

THE 'MORAL PANIC' OVER PSYCHOLOGICAL WELLBEING IN THE LEGAL PROFESSION: A PERSONAL OR POLITICAL ETHICAL RESPONSE?

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I INTRODUCTION

In 2001 positive psychology superstar Martin Seligman co-authored an article entitled 'Why Lawyers Are Unhappy',¹ which elegantly and compellingly described disproportionate discontent, disillusionment, depression and drug abuse among American lawyers. In 2005 the article was re-published in Australia,² followed by a steady trickle, now a small stream, of research and commentary documenting the unique psychological distress of Australian lawyers and law students,³ and calling for professional associations, law firms and law schools to do something about it. This is a call that has indeed been

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1 Martin Seligman, Paul Verkuil and Terry Kang, 'Why Lawyers Are Unhappy' (2001) 23 *Cardozo Law Review* 33. Seligman's article was not original or unique in noting the problems and potential answers. It had long been foreshadowed, most notably in famous works by Susan Daicoff and by Patrick Schiltz in the United States: see Susan Daicoff, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46 *American University Law Review* 1337; Patrick J Schiltz, 'On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession' (1999) 52 *Vanderbilt Law Review* 871. In Australia, Allen and Baron had also pointed to these issues earlier and did so in a way that connected the personal and the political: see Judy Allen and Paula Baron, 'Buttercup Goes to Law School: Student Wellbeing in Stressed Law Schools' (2004) 29 *Alternative Law Journal* 285.

2 Martin Seligman, Paul Verkuil and Terry Kang, 'Why Lawyers Are Unhappy' (2005) 10 *Deakin Law Review* 49.

3 See Appendix 1.

heeded and a number of law schools and professional associations have now introduced counselling, mindfulness and wellbeing programmes.⁴

Two large scale Australian studies are widely cited as showing the unique prevalence and intensity of clinical levels of depression, anxiety and stress among lawyers and law students, compared with other segments of the Australian population: the Beaton Consulting 'Annual Professions Survey' of 2007,⁵ and the report of a survey commissioned by the Tristan Jepson Memorial Foundation and conducted by the Brain and Mind Research Institute in 2009.⁶ Since then, several Australian scholars have also followed up with their own empirical studies of lawyer and, more commonly, law student depression.⁷

The first Part of this article suggests that the *Beaton Study* and *BMRI Report*, and some of the studies that have followed each have methodological limitations that mean that evidence of a unique and alarming wellbeing crisis among lawyers and law students as compared to the rest of the population is not clear cut. All statistical studies are imperfect and produce ambiguous data that require interpretation. In the wellbeing literature, there is a developing consensus that the data can be interpreted to conclude that lawyers and law students suffer disproportionately and acutely from clinical depression that is at least partly caused by the traditional adversarial idea of legal professionalism in practice and education.

The second Part of the article suggests that it is fruitful to see this developing consensus around the statistical reality of the lawyer wellbeing crisis as a 'moral

4 See Appendix 2.

5 Beaton Consulting, 'Annual Professions Survey' (Research Summary, beyondblue, April 2007) <http://www.beatonglobal.com/pdfs/Depression_in_the_professions_survey.pdf> ('*Beaton Study*').

6 Norm Kelk et al, 'Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers' (Report, Brain and Mind Research Institute, University of Sydney, January 2009) <<http://www.cald.asn.au/docs/Law%20Report%20Website%20version%204%20May%2009.pdf>> ('*BRMI Report*'). 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; Sharon Medlow, Norm Kelk and Ian Hickie, 'Depression and the Law: Experiences of Australian Barristers and Solicitors' (2011) 33 *Sydney Law Review* 771.

7 Five follow-up studies are summarised in Table 1, along with the *Beaton Study* and *BMRI Report*: see Catherine Leahy et al, 'Distress Levels and Self-Reported Treatment Rates for Medicine, Law, Psychology and Mechanical Engineering Tertiary Students: Cross-Sectional Study' (2010) 44 *Australian and New Zealand Journal of Psychiatry* 608 ('*University of Adelaide Study*'); 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 ('*ANU Study*'); 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 ('*Monash Study*'); Adele J Bergin and Nerina L Jimmieson, 'Australian Lawyer Well-Being: Workplace Demands, Resources and the Impact of Time-Billing Targets' (2014) 21 *Psychiatry, Psychology and Law* 427; 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 ('*Melbourne Law School Study*').

panic'.⁸ Sociologists deploy the notion of a 'moral panic' as an analytical tool (not necessarily a pejorative label) in order to uncover the ways in which communities' responses to uncomfortable social, economic and political change sometimes coalesce around a particular diagnosis and action plan. This article suggests that discussion of a wellbeing crisis is a manageable way for people to make sense of broader concerns, shifts, and indeed moral crises, in the legal profession and the law school. Evidence of serious individual and aggregate psychological distress in the legal profession is creating a powerful discourse to advocate for change.

There is, however, a danger that the wellbeing discourse will be co-opted by powerful interests that seek to confine change to the individual and not the collective social, economic and political levels. The promotion of positive professional identities that include non-adversarial dispute resolution and personal resilience are exciting and important additions to discourses of legal professionalism.⁹ There is, however, a risk that the emphasis on diagnosing and resolving psychological distress at the individual level and identifying roles for lawyers as problem-solvers at the collective level will domesticate, depoliticise and defuse profound ethical and socio-political questions. The article concludes that legal educators, scholars, and lawyers should engage our own and our students' 'sociological imagination'¹⁰ and critical faculties to connect private experiences of psychological distress with a recognition that legal education and the practice of law is only good when it is pursued for the public good. Shifting social, economic and political relations in society at large and the profession in particular continually demand ongoing collective conversations about the public role of the profession as social trustee of the legal system, guardian of justice, standing at the uncomfortable interstices of conflict and exploitation in a world that continues to perpetuate inequality and to court environmental, economic and social disaster.

II ALARMING STATISTICS

Two studies, the *Beaton Study* and the *BMRI Report*, are cited by a suite of practitioners, professional associations, regulators, judges, policy makers and academics to show that Australian lawyers and law students suffer from a unique

8 For a definition and explanation of this term, see below Part III(A).

9 See Rachael Field, James Duffy and Anna Huggins, *Lawyering and Positive Professional Identities* (LexisNexis, 2014).

10 For a definition and explanation of this term, see below Part III(E).

degree of psychological distress when compared with other occupations and the general population.¹¹

Writing about the wellbeing crisis typically begins with statements referring to: ‘the fact that Law Schools are “breeding ground[s] for depression, anxiety and other stress related illnesses” is now widely accepted in Australia and internationally’;¹² and ‘alarming levels of psychological distress experienced by Australian lawyers’.¹³

An academic study from the Australian National University comments that:

[The *BMRI Report*] hit Australian legal educators hard. No longer could we shrug off law student distress as primarily an American problem. The problem is ours too, facing us every day in our classrooms. We simply can not fail to respond to data showing that 35 per cent of Australian law students suffer from disabling symptoms of depression.¹⁴

Another academic article cites the comments of Professor Patrick McGorry, Australian of the Year 2010, youth mental health expert and high profile mental health policy advocate, that: ‘Australia is in the midst of a mental health crisis in which sufferers, including lawyers, are being struck down at their peak’.¹⁵

This commentary, discussion and indeed alarm, has also prompted action and the commitment of resources by law schools, legal professional associations, law firms and private foundations.¹⁶ Some of these wellbeing initiatives are long overdue. The professional associations should not have required evidence of a mental health crisis to introduce long overdue programmes such as specialist, confidential counselling services for lawyers, explicit policies for how mental health issues will be treated in disciplinary and regulatory processes, and policies that discourage or prohibit bullying and discrimination. Similarly the notion that

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- 11 Appendix 1 sets out the scholarly articles and major speeches and reports on lawyer and law student wellbeing published in Australia since Seligman’s articles was published in Australia in 2005 – indicating the growing interest the topic has attracted among both scholars and practitioners including legal profession associations and regulators.
 - 12 Larcombe et al, *Melbourne Law School Study*, above n 7, 430–1, quoting Ruth Ann McKinney, ‘Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?’ (2002) 8 *Journal of the Legal Writing Institute* 229, 229. In the *Melbourne Law School Study*, Larcombe et al cite American and Australian literature, including the *BMRI Report*.
 - 13 Bergin and Jimmieson, above n 7, 1.
 - 14 Townes O’Brien, Tang and Hall, *ANU Study*, above n 7, 149. The 35 per cent figure is from *BMRI Report*, above n 6, 12.
 - 15 Frances Gibson, ‘Psychiatric Disability and the Practising Lawyer in Australia’ (2012) 20 *Journal of Law and Medicine* 391, 391. Gibson goes on to cite the *BMRI Report*, above n 6, which is what McGorry was also referring to when he made this comment in his 2010 Tristan Jepson Memorial Foundation Annual Lecture: see Claire Chaffey, ‘McGorry Links Firm Environment to Depression’, *Lawyers Weekly* (online), 2 September 2010 <http://allnet.com/community/lwau/blogs/top_stories/archive/2010/09/02/mcgorry-links-firm-environment-to-depression.aspx>.
 - 16 Appendix 2 summarises the various wellbeing programmes that have been set up nationwide and in the three most populous states (NSW, Victoria and Queensland) for practising professionals and law students by legal profession and law student associations and legal education institutions focused on individual wellbeing, resilience and mental health.

law schools might only think to introduce education about non-adversarial dispute resolution or seek to temper hyper-competition and cynicism among law students once confronted by evidence of widespread psychological distress is in itself disturbing.¹⁷

As the remainder of this Part shows, the evidence that lawyers and law students are facing a disproportionate and alarming mental health crisis compared with other segments of the population, and that this is uniquely caused by the experience of law, is not as clear cut as the statements quoted above might suggest. As the discussion below will show, there certainly is evidence that there is widespread and significant psychological distress among law students and lawyers. Thus this article is not intended to provide ammunition for 'naysayers' who might deny the need to be concerned about lawyer and law student wellbeing at all.¹⁸ Nor is it intended to dispute the need for many of the programmes introduced as a result of the wellbeing movement.

