; TLO3).
5. Work in practice groups to analyse a legal dispute, formulate an appropriate advice, communicate with the client, diagnose an appropriate process, and implement that process in a role-play (TLO3; TLO5).
6. Recognise, reflect upon, and respond to, ethical issues arising out of the legal dispute and its resolution (TLO2).
7. Reflect on and assess your own capabilities and performance, and make use of feedback as appropriate, to support personal and professional development (TLO6).

As the above collection of learning outcomes reflects, a DR capstone subject has the potential to address all TLOs at an advanced level.

The legal problems and matters in dispute could be presented to students as an authentic client file with, for example, realistic file notes, letters and other documents, as well as recorded client interviews. To replicate a real-world matter, the facts and relevant documentation would develop and unfold throughout the semester. As we indicated above, each element of the legal issues and disputes included in the learning experiences and assessment could be designed to draw on a range of areas of law that students have previously studied as core subjects. It would be appropriate for the set problems to be relatively complex, and for them also to raise complex ethical considerations. Information relevant to the required legal and DR analysis and advice could be presented via the subject's online learning management site by way, for example, of recorded client interviews, and documentation.

It is important that assessment in the subject is intentionally designed as a teaching tool — effectively assessing *for* learning rather than assessment *of* learning. Running a client file and implementing a DR process through a role-play are learning experiences that mirror the realities of contemporary legal service delivery. This sort of assessment task asks students to work independently and to assume responsibility for their own learning, whilst also working effectively in collaboration with peers. Students could work in practice groups, and the DR problem could be presented from at least two different client perspectives. Practice groups would work for an allocated client and then be paired with a practice group acting for the other client in order to engage in a final DR role-play assessment item.

Authentic learning activities such as these would extend the students' abilities in terms of complex legal problem-solving, reasoning and analysis; as well as in dispute diagnosis and informed decision-making about what constitutes an appropriate DR process for a given situation. The learning activities would also extend the students' effective, appropriate and persuasive communication skills; build their capacity to work effectively in practice teams; develop their critical reflection skills about making informed decisions to best serve the client's legal and extra-legal needs and interests; and support the students' ability to recognise and reflect on ethical issues likely to arise in DR professional contexts.<sup>80</sup>

### B *DR and the Capstone Principled Framework for Curriculum Design*

The six principles of the capstone framework for law are: transition, integration and closure, diversity, engagement, assessment, and evaluation.<sup>81</sup> These principles have been discussed in detail in recent publications of the *Curriculum Renewal in Legal Education* project team.<sup>82</sup> This section briefly outlines the key principles that a DR capstone subject for law would address. Whilst such a subject has the potential to address all the principles in the capstone framework, this conceptualisation of the subject particularly highlights the principles of transition, closure and engagement.

As Butler et al note, students in their final year of law, are in a state of transition 'as they prepare to move from undergraduate students to university alumni and emerging professionals'.<sup>83</sup> The *transition principle* highlights

students' self-management and other legal skills to deal with uncertainty, complexity and change; assisting students in beginning to develop a sense of professional identity; and supporting students to manage their career planning and development.<sup>84</sup>

A DR capstone subject has the potential to support student transition by setting students learning and assessment challenges that mirror professional practice — both in the subject's content and complexity, and in replicating the way that legal services are realistically delivered. For example, client file-management, realistic document creation and engagement in authentic DR role-plays are important transition exercises. The opportunity to reflect on these learning experiences can also assist students to develop their emerging sense of professional identity and belonging within the profession. Finally, through engagement with real-world legal professional tasks,

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<sup>80</sup> For more detail on potential assessment design ideas see Kift et al, above n 71.

<sup>81</sup> Kift et al, above n 71.

<sup>82</sup> See, eg, Kift et al, above n 71; McNamara et al, 'Capstones as *Transitional Experiences*', above n 72; Des Butler et al, 'Embodying Life-Long Learning: *Transition and Capstone Experiences*' (2017) 43 *Oxford Review of Education* 194.

<sup>83</sup> Butler et al, above n 82, 2.

<sup>84</sup> Kift et al, above n 71.

students are given the opportunity to think about the development and direction of their legal career, which is also important to the efficacy of the transition process out of law school.

The *closure principle* is

concerned with supporting students to integrate, synthesise and extend their learning in the program; enabling students to attain a sense of completion and an understanding of what it means to be a law graduate and a global citizen.<sup>85</sup>

The closure principle is closely related to the transition principle. Capstone subjects are effective vehicles for providing closure experiences for final year students because such high-impact and integrative learning experiences offer students opportunities to synthesise, consolidate and extend their legal professional knowledge and skills. As with the transition principle, the closure principle is related to the development of the students' emerging professional identity. In achieving a sense of closure on their legal education, students can draw together the threads of the diverse content and skills taught across the years of their degree, adding additional layers of complexity in terms of extending their understanding of the ethical and social values relevant to legal practice. Through a sense of closure, students can start to conceive of themselves as 'skilled problem solvers and life-long learners who can meet the rigours of the dynamic, competitive, and challenging world of 21<sup>st</sup> century legal practice'.<sup>86</sup>