This article does suggest that the partial and incomplete data that has been collected is being interpreted in a particular direction that on the one hand provides a good basis for advocating for achievable improvements in legal practice and legal education, yet on the other hand runs the risk of over-individualising and medicalising more serious social, economic and political problems in the legal profession and legal ethics.

17 See Kath Hall, 'Do We Really Want to Know? Recognising the Importance of Student Psychological Wellbeing in Australian Law Schools' (2009) 9(1) *QUT Law and Justice Journal* 1; Kate Galloway and Peter Jones, 'Guarding Our Identities: The Dilemma of Transformation in the Legal Academy' (2014) 14 *QUT Law Review* 15.

18 Rachael Field has challenged 'naysayers to front up ... meet us in print and explain why our concerns for student stress levels, anxiety and depression are exaggerated, or should not be acted upon': 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(2) *QUT Law and Justice Journal* 133, 137.

Table 1: Australian Studies of Lawyer and Law Student Wellbeing¹⁹

Study	Target Population	Number of Respondents and Sample <i>All are voluntary self-complete online or paper surveys</i>	Measure of Psychological Distress	Major Findings about Proportion of Law Students and Lawyers Suffering Psychological Distress and Comparisons
Beaton Study (2007)	Lawyers and 'professional s' from nine other occupations	7551 professionals Convenience sample Response rate unknowable Representativeness unknown	DASS-21 Moderate or above depressive symptoms	'Almost 16%' of lawyers • Highest 'professional group' in survey (6% to 16%) • 6.34% general population ²⁰
BMRI Report (2009)	Lawyers and law students	741 students, 924 solicitors, 756 barristers (total: 2421) Convenience sample Response rate unknowable Representativeness unknown (except that females overrepresented)	K-10 High or very high distress	35.4% of law students • 13% of general population aged 18-34 ²¹ • 18% medical students 31% of solicitors and 16.7% of barristers • 13% general population ²²
University of Adelaide Study (2010)	Students in medicine (all years), psychology (year three), law, mechanical engineering (years two and three)	974 students All students present at certain lectures and tutorials Response rate: 78% (law: 68%)	K-10 High or very high distress ($\geq 22/50$)	58% of law students • 48% of all students surveyed (52% mechanical engineering; 44% medicine; 40% psychology) • 11% in age-matched sample from South Australian population survey

¹⁹ Table 1 contains all published studies of lawyer and law student wellbeing in Australia that could be identified. All studies are fully referenced in the footnotes to the main article. Note that most of the law student wellbeing surveys also asked about positive wellbeing and satisfaction variables. This article focuses only on the measuring of negative emotions. In addition, see also Massimiliano Tani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19 *Legal Education Review* 3, which is an empirical study that does not directly study wellbeing but other attitudes and relates to wellbeing. See also Anna Huggins, 'Autonomy Supportive Curriculum Design: A Salient Factor in Promoting Law Students' Wellbeing' (2012) 35 *University of New South Wales Law Journal* 683, who provides a useful theoretical consideration of extant data collected by other scholars.

²⁰ S H Lovibond and P F Lovibond, *Manual for the Depression Anxiety Stress Scales* (Psychology Foundation, 2nd ed, 1995).

²¹ Australian Bureau of Statistics, 'National Survey of Mental Health and Wellbeing (2004–5): Summary of Results' (2006) ('*ABS 2004–5*').

²² Ibid.

Study	Target Population	Number of Respondents and Sample <i>All are voluntary self-complete online or paper surveys</i>	Measure of Psychological Distress	Major Findings about Proportion of Law Students and Lawyers Suffering Psychological Distress and Comparisons
ANU Study (2011)	Two cohorts of first-year law students at end of year; cohort 2 also surveyed at beginning of year	Cohort 1: 214; Cohort 2: 174 and 81 All first-year students in 2009 and 2010 Response rates not reported; appears to be poor rate for cohort 2 (second survey) – but reasonable for cohort 1 and cohort 2 (first survey) Some data on sample reported but assessment of representativeness not reported (except that females overrepresented)	DASS-21 Moderate or greater depressive, anxiety and stress symptoms	32% depressive; 31% anxiety; 20% stress at end of year 14%, 27% and 19% at beginning of year - Average scores higher than normative population of 18–24 at end of year (but at beginning of year lower on depression, higher on anxiety and same on stress) Note comment about low response rate for cohort (second survey): 'This was possibly due to concurrent assessment pressures at this busy time of academic year' ²³
Monash Study (2011)	First year law students at end of year compared with beginning of year	354 students at beginning and 331 at end of year All students in a compulsory first year subject Response rate not reported but appears good; excellent retention rate Assessment of representativeness not reported	DASS (full 42 items) Moderate or greater depressive symptoms ABS 2007 (ie, clinical interview based on DSM) ²⁴	15% at end of year 8.5% at beginning of year 6.2% in general population²⁵

23 Townes O'Brien, Tang and Hall, *ANU Study*, above n 7, 157.

24 Australian Bureau of Statistics, 'National Survey of Mental Health and Wellbeing (2007): Summary of Results' (2008) ('*ABS 2007*').

25 Ibid.

Study	Target Population	Number of Respondents and Sample <i>All are voluntary self-complete online or paper surveys</i>	Measure of Psychological Distress	Major Findings about Proportion of Law Students and Lawyers Suffering Psychological Distress and Comparisons
Bergin and Jimmieson (2013)	Lawyers; cross-sectional single point in time	384 lawyers Convenience sample Response rate not knowable but appears particularly low Some data on sample reported but assessment of representativeness not reported (except that females overrepresented).	DASS-21 Moderate or greater depressive, anxiety and stress symptoms	37% depressive; 31% anxiety; 49% stress 35% hazardous or harmful drinking (FAST)
Melbourne Law School Study (2013)	Law students (all years in both LLB and JD)	327 students All students 37% response rate JD, fifth-year LLB and female students overrepresented	DASS-21 Moderate or greater depressive, anxiety and stress symptoms	27% depressive; 30% anxiety; 25% stress

A The Reliability and Validity of the Australian Evidence of a Lawyer and Law Student Wellbeing Crisis

Table 1 summarises the findings and methodologies of the *Beaton Study*, *BMRI Report* and five subsequent published empirical studies investigating the extent of lawyer and law student wellbeing and psychological distress in Australia.

The *Beaton Study* and *BMRI Report* provide the most widely cited statistics about lawyer wellbeing.²⁶ The *Beaton Study* reported 15.2 per cent of lawyers with moderate to severe symptoms of depression, compared with 10.5 per cent in other professions in 2006.²⁷ The *BMRI Report* in 2009 found higher levels:

31% of solicitors and 19% of barristers suffered from psychological distress severe enough to warrant clinical assessment [and] 62.6% of solicitors and 43.9% of barristers experienced significant (moderate, high or very high) levels of psychological distress, compared with 37.1% of the general population.²⁸

The *BMRI Report* also finds that:

31.3% of solicitors and 21.6% of barristers indicated that they would not seek help for depression [*BMRI Report*] and lawyers are more likely than other professional

²⁶ Most of the articles and speeches cited in Appendix 1 refer to their findings.

²⁷ *Beaton Study*, above n 5, 2.

²⁸ Reported in Bergin and Jimmieson, above n 7, 1.

groups to use alcohol or drugs to manage feelings of sadness and depression [Beaton Study].²⁹

Many studies also rely on the *BMRI Report* finding that 35.4 per cent of law students suffer from high or very high psychological distress compared with 13 per cent of the general population aged 18–34.

Both the Beaton Study and BMRI Report are flawed methodological tools for investigating the extent of lawyer psychological distress and comparing it with other segments of the Australian population as the remainder of this section demonstrates.

The main purpose of the 'Annual Professions Survey' conducted in 2006, the basis for the *Beaton Study*, was to collect benchmarking data that Beaton Consulting would sell to the various professional associations and professional services firms (in law, engineering, accounting and management consulting) which subscribe to their annual survey.³⁰ These firms and associations pay to join the survey and receive the results for the purposes of receiving feedback on the services they offer their clients or members and how their service compares with other firms and associations. These firms and associations pass on the contact details of their clients and members to Beaton Consulting to survey. The main survey and its data are therefore valuable

29 Ibid. Tani and Vines, above n 19, have stated that:

We know that law students and law professionals are disproportionately affected by depression ... out of 105 professions surveyed, US lawyers rank first in depression and suffer depressive illness at a rate two to four times that of the general population. Twenty five per cent of US lawyers suffer from psychological distress, a disproportionate number commit suicide, and there is evidence that they have a high rate of substance abuse including alcohol abuse. Recently, this data has been added to by Australian studies which appear to agree: at 5 (citations omitted).

In addition to the *Beaton Study* and *BMRI Report*, Tani and Vines cite W Eaton et al, 'Occupations and the Prevalence of Major Depressive Disorder' (1990) 32 *Journal of Occupational Medicine* 1079, 1083; G A Benjamin, E Darling and B Sales, 'The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse among United States Lawyers' (1990) 13 *International Journal of Law and Psychiatry* 233, 240; Seligman, Verkuil and Kang, above n 1, 54; Martin Seligman, *Authentic Happiness* (Simon and Schuster, 2004) 177. See generally, American Bar Association, *The Report of at the Breaking Point: A National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives – Its Impact on Law Firms and Client Services* (1991).

30 The survey is conducted annually and is now called the Annual Business and Professions Study. Much of the purpose and methodology of the survey can be gleaned from the frequently asked question website for respondents to the survey: Beaton Research and Consulting, *Annual Business and Professions Study FAQs* <<http://www.beatonglobal.com/annual-business-and-professions-study-faqs/>>. For a description of the most recent (2012–13) annual survey, see also Fleur Caponong, 'Annual Business and Professions Study 2013 Larger than the Population of Orange, NSW' (12 December 2014) *Beaton Research and Consulting* <<http://www.beatonglobal.com/annual-business-and-professions-study-2013-larger-than-the-population-of-orange-nsw/>>.

proprietary information collected from this self-selecting client sample, and much information about the sample, methodology and results is not made public.³¹

Beaton Consulting usually include a widely publicised pro bono element on an issue of professional and community concern in the survey. The pro bono element of the survey in 2006 consisted of an optional additional mental health component which had been designed by beyondblue (a privately funded initiative aimed at developing community understanding and oriented depression and anxiety initiative). These particular questions have not been asked again in any subsequent year.³² It was this pro bono element in the 2006 survey that formed the basis for the findings in the *Beaton Study* about the prevalence of depression in the legal profession.

The *BMRI Report* was commissioned by the Tristan Jepson Memorial Foundation specifically to collect evidence of depression among law students and lawyers. The suicide of young lawyer Tristan Jepson prompted discussion, anecdote sharing and soul searching among his family, friends, teachers and colleagues about the pressures faced by young lawyers working in large law firms and the extent of hidden depression and use of anti-depressants by young lawyers. Tristan Jepson's parents set up the Foundation to raise awareness and de-stigmatise mental illness among law students and the legal profession. As they explain:

Quite quickly, our work with the University and the profession led us to believe that there was a widespread refusal to acknowledge there was a problem. One of the problems, however, was there was no Australian research on the issue. This led to 'Courting the Blues', a ground-breaking piece of research conducted by the Brain & Mind Institute at the University of Sydney. The study involved a [voluntary self-selected] survey of more than 2000 lawyers [and law students], and

31 There is no publicly available information about the exact sampling methodology used in the 2006 survey. But as it is an annual survey used for benchmarking it is probable that the methodology is not radically different from year to year. This means that the methodology described in later reports is likely to be similar to how the 2006 survey was collected, with the main difference that the sample size has increased over the years. There is some publicly available information for the methodology of the Beaton Research and Consulting, 'Annual Business and Professions Study' (Study, 2011). It states

The 2011 Annual Business and Professions Study (ABPS) ran from 4 to 30 November 2010 and examined the views of over 26,000 members of the Australian business community. The ABPS is an annual collaboration of over 25 professional associations, 100 professional service firms and a pro bono partner. The 2011 ABPS asked respondents about their experiences from a number of different perspectives: Member satisfaction of professional associations; Client perceptions of professional service firms; Employee engagement of professional service firms: Beaton Research and Consulting, *Mental Health in the Workplace* (2011) <http://www.beatonglobal.com/pdfs/Anxiety_and_depression_in_the_workplace.pdf> 3.

32 In some other years the survey has asked about attitudes and responses to mental health issues in the workplace. A mental health element was included in the 2011 study but concerning only knowledge and attitudes to depression in the workplace, not prevalence of mental health issues among the respondents themselves: see Beaton Research and Consulting, *2011 Annual Business and Professions Study* (Annual Professions Survey) (Research Summary, beyondblue, May 2011) <http://www.beatonglobal.com/pdfs/2011_Annual_Business_and_Professions_Study.pdf>.

confirmed what we had feared – depression seemed to be rife among the profession and in the law schools. Sadly, 1 in 3 lawyers suffer from depression, which is an alarming statistic.³³

A number of Australian law school scholars have responded to the *Beaton Study* and *BMRI Report* by conducting further studies of lawyer and, in most cases, law student wellbeing, as shown in Table 1.³⁴

As the sections below show, there are three ways in which the methodologies of these various studies introduce ambiguity into the statistics gathered: first, the use of psychological scales; second, the samples on which they are based; and, third, the difficulty of collecting evidence to establish whether or not there is a unique or causal link between being a law student or lawyer and psychological distress.

1 *Using Psychological Distress Scales in Survey Research to Create Clinical Categorisations*

The first issue is the way the results from the psychological distress scales used in these surveys tend to be cited to imply categorical clinical conclusions. The various studies all use either the Kessler Psychological Distress Scale ('K-10') or, more commonly, the Depression, Anxiety and Stress Scale ('DASS'), as indicated by Table 1.

The full (42 questions) and 21 question versions of the DASS contain three separate sub scales designed to measure specific negative emotional states of depression, anxiety and stress.³⁵ Respondents reply on a four-point scale (scored 0–3) as to how often they have experienced symptoms in the last week. This results in scores in the range of 0–42 for each of the three specific subscales.³⁶ The K-10, by contrast, is a generalised negative emotion scale consisting of 10 questions to measure psychological distress.³⁷ It has a minimum score of 10 and a maximum of 15.

Both scales have been developed and tested against 'normative' populations so that data is available as to how widespread each level of distress is in the normal population. This means that data collected using these scales can be used

33 Marie Jepson, 'Meet Marie Jepson; Founder of the Tristan Jepson Memorial Foundation' on *Sofee* (18 June 2013) <<https://www.sofee.com.au/blog/90/>>.

34 The studies are cited at above n 7. Only one, by Bergin and Jimmieson, studies lawyers as well as law students.

35 Lovibond and Lovibond, above n 20; Psychology Department, University of New South Wales, *Overview of the DASS and Its Uses* <<http://www2.psy.unsw.edu.au/Groups/Dass/over.htm>>. The questions can be found at Psychology Department, University of New South Wales, *Download DASS Forms* <<http://www2.psy.unsw.edu.au/dass/down.htm>>.

36 If the DASS-21 is used then the score from the 21 questions is simply multiplied by two.

37 R C Kessler et al, 'Short Screening Scales to Monitor Population Prevalences and Trends in Non-specific Psychological Distress' (2002) 32 *Psychological Medicine* 959. The questions can be found at: Transport Accident Commission, *Kessler Psychological Distress Scale (K10)* <https://www.tac.vic.gov.au/files-to-move/media/upload/k10_english.pdf>.

to compare symptoms or negative emotional states (ie, feelings of distress) between samples (eg, from different occupational groups), or between a sample (eg, of law students or lawyers) and the general population, but only as long as sampling is appropriate.

The makers of both scales, however, caution that in survey type research one should not assume that application of the scales necessarily implies a categorical diagnosis of a mental disorder such as depression. Neither scale is designed to fully support a clinical diagnosis of a mental disorder. Rather, they are intended to be used as screening and monitoring tools by medical practitioners with people at risk of mental disorders before moving onto diagnosis via more specific scales, interviews and/or clinical observation. Responses to these scales in surveys inform researchers about the prevalence of symptoms that are likely to be present as a matter of degree in *all* members of the population at some time, but not to draw categorical conclusions about underlying clinical conditions. These scales are designed to investigate the degree of symptoms that most 'normal' people will have at some time, and to what degree someone is experiencing heightened symptoms that indicate a risk of more serious troubles.

The issue is that the use and reporting of these scales in survey research tends to de-emphasise the extent to which they measure shades of grey in the extent of distress always present throughout the population and exaggerate their diagnostic conclusiveness. This in turn implies the need for clinical responses to the clinical problem apparently uncovered, and heightens the sense of alarm.

For example, the results of the DASS are frequently reported by proportions of respondents in each of the categories, 'mild', 'moderate', 'severe', and 'extremely severe'. According to the creators of the DASS these categories are 'necessarily arbitrary'.³⁸ This is because:

The DASS is based on a *dimensional* rather than a *categorical* conception of psychological disorder. The assumption on which the DASS development was based (and which was confirmed by the research data) is that the differences between the depression, the anxiety, and the stress experienced by normal subjects and the clinically disturbed, are essentially differences of degree. The DASS therefore has no direct implications for the allocation of patients to discrete diagnostic categories postulated in classificatory systems such as the DSM and ICD [widely used and accepted clinical diagnosis tools].³⁹

38 The DASS website points out that

[e]motional syndromes like depression and anxiety are intrinsically dimensional - they vary along a continuum of severity. Hence the selection of a single cutoff score to represent 'clinical' severity is necessarily arbitrary. This is one of the fundamental differences between the DASS and categorical measures based on psychiatric diagnosis: Psychology Department, University of New South Wales, *DASS FAQ (Frequently Asked Questions)* <http://www2.psy.unsw.edu.au/Groups/Dass/DASSFAQ.htm#_1._What_does_the_DASS_measure_.and.>.

They go on to say that: 'For most research purposes, it is much better to use DASS scores rather than attempt to divide a sample into "normal" vs "clinical" or "high" vs "low"'.

39 Psychology Department, University of New South Wales, *Overview of the DASS and Its Uses*, above n 35 (emphasis in original).

The creators suggest that creating labelled categories of degree of severity of symptoms using the DASS may be useful for clinical purposes within the context of a more thorough clinical assessment. This allows comparison of an individual against the normative population proportions for each category (which are provided in the 1995 manual).⁴⁰ For research purposes, however, they suggest that it is generally more appropriate to use only the numerical scores.

It is therefore generally not appropriate, in reporting survey based research using either of these scales, to use categories or labels such as 'mild', 'moderate', 'severe', or 'clinical' versus 'normal' that might sound like a clinical diagnosis.⁴¹

Nevertheless the *Beaton Study* and the other studies that use these scales generally do report their findings as if they could create a dividing line between 'normal' and 'clinical' respondents. Note, for example, the slippage in language – from indications of depressive symptoms to the incidence of depression – in the way the *Beaton Study* summarises its findings:

Results from a survey of over 7500 Australian professionals indicated higher than average levels of *depressive symptoms* when compared with the general Australian population. These higher *rates of depression* were consistently found across all age groups ... These preliminary findings highlight an urgent need for senior leaders in professional service firms to acknowledge and respond promptly to the *high incidence of depression*.⁴²

The academic studies that use the DASS are more careful – they all report the results in terms of categories but also report scores.⁴³ They show varying degrees of carefulness in reporting that their research only indicates the degree of

40 See Lovibond and Lovibond, above n 20.

41 See Psychology Department, University of New South Wales, *Overview of the DASS and Its Uses*, above n 35.

42 *Beaton Study*, above n 5, 1 (emphasis added). The *Beaton Study* does point out in a footnote that it is not appropriate to draw inferences about levels of clinical depression, anxiety and stress in the legal profession from their study, and that the use of the category labels may be misleading in that regard:

To enable comparisons to be made in the Annual Professions Survey, the scores on the depression scale have been interpreted in the form of severity ratings ranging from normal to moderate or severe. It is important to note that high scores on the depression scale (ie, moderate or severe) would not alone indicate a clinical diagnosis of depression, further assessment would be required: at 5.

But they do it anyway, suggesting a degree of certainty around the clinical status of a certain proportion of lawyers that is not warranted by either the scale itself (that is the substantive questions asked), or the sample.

43 Eg, Larcombe et al stated that:

Based on their responses, respondents were given a raw score on each subscale, which determines classification within five levels of depressive, anxiety, and/or stress symptoms, namely: 'normal', 'mild', 'moderate' 'severe' or 'extremely severe'. Figure A shows that in each of the DASS scales approximately 60% of the respondents returned scored in the 'normal' range. However, less than half of the respondents were in the normal ranges for all three of the DASS scales: Larcombe et al, *Melbourne Law School Study*, above n 7, 415.

prevalence of ‘symptoms’ of psychological distress – as opposed to implying clinical diagnoses.⁴⁴

Like the DASS, the K-10 is intended as a screening mechanism to be followed by more specific diagnostic tests if necessary. Interpretations differ as to where one should draw the lines on the scale of 1 to 50. All agree that scores of 31 and over (scored as ‘very high’ distress) are likely to be indicative of a serious depression or anxiety problem.⁴⁵ It is less clear at what point distress scores between 15 and 30 should be considered indicative of likelihood of a mental disorder. The *BMRI Report* refers to scores between 16 and 21 as ‘moderate’ distress, and scores between 22 and 29 as ‘high’ distress.⁴⁶

The *BMRI Report* is careful to draw appropriate conclusions from the application of this scale. For example: ‘The law student sample had a higher level of reported distress than other Australian samples for which this measure is available’.⁴⁷

As with the DASS, however, the repeated short form reporting of these categorisations tends to exaggerate the diagnostic conclusiveness of the results. Thus articles and policy statements that cite the *BMRI Report* and the *Beaton Study* make statements that imply clinical categorisations such as: ‘over 35 per cent of law student and almost a third of solicitors and one-fifth of barristers had levels of depression regarded as disabling’;⁴⁸ and:

The BeyondBlue and Beaton Consulting Annual Professions Survey of April 2007 found that lawyers are two and a half times more likely to *suffer from clinical depression* than other professionals. Late last year Sydney University’s Brain and Mind Research Institute put it at four times more likely. That research involved 2400 lawyers and found that one in three solicitors and one in five barristers report depression.⁴⁹

2 Non-Representative Sampling

The second issue is that the two major studies’ reliance on voluntary, self-selected convenience samples is likely to focus in on the experience of symptoms of psychological distress in the legal profession without providing a reliable basis for comparing the exact prevalence and extent of these symptoms with other

44 Townes O’Brien, Tang and Hall, for example, are careful but might still be misread when they say: ‘We simply can not fail to respond to data showing that 35 per cent of Australian law students suffer from disabling symptoms of depression’: Townes O’Brien, Tang and Hall, *ANU Study*, above n 7, 149.

45 This is recognised by Kelk et al: ‘The present survey thus uses only scales aimed at establishing levels of risk for depression and levels of disability’: *BMRI Report*, above n 6, 7. See also *ABS 2007*, above n 24, using K-10 as a correlation tool to show how it works in correlating with interview based diagnosis.

46 *BMRI Report*, above n 6, 10. So also do the comparator Australian Bureau of Statistics reports: *ABS 2004–5*, above n 21; *ABS 2007*, above n 24.

47 *BMRI Report*, above n 6, 12. The Report goes on to cite proportions of those with high or very high levels of distress.

48 Tani and Vines, above n 19, 6 (emphasis added).

49 John Briton, ‘Lawyers, Emotional Distress and Regulation’ (Paper presented at the Bar Association of Queensland 2009 Annual Conference, Gold Coast, 8 March 2009) (emphasis added) (citations omitted).

segments of the population. This focus on data collected from a voluntary self-selected sample in the *Beaton Study*, *BMRI Report* and Bergin and Jimmieson study tends to exaggerate the impression of the extent of distress in the law as compared with the rest of the population, without providing a reliable evidence base for comparison.

In order to make valid generalisations about the prevalence of depression from a sample to the profession (or law students) as a whole, a survey sample should be based on probability sampling that ensures the sample is as representative of the general population as possible. Neither the *Beaton Study* nor *BMRI Report* makes any attempt to identify what the population is from which the sample is drawn, and no attempt was made at probability or representative sampling in either study. Both were sent out widely with people self-selecting to respond.

Beaton Consulting sends out its survey via professional associations and professional services firms with which it has some relationship as a client or pro bono or marketing partner, and then it is left to those firms and associations to pass it onto members and clients and for those members and clients to choose whether to fill it out or not. There is no information provided about the representativeness of the *Beaton Study* sample as against the general populations of professionals in the various professional groups surveyed.⁵⁰

The *BMRI Report* is based on a self-report survey sent out to 13 universities and the Law Society of New South Wales, Law Institute of Victoria and New South Wales Bar Association, which were then expected to send it out to students and lawyers. The authors recognise that this means that the representativeness or skewedness of the sample is unknown.⁵¹ The *BMRI Report* notes that females are overrepresented in the survey in all categories and that the female respondents reported a higher rate of depression,⁵² suggesting one way in which the finding of the prevalence of depression may be exaggerated. But no other information is available about the representativeness or otherwise of the sample.

The only valid conclusions about the exact extent of symptoms of psychological distress that can be drawn from these voluntary self-selected samples is that a certain proportion of the lawyers and law students who actually chose to fill in the survey had high or very high psychological stress. Indeed, those who were willing to fill out these surveys may well be more likely to be those who have experienced psychological distress themselves or seen others

50 See text accompanying above n 4 for which professional groups were in fact sampled for the study in *Beaton Study*, above n 5.

51 Kelk et al stated that:

One factor that must be borne in mind concerns the extent to which the three samples are representative of their populations. Given that this survey was advertised as a survey about depression, one wonders whether the people who completed the questionnaire were likely to be more (or less) depressed than the people who failed to complete the questionnaire: *BRMI Report*, above n 6, 4.

52 Ibid 4.

close to them experience distress, and are therefore motivated towards making known the experience of psychological distress so that it can be acted on.

Both the *Beaton Study* and *BMRI Report* have also been cited to show that law students and legal professionals are more depressed than other professions, students and the Australian community more generally. However, since the samples do not support generalisation to law students and legal professionals as a whole, nor can they support comparisons with other segments of the population. The *BMRI Report* figures, for example, are compared against other figures from the general community collected using representative sampling methods, including the Australian Bureau of Statistics ('ABS') National Health Survey of 2004–5,⁵³ and the National Survey of Mental Health and Wellbeing.⁵⁴ The fact that findings from self-selected non random samples are being compared with findings from representative community samples, and that different instruments for measuring psychological distress were used, means one should be very cautious in concluding that the findings are comparable. The *BMRI Report* also compares its findings with a survey of medical students conducted by the Brain and Mind Research Institute,⁵⁵ but with the sample drawn in a completely different way.

The *Beaton Study* is cited to suggest that it compared lawyer rates of depression with other professional groups and found lawyers the most depressed. This may be read to imply that lawyers are more depressed than other well-known professions such as medical doctors, dentists, teachers and clergy. The fine print in the *Beaton Study*, however, states that: “Professionals” are defined as individuals who work for professional services firms’.⁵⁶ That is, law firms, accounting firms, consulting engineering firms and management consulting firms, all commercially oriented professions and the type of firms to whom Beaton Consulting markets its consulting services. This means that only nine types of professionals are included in the survey: accounting, consulting, engineering, law, patent attorney, actuarial firm, IT services, architectural, and insurance underwriting and insurance brokering. Professionals in areas such as

53 ABS 2004–5, above n 21.

54 G Andrews et al, *The Mental Health of Australians* (Department of Health and Aged Care (Cth), 1999), which was more carefully sampled to ensure representativeness and of course includes the power and legitimacy of the ABS to compel answers.

55 I B A Hickie et al, ‘The Assessment of Depression Awareness and Help-Seeking Behavior: Experiences with the International Depression Literacy Survey’ (2007) 7 *BMC Psychiatry* 48, cited in *BMRI Report*, above n 6, 12.

56 *Beaton Study*, above n 5, fn 3.

health care, education or the social services sector are not included in the data.⁵⁷ Moreover the *Beaton Study* repeats the same sampling strategies for each of the professions, thus comparing a series of non-representative samples with each other.

Of the follow-up studies, the Bergin and Jimmieson study uses a convenience sample methodology and self-selection survey along similar lines to the *BMRI Report*, covering both law students and lawyers.⁵⁸ Its sample is less extensive than the *BMRI Report*, and it has quite a poor response rate.⁵⁹ The results are dramatic: 30 to 50 per cent of law students and lawyers answering the survey score moderate or above on the three DASS scales. The fact that this number of respondents have this experience is indeed concerning. It does not necessarily follow that the same proportion of the profession as a whole have the same experience. The poor response rate may mean that the survey findings are vulnerable to a self-selection bias, with those who have experienced psychological distress more likely to want to voice their experience.

The four university based studies following on from the *Beaton Study* and *BMRI Report* generally work with much better samples and response rates than the *Beaton Study* and *BMRI Report*⁶⁰ – probably because they focus on law students at their own institutions, thus providing an identifiable and easily accessible population for study. Moreover, the fact that these studies are based on particular law school cohorts means that the researchers can better evaluate the representativeness of their samples and interpret results accordingly. These studies still rely on voluntary self-filled surveys and will therefore still be vulnerable to self-selection bias. They are largely based on law students experiencing the first year of university study and assessment which may in itself be a disruptive and distressing experience.

57 Note that the report itself is careful to make statements such as: 'Statistical analysis demonstrates that respondents from *legal professions* particularly were more likely to report moderate to severe symptoms of depression when compared with the total sample.'; *Beaton Study*, above n 5, 2 (emphasis in original). See further, '[i]n addition to higher rates of depressive symptoms, legal professionals were also more likely to use alcohol and other drugs to reduce or manage feelings of sadness and depression when compare with other professional groups. ... Those working in law firms indicated higher rates of depressive symptoms when compared with other professional groups examined.'; at 3. Beaton Consulting appear not to have had clients in these other more caring but less business-oriented, less profitable professions. We know that they started by working with law firms. See Beaton Research and Consulting, *History of Beaton Benchmarks* <<http://www.beatonglobal.com/beaton-benchmarks/>>.

58 Bergin and Jimmieson, above n 7.

59 There were only 384 responses to an online survey sent out via six state and territory law societies: *ibid* 430–1. But the data was used for both conclusions about prevalence of demands such as high emphasis on profits, high time pressure, emotional demands and competitiveness; and correlational analyses about the impact of time billing targets rather than for making generalisations about prevalence of psychological distress.

60 See above Table 1.

The *Monash Study*,⁶¹ which has by far the best response rate,⁶² and also the most extensive survey questions,⁶³ also finds the least dramatic results: 15 per cent moderate or greater on the DASS at the end of the year.⁶⁴ The *University of Adelaide Study* with the poorest response rate (and therefore the conclusions perhaps most biased by self-selection) finds 48 per cent of law students psychologically distressed (4.4 times more so than an age matched peer sample).⁶⁵ This suggests that better samples may lead to much less dramatic results.

3 Proving That Law Causes Psychological Distress

The *Beaton Study* and *BMRI Report* are often cited as if they proved that the experience of law school or legal practice *causes* depression. Studying law students and lawyers in isolation may lead to the impression that there is a causal link between the study or practice of law and mental health problems, yet such studies have not yet been published.⁶⁶

The evidence suggests that it is not only lawyers and law students who have a high and increasing rate of reported psychological distress and mental health disorders. According to the Australian Institute of Health and Welfare's 2013 'Mental Health Services' report,⁶⁷ 45 per cent of all Australians aged between 16 and 85 will experience one or other of the common mental health-related disorders over their lifetime. Every year, 20 per cent of the Australian population

61 Lester, England and Antolak-Saper, *Monash Study*, above n 7.

62 The *University of Adelaide Study*, *ANU Study* and *Melbourne Law School Study* all appear to have responses rates below 40 per cent: Leahy et al, *University of Adelaide Study*, above n 7; Townes O'Brien, Tang and Hall, *ANU Study*, above n 7; Larcombe et al, *Melbourne Law School Study*, above n 7. The *ANU Study* is the only one that collects data at two points in time. But the response rate dropped off at time two.

63 It uses both the DASS 42 and Positive and Negative Affect Schedule. The author discloses that she is currently a Professor at Monash Law Faculty. However she was not at Monash University when the survey was conducted and analysed. Nor did she have anything to do with this study or any of the others mentioned in this article.

64 It is not clear whether this is just the depression subscale or total DASS. Not much information is given in the published article. The article compares with 6.2 per cent depression in the general population according to *ABS 2007*, above n 24; but this is based on clinical interview protocols for depression.

65 Leahy et al, *University of Adelaide Study*, above n 7.

66 A study from which valid causal inferences can be made would need to control for factors such as family background and previous history of depression, and whether those prone to anxiety and stress self-select into law school and legal practice in the first place. They would also need to control for what else is going on in the young lawyer's life, bearing in mind that their experience of law is not the only factor that might trigger stress and anxiety. It would also require longitudinal studies, that is, studies that investigate whether depressive symptoms occur after the experiencing law school or legal practice. There are some studies that do begin the attempt to do this, including Townes O'Brien, Tang and Hall, *ANU Study*, above n 7.

67 Australian Institute of Health and Welfare, *Mental Health Services: In Brief* (2013) 2. This is based on *ABS 2007*, above n 24, which is the last comprehensive national mental health survey.

will experience the symptoms of a mental disorder.⁶⁸ The most common are mood disorders, such as depression and anxiety, and substance use disorder. The last ABS National Mental Health Survey shows that mental health disorders are more common in younger members of the population.⁶⁹ Affective (depressive) and anxiety disorders are more common in women while substance use disorders are more common in men. The Mental Health Services Report also estimates that there were 32.7 million prescriptions for mental health related medications dispensed in 2011–12, 11.2 per cent of PBS subsidised prescriptions for the year, and an average growth of 3 per cent per year in the number of prescriptions for the previous 5 years.⁷⁰ In that context, it should hardly be surprising that when researchers look, they will find evidence of high levels of distress in any particular segment of the population where there is time and money to seek out that distress.⁷¹ In the long term, disproportionate attention to some sectors of the population may even skew understandings of the extent and severity of psychological distress in different segments of the population on the basis of meta-analyses and literature reviews.

The evidence from these studies, as well as earlier investigations,⁷² is that many law students and young lawyers experience distress with the transformation of thinking and identity they experience as they come to terms with the 'lawyer cast of mind',⁷³ as well as the stresses and strains of high workloads, high competition, little control and uncertain job opportunities and work futures.⁷⁴ But is this unique to law?

The *University of Adelaide Study*,⁷⁵ which compares law students with other university students, was prompted by a concern that it was *medical* students suffering uniquely high psychological distress. Although the law students in the

68 About nine per cent of the population received some sort of mental health service in 2010–11 and there were at least 15 million visits to general practitioners related to mental health: Australian Institute of Health and Welfare, above n 67, 1, 4.

69 ABS 2007, above n 24. However, only those aged 16 to 85 were surveyed.

70 Australian Institution of Health and Welfare, above n 67, 34.

71 The Brain and Mind Research Institution was funded by the Tristan Jepson Memorial Foundation which itself is funded by donation from the legal profession. The *Beaton Study* was a pro bono service offered by a consulting firm that has its foundation and base in offering management consultancy to law firms.

72 See eg, R Granfield and T Koenig, 'It's Hard to Be a Human Being and a Lawyer: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice' (2002) 105 *Western Virginia Law Review* 495; Andrew Goldsmith, 'Warning: Law School Can Endanger Your Health!' (1995) 21 *Monash University Law Review* 272; J Palermo and A Evans, 'Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill Towards Lawyer's Professionalism' (2008) 17 *Griffith Law Review* 252.

73 See R Rosen, C Parker, and V Nielsen, 'The Framing Effects of Professionalism: Is There a Lawyer Cast of Mind? Lessons from Compliance Programs' (2012) 40 *Fordham Urban Law Journal* 297.

74 See Richard Collier, "'Love Law, Love Life': Neoliberalism, Wellbeing and Gender in the Legal Profession – The Case of Law School' (2014) 17 *Legal Ethics* 202; Hilary Sommerlad, 'The Commercialisation of Law and the Enterprising Legal Practitioner: Continuity and Change' (2011) 18 *International Journal of the Legal Profession* 73.

75 Leahy et al, *University of Adelaide Study*, above n 7.

sample group did turn out to have the highest scores for psychological distress (58 per cent), all students had very high levels (average of 44 per cent across the various disciplines), compared with an age matched population sample (11 per cent).⁷⁶ The authors suggest that although disciplines may cluster into bands with varying levels, all the disciplines had a large proportion of students who were highly distressed in their study and in a range of studies on tertiary students from a host of other countries: 'The disturbing factor from all these findings is not that one discipline may be comparatively more distressed than another, but that they all appear to be more distressed than age matched peers from the general population'.⁷⁷

Another study cites 84 per cent of all Australian university students suffering symptoms of psychological distress.⁷⁸ It might be more accurate to interpret the various studies indicating severe psychological distress among law students, in the same way that the authors of the *ANU Study* do. They suggest that first-year law students 'experience psychological struggles and changes in their thinking styles, self-concept and sense of wellbeing' as they navigate the first year of law school and face their end of year assessment.⁷⁹ These struggles are expressed in a particular way in law school but relate to the inevitable development and change of identity as any young person comes to terms with tertiary education in the current climate.

Similarly, Collier points out the proliferation of literature, noting that lawyers in all areas of practices face:

concerns around poor work/life balance, frequent long hours and 'work-aholism' (especially in large commercial 'City' firms), job insecurity, cultures of 'presenteeism, career dissatisfaction, high pressure/high stakes environments, lack of autonomy ... the increasingly hyper-competitive and business-like nature of

⁷⁶ These figures are of course subject to all the caveats above in relation to sample and use of psychological scales. The authors find that there was probably not a statistically significant difference between law (58 per cent) and mechanical engineering students (52 per cent): *ibid* 611.

⁷⁷ *Ibid* 613. A recent, as yet unpublished study, from the University of Melbourne appears to find similar results: see Wendy Larcombe, Sue Finish and Rachel Sore, *Not Only Law Students: High Levels of Psychological Distress in a Large University Sample* (2014) Wellness Network for Law <http://wellnessforlaw.com/wp-content/uploads/2014/03/Wendy-Larcombe_Not-only-law-students.pdf>.

⁷⁸ Helen M Stallman, 'Psychological Distress in University Students: A Comparison with General Population Data' (2010) 45 *Australian Psychologist* 249, 252. See also Wendy Larcombe et al, 'Prevalence and Socio-Demographic Correlates of Psychological Distress among Students at an Australian University' [2014] *Studies in Higher Education* 1, 1.

⁷⁹ Townes O'Brien, Tang and Hall, *ANU Study*, above n 7, 150. Note that they find that law students in the first week of law school have similar or lower levels of distress than other Australians aged 18–24 and indeed, as one might hope, greater sense of life satisfaction. Towards the end of the first year they 'had more symptoms or a greater intensity of symptoms, of depression and stress, compared with both beginning-of-year students and young Australian adults generally'. 'Beginning-of-year law students had slightly higher levels of anxiety compared with young Australians, with small increases in the intensity of, or number of, symptoms over the academic year': at 161. They also note that although '[e] nd-of-year law students had lower levels of life satisfaction compared with beginning-of-year student', 'the mean score was still at a level equivalent to the general community': at 162.

law ... exacerbated in the context of an intensively competitive credentialisation process which, set within a user-pays systems of education, has heightened concerns around an individual's potential 'fear of failure'.⁸⁰

Collier connects these pressures that are particular to legal education and the practice of law to broader trends of marketisation of universities and the way the logic of the market has now come to shape civil society, including the profession, and the provision of core public services such as health care, justice and education.⁸¹

B Responding to Imperfect Statistics

Thus, although these data establish that many law students and lawyers experience worrying symptoms of psychological distress, the studies are not necessarily adequate to say that lawyers and law students are dramatically *more* clinically depressed, anxious or suffering from other mental illnesses as compared with the general population, or that it is *law* specifically that causes it. Nevertheless, Seligman's 2005 article,⁸² and the more dramatic summaries of the evidence cited at the beginning of this article, tend to assume these conclusions can be drawn. This may well have helped advocates for change convince sceptical law school administrators and professional leaders to accept the need to take sensible and compassionate action to address mental health issues in the profession. The second Part of this article suggests that there might also be a price to pay for emphasising the clinical, individual and unique aspects of lawyer and law student psychological distress in calls for action, rather than the politics of commercialisation and marketisation of legal education and practice.

III CONNECTING THE PERSONAL AND THE POLITICAL

A A Moral Panic

The proliferation of lawyer wellbeing studies and programmes⁸³ suggests something approaching a 'moral panic'. In criminologist Stanley Cohen's classic definition, a moral panic was a situation where mass media amplified deviance and created an opportunity for moral entrepreneurs ('editors, bishops, politicians and other right-thinking people') to create hostility to '[a] condition, episode, a

80 Collier, above n 74.

81 Ibid 210. See also Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012); Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2009) 26 *Sydney Law Review* 481; Sommerlad, above n 74.

82 Seligman, Verkuil and Kang, above n 1.

83 See Appendices 1 and 2.

person or group of persons ... as a threat to societal values and interests'.⁸⁴ Moral crusaders with the support of media and politicians could then use the moral panic to create or reinforce certain social rules. A moral panic in this sense can be defined as a situation in which:

the official reaction to a person, groups of persons or series of events is *out of all proportion* to the actual threat offered, when 'experts' ... *perceive* the threat in all but identical terms, and appear to talk 'with one voice' of rates, diagnoses, prognoses and solutions, when the media representations universally stress 'sudden and dramatic' increases (in numbers involved or events) and 'novelty', above and beyond that which a sober, realistic appraisal could sustain.⁸⁵

A classic moral panic might be a situation where media representations of crime and violence associated with bikie gangs is followed by a social outcry and repressive legislation criminalising biker gangs and all associated with them.⁸⁶

More recently, social scientists have broadened the scope of situations to which the term 'moral panic' might be applied. Krinsky suggests that the essence of moral panics is that they are 'misleading expressions of enduring social and economic conflicts'.⁸⁷ Writing about the history of the English Bar in the 1860s, Wes Pue has suggested that a 'moral panic' may be an expression of moral outrage over the behaviour or life circumstances of a particular set of individuals – but this outrage is an outworking of a sense of discomfort, contest and conflict stemming from broader social, legal or normative changes.⁸⁸ In this case, the outrage is the sense of alarm and concern about the psychological distress experienced by many individuals and the failure of professional associations and law schools to address it. As in a classic moral panic, there is strong language emphasising the uniqueness of the extent of lawyer depression, an apparent consensus about rates and diagnoses, and a unity in proposing that it is important to respond with priority and alarm in adopting certain solutions.⁸⁹ Scholarly and activist critique of the profession may well be coalescing around the diagnosis of a crisis of psychological wellbeing in the legal profession and a series of programmes aimed at improving lawyer wellbeing in response.

84 Stanley Cohen, *Moral Panics and Folk Devils: The Creation of the Mods and the Rockers* (Harmondsworth, 2002) 1, quoted in Charles Krinsky, 'Introduction: The Moral Panic Concept,' in Charles Krinsky (ed), *The Ashgate Research Companion to Moral Panics* (Ashgate, 2013) 3–4.

85 S Hall et al, *Policing the Crisis: Mugging, the State, and Law and Order* (Palgrave Macmillan, 1978) 16, quoted in Krinsky, above n 84, 5 (emphasis in original).

86 See George Morgan and Selda Dagistanli, 'Global Fears, Local Anxiety: Policing, Counterterrorism and Moral Panic Over "Bikie Gang Wars" in New South Wales' (2010) 43 *Australian and New Zealand Journal of Criminology* 580.

87 Krinsky, above n 84, 10.

88 Wesley Pue, 'Moral Panic at the English Bar: Paternal vs Commercial Ideologies of Legal Practice in the 1860s' (2006) 15 *Law and Social Inquiry* 49, 53.

89 See above nn 12–15 and accompanying text, and the articles and speeches summarised in Tables 1, 2 and 3. Indeed the concern in many of these studies with suicide and drug abuse as inappropriate ways that lawyers might respond to depression may be a particular pointer to the idea of a moral panic.

The 'moral panic' analysis suggests that, as a community's constellations of social, economic and political power change, so must its normative understandings of what practices and behaviours are legitimate or illegitimate, appropriate and inappropriate, or ethical and unethical. This is likely to cause discomfort, contest and conflict.⁹⁰ In other words, a moral panic is an indication that a community is experiencing an uncomfortable change, a contestation, strengthening, or adjustment of political and economic arrangements that is forcing change in the community's social mores. And as social mores change, the inherited ethical ideologies that underlie them must change too. A moral panic is a point at which discomfort, contest and conflict manifest and crystallise. It is a point at which certain interests and values may be asserted and contested while others may be ignored, de-emphasised or even demonised.⁹¹ It is a point at which such conflict can come to the surface and cause productive change or be swept under the carpet. It creates a discourse around what matters. These discourses are powerful in either legitimating or destabilising current social, political and economic arrangements.

Wherever there is a moral panic, an important question is whose interests are furthered by the creation of the moral panic and its proposed solutions and which are downplayed or displaced. The following sections suggest that the lawyer wellbeing crisis is a manifestation of growing commercialisation and resultant employment uncertainty in legal education and the legal profession. This certainly has implications for individuals' psyches but there is a danger that too much focus on prescribing individual psychological and medical solutions will make individuals ethically responsible for managing their own responses to a social, economic and political situation that itself should be questioned and changed. In the case of law, there is also the danger that it will draw attention away from the public purpose of legal education and the legal profession itself, including the provision of justice through the public court system.

B Contests over Broader Social, Political and Economic Arrangements

As Wes Pue points out in his history of earlier moral panics over lawyer conduct, a moral panic might be sparked by 'seemingly chance factors'.⁹² In the case of the lawyer wellbeing crisis they are indeed tragic ones – depression and suicide⁹³ – and discussion and soul searching followed. Yet the fact that these individual tragedies have caught the collective attention and imagination of the profession at a particular point time are also 'the products of specific historical forces in specific social environments'.⁹⁴

90 Ibid.

91 See Krinsky, above n 84; Pue, above n 88

92 Pue, above n 88, 53.

93 The *BMRI Report* came about as a result of lawyer named Tristan Jepson's suicide.

94 Pue, above n 88, 53.

In law there has been significant change in the profit models for both commercial legal advice and also advice to individuals and small businesses. The changes in the social, political and economic arrangements of legal practice in recent decades are so great and obvious that they hardly need to be rehearsed here. Important developments include: the growth, industrialisation and commercialisation of large corporate law firms; the contestation of law firm power by in-house lawyers, boutique firms, and off-shore outsourced legal services; the consolidation, increased profit orientation, and financialisation of personal plight firms; and reduced funding and increased regulation of legal aid provision.⁹⁵ There has also been considerable change in the funding and regulation of law schools including the withdrawal of public funding from universities, law degrees as profit centres for universities, and the pressures of increasing regulation of academic teaching and research performance.⁹⁶ This all makes lawyers' own employment and careers less certain and secure, more competitive, more 'liquid', and less embedded in one firm or even one profession.⁹⁷ These changes are not at all unique to the law, although, as suggested above, they will manifest in particular expressions in law.

In the midst of such change in legal practice and education, it is expected that people's sense of what behaviours are appropriate and inappropriate will also change and conflict. In the 1980s and 1990s, there was much discussion in scholarship and the profession about the impact of commercialisation on lawyers' ethics.⁹⁸ In the last decade, however, the concern with lawyer mental health has become a more prominent theme in the literature,⁹⁹ and appears to have had an impact on the programmes offered by law schools, professional associations and legal profession regulators.¹⁰⁰

95 See, eg, C Cameron, 'Hired Guns and Smoking Guns: *McCabe v British American Tobacco Australia Ltd*' (2002) 25 *University of New South Wales Law Journal* 768; Kath Hall and Vivien Holmes, 'The Power of Rationalisation to Influence Lawyers' Decisions to Act' (2008) 11 *Legal Ethics* 137; Michael Kirby, 'Billable Hours in a Noble Calling' (1996) 21 *Alternative Law Journal* 257. See Christine Parker and Tanina Rostain, 'Law Firms, Global Capital and the Sociological Imagination' (2012) 80 *Fordham Law Review* 2347; Sommerlad, above n 74.

96 Allen and Baron, above n 1; Christine Parker and Andrew Goldsmith, "'Failed Sociologists" in the Market Place: Law Schools in Australia' (1998) 25 *Journal of Law and Society* 33; Andrew Goldsmith and Guy Powles, 'Lawyers Behaving Badly: Where Now in Legal Education for Acting Responsibly in Australia?' in Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, 1998); Thornton, *Privatising the Public University*, above n 81; Thornton, 'The Idea of the University', above n 81.

97 See eg, Joanne Bagust, 'The Legal Profession and the Business of Law' (2013) 35 *Sydney Law Review* 27; Marc Galanter and William Henderson, 'The Elastic Tournament: A Second Transformation of the Big Law Firm' (2008) 60 *Stanford Law Review* 1867. See also Zygmunt Bauman, *Liquid Life* (Cambridge, 2005).

98 See references at above nn 95–6.

99 See Appendix 1.

100 As Appendix 2 suggests.

The question is what social, economic and ideological interests are being served and which are being ignored by this particular diagnosis of the problem and proposed solution?

C An Individualising Discourse

The danger is that paying attention to lawyer depression as a clinical issue that uniquely faces the legal profession might create a discourse around lawyers' ethics that emphasises individual lawyers' 'ethical' responsibility to recognise and treat the signs of depression in themselves and others, rather than to work collectively as a profession to create a meaningful role in society and a better, more just polity and economy. It is useful, supportive, perhaps even foundational to human and professional functioning to teach individuals coping mechanisms and resilience. It is also a matter of fundamental fairness to practice tolerance and non-discrimination in relation to those with mental health problems, and to make it clear that there is no shame in seeking therapy, pharmaceuticals and appropriate medical treatment when necessary. At the same time these are also all responses that can, if emphasised as the only response to distress, 'responsibilise' individuals for their experiences, and may serve to disconnect them from the broader social, economic and political relations in which those experiences make sense.

Critics of neoliberalism have pointed out that the increasing marketisation of economy and society has made each individual more and more responsible for his or her own education and career, yet at the same time more precarious in his or her financial, employment and social relations than ever before.¹⁰¹ Hilary Sommerlad shows how commercial law firms' human resources management discourses look for young lawyers who can present themselves as entrepreneurial, self-regulating, robust and resilient individuals,¹⁰² even as law firm partners cede more and more of their own professional autonomy over to clients.¹⁰³ As Sommerlad points out:

The responsibility to develop a client base and meet targets is cascaded down to each employee ... Corporate identity is thereby individualised through a reflective process in which the needs of the law firm [and thereby service to the client] are 'emphasised within individual thought as means for achieving career success' ... the aspiring vacation placement student must demonstrate the ability to engage in ... enterprise as a project of personal fulfilment.¹⁰⁴

101 See Zygmunt Bauman, *Does Ethics Have a Chance in a World of Consumers?* (Harvard University Press, 2008); David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Blackwell, 1989); Thomas Lemke, *Foucault, Governmentality, and Critique* (Paradigm Publishers, 2011).

102 Sommerlad, above n 74, 82–3.

103 Ibid 86.

104 Ibid 85 (citations omitted). See also Christopher Grey, 'Career as a Project of the Self and Labour Process Discipline' (1994) 28 *Sociology* 479.

Thus the successful young lawyer must present himself or herself as an autonomous individual, but in fact work in a law firm team that is always available to serve the client and thus derogates from the ideal of a law firm and professional which autonomously serve the law and the public good, not just the client. Sommerlad's analysis of young lawyers' experiences in recruitment and summer clerkships and her reading of law firm human resource management discourse shows starkly how it is the individual lawyer, himself or herself, who is asked to manage this contradiction in the presentation of himself or herself.

As I argue below, there is a contradiction, or a balancing act, between service to client and court, advocacy and legal justice, that has traditionally been at the heart of the profession's collective understanding of its public role. It has certainly always been contested and picked over by lawyers with different views as to where the balance should lie – but in a way that is a chief responsibility of the collective project of the profession as a community. There is a danger that wellbeing advocates will be co-opted to support an individualising and responsibilising discourse that further confines this contradiction to the psyche of the individual lawyer, seeking to make the individual bear what the profession as a collective should take responsibility for.

In the neo-liberal context, fostering individual 'resilience' has become an integral part of social governance.¹⁰⁵ As Matthew Ball argues on the basis of his analysis of various texts aimed at fostering law student 'resilience' in Australia, the United Kingdom and United States, students are being encouraged to manage their own uncertainty and risk by taking up:

psychologically- and biomedically-infused subject positions, becom[ing] well-disciplined subjects, entrepreneurs of the self ... and even virtuous persons as ways of avoiding, or 'bouncing back' from educational experiences likely to be produce mental ill-health.¹⁰⁶

The 'Resilience' DVD produced by the New South Wales College of Law with the sponsorship of several law firms and distributed widely to lawyers and law students as an educational tool to raise awareness of lawyer depression appears to perform a similar function. Throughout the DVD, four lawyers – all working for large commercial law firms – recount their stories of depression, mental breakdown and rehabilitation via counselling, medication and the support of family, friends and firm. Their stories are interspersed with information about depression, anxiety and stress from a medical point of view, and supportive statements from leaders in the profession about how lawyers should report their psychological distress to their firms and regulatory bodies in order to seek psychological help and treatment so that they can get back to work.

105 Matthew Ball, 'Self-Government and the Fashioning of Resilient Personae: Legal Education, Criminal Justice, and the Government of Mental Health' (2011) 23 *Current Issues in Criminal Justice* 97. See also Katie Aubrecht, 'The New Vocabulary of Resilience and the Governance of University "Student Life"' (2012) 6 *Studies in Social Justice* 67; Sommerlad, above n 704

106 Ball, above n 105, 98–9.

D Moral Panic as Individualising Discourse

The chief function of a moral panic is to make a public issue of the need to treat and control individual behaviour – and thereby divert attention away from the interests served by current and changing social, political and economic arrangements. In the classic conception of a moral panic a particular group of individuals are demonised in an attempt to draw and reinforce moral boundaries. Thus Cohen conceptualised a moral panic as creating 'folk devils' whose deviance must be controlled.¹⁰⁷ The lawyer wellbeing crisis does not demonise individual lawyers who are depressed. To the contrary, it seeks to support and destigmatise those who suffer depression, anxiety, stress and mental disorders in the profession. The danger, however, is that those who benefit from the current system can use wellbeing programmes to direct attention and support to the personal burden borne by individuals for the stresses and strains of the system without addressing the necessity for individuals collectively to act as citizens to change political, social and economic arrangements.

Many others have made the point more generally that the mental health crisis facing the western world is both an experienced fact and a social construction.¹⁰⁸ It is an experienced fact: individuals are under great social, economic and political stress and suffer psychological distress and seek individual psychological treatment as a result. But it is also a social construction. It is part of the neoliberal condition to interpret dissatisfaction with our lives in terms of individual troubles to be addressed by medication and personal coping and wellbeing strategies rather than collective political and social action.¹⁰⁹ 'Coping with fear becomes a problem of individual psychology or a medical issue, while the material conditions and the strategic aims of the production of fear remain invisible.'¹¹⁰ We may feel powerless to change the social and economic system in which we live our lives, but we might feel that we can at least be responsible for our own psychological response to that situation and help others to also respond in a psychologically healthy way. This is dangerous if it is the only response. This moral panic could divert attention away from fundamental social, economic and political issues in the way law is practised and taught that are known to create or sustain depression and anxiety. If the issue is framed in a largely psychological 'wellbeing' framework, there are powerful factors and interests in

107 Cohen, above n 84.

108 There is a venerable tradition of critiquing the socially constructed nature of mental health, the use of psychiatry and psychology to subjugate individual difference, diversity and social anarchy, and especially the 'manufacture of depression' in the contemporary western world. See eg, Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books, 1961); Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Random House, 2006); Carl Walker and Ben Fincham, *Work and the Mental Health Crisis in Britain* (Wiley, 2011).

109 Lemke, above n 101, 50. See also Bauman, above n 101.

110 Lemke, above n 101, 50.

our society and political economy that will seek to confine it to the personal rather than the political.

E Exercising Sociological Imagination through Legal Ethics

Scholars and commentators who write on the lawyer wellbeing crisis do of course recognise the need for individual psychological distress to be understood in the context of social conditions.¹¹¹ The seminal article by Seligman,¹¹² for example, points out that firm cultures and the adversarialism of the profession probably contribute to lawyer distress.¹¹³ But there is a danger in the wellbeing literature that the public professional role of lawyers as adversarial advocates and guardians of justice is the thing that is demonised. The notion that the lawyer role can be richer than just client service is also de-emphasised.¹¹⁴

Traditional professional legal ethics, by contrast, draws on a ‘sociological imagination’ that, at its best,¹¹⁵ does the opposite. This idea of the ‘sociological imagination’ comes from Wright Mills’ humanistic vision for sociology: to educate individuals to avoid being ‘falsely conscious of their social positions’.¹¹⁶ Mills argues that, while individuals often feel that the circumstances of their daily life are their own problems alone, the ‘sociological imagination’ connects their personal troubles to public issues so that they can understand that their personal problems are shared by others and can only be solved by change to the structure of the groups and societies in which they live.¹¹⁷ It finds personal issues and troubles in the practice of a profession and connects them to broader public issues in the role and function of that profession in society, and the virtues and practices of a profession. It suggests that the troubles that individual professionals face are shared, and that therefore solutions must and can be found through collective political, economic and social action. Legal ethics scholarship and commentary thus provide a set of discursive resources that can be used as a

111 An excellent example is Molly Townes O’Brien, ‘Connecting Law Student Wellbeing to Social Justice, Problem-Solving and Human Emotions’ (2014) 14 *QUT Law Review* 52.

112 Seligman, Verkuil and Kang, above n 1.

113 Eg, Bergin and Jimmieson are also suggestive in the way they seek to connect personal experiences of wellbeing with broader issues in the law firm and profession – all factors that have been shown to impact on depression: time pressure, emotional demands, emphasis on profits, competitiveness, role ambiguity and role conflict, job control, occupational rewards through money, esteem or praise, career opportunities and the social value of work: Bergin and Jimmieson, above n 7. Each of the university studies shown in Table 1 also questions the competitiveness, adversarialism and focus on gaining employment serving commercial clients in law school and the profession. Many of the articles and speeches referred to in Appendix 1 also traverse these themes.

114 But see Field, Duffy and Huggins, above n 9; Townes O’Brien, above n 111.

115 And there is of course much that was self-serving and hypocritical in traditional legal ethics: see Richard Abel, ‘Why Does the ABA Promote Ethical Rules?’ (1981) 59 *Texas Law Review* 639; Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999).

116 C Wright Mills, *The Sociological Imagination* (Oxford University Press, 2000) 5–8.

117 Ibid 171–87. Parker and Rostain have applied the idea of sociological citizenship to ethical issues in contemporary commercial legal practice: Parker and Rostain, above n 95.

basis for talking and teaching about the profound challenges and opportunities facing the law and all those of us who work with it. This literature addresses the question not so much of what will make an individual lawyer feel comfortable, but what makes for a good life as a lawyer in a profession that contributes to the public good in economy, society