A DR capstone subject can be used to implement the closure principle because integration and synthesis is achieved by students applying substantive legal knowledge, as well as the legal skills and capabilities, developed throughout their degree to analyse and manage the DR scenario, diagnose an appropriate DR process, advise the client about the dispute resolution scenario, and implement the relevant DR process. The design of a DR capstone can intentionally support students to apply research, as well as develop analytical and communication skills for a complex DR matter. In addition, students can gain a sense of completion through providing advice in relation to a legal problem which mirrors professional realities, and through their practice of an authentic role-play of a DR process.<sup>87</sup>

The recent challenges and changes to higher education have brought the idea of student engagement to the forefront of discussions about the efficacy of student learning experiences and student learning

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<sup>85</sup> Ibid. See also John N Gardner and Gretchen Van der Veer (eds), *The Senior Year Experience: Facilitating Integration, Reflection, Closure, and Transition* (Jossey-Bass, 1999).

<sup>86</sup> Kift, Israel and Field, above n 5.

<sup>87</sup> See, eg, Michele Ruyters, Kathy Douglas and Siew Fang Law, 'Blended Learning Using Role-Plays, Wikis and Blogs' (2011) 4(4) *Journal of Learning Design* 45; Kathy Douglas and Belinda Johnson, 'Legal Education and E-Learning: Online Fishbowl Role-Play as a Learning and Teaching Strategy in Legal Skills Development' (2010) 17(1) *eLaw: Murdoch University Electronic Journal of Law* 28.

outcomes.<sup>88</sup> Student engagement is ‘widely recognised as an important influence on achievement and learning in higher education’.<sup>89</sup> The *engagement principle* aims to

require students to assume active roles, to apply their learning in realistic, authentic and unfamiliar contexts and to take responsibility for their own work; and to provide opportunities for reflection to enable students to make connections between their learning and professional contexts, and to assist the development of their professional identity.<sup>90</sup>

Enacting the engagement principle in a DR capstone subject is critical because students who are engaged are ‘more likely to persist, achieve success and complete qualifications’.<sup>91</sup> To this end, engagement is crucial to students’ learning outcomes and can act as a mechanism of equity facilitating the successes of diverse students in higher education.

A capstone DR subject aligns with the engagement principle because the legal analysis and advice components of the learning and assessment activities involve students in active, real-world learning in order to problem-solve and advise the clients using a practice group approach to a complex DR matter. In addition, the role-play component of the assessment is intrinsically engaging and authentic as it requires students to practice a range of skills in a realistic context and to take responsibility for the outcome of the process. Finally, the reflective component of the subject design engages students through enabling them to develop connections between their learning and professional contexts, further assisting with the development of their emergent professional identity.

A DR capstone subject can also be designed to enact the diversity, assessment and evaluation principles of the capstone curriculum framework. The *diversity principle* is intended to enhance students’ capacity to engage with diversity in legal contexts. Ensuring that the clients’ DR matter is drafted to draw out issues around diversity that are likely to be encountered in legal professional practice is important to the efficacy of a DR capstone. Further, the introduction of a practice group approach to the management of the clients’ matter can support the diversity principle, as can the requirement of reflection on the opportunities and challenges of communicating with diverse audiences. The *assessment principle* aligns assessment practice with the capstone principles, requires students to make appropriate use of

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<sup>88</sup> See Nick Zepke, ‘Understanding Teaching, Motivation and External Influences in Student Engagement: How Can Complexity Thinking Help?’ (2011) 16 *Research in Post-Compulsory Education* 1, 2.

<sup>89</sup> Ella R Kahu, ‘Framing Student Engagement in Higher Education’ (2013) 38 *Studies in Higher Education* 758; Karen J Nelson, Sally M Kift and John A Clarke, ‘A Transition Pedagogy for Student Engagement and First-Year Learning, Success and Retention’ in Ian Solomonides, Anna Reid and Peter Petocz (eds), *Engaging with Learning in Higher Education* (Libri, 2012) 117, 117.

<sup>90</sup> Kift et al, above n 71.

<sup>91</sup> Linda Leach and Nick Zepke, ‘Engaging Students in Learning: A Review of a Conceptual Organiser’ (2011) 30 *Higher Education Research and Development* 193.

feedback and to reflect on their own capabilities and performance. A DR capstone subject can enact this principle through offering authentic assessment that mirrors what will be expected of students as graduates in the professional world of work. Also, staged assessment requires students to make use of feedback and to reflect on their own performance. Finally, the *evaluation principle* aims to ensure regular evaluation of subjects to ensure relevance, coherence and alignment with the program. A capstone DR subject can positively contribute to whole-of-program evaluations; as well as to the demonstration of student attainment of the discipline learning outcomes.

## V CONCLUSION

There is a strong case for including DR as a core compulsory subject in the law curriculum in all law degrees across Australia. DR is now an undeniably central and critical element of legal professional practice in Australia, and it is also an invaluable skill in various other professional and personal contexts. While there are challenges in making another law subject compulsory in an already crowded curriculum, the positive outcomes of this change will far outweigh any negative perspectives. There are a range of curriculum design approaches that could support the effective inclusion of DR in the core curriculum. Our proposal, drawing from the work of the *Curriculum Renewal in Legal Education* project team, is for the introduction of a DR capstone subject to support (in particular) student transition, closure and engagement and to promote a positive learning experience in the final year of law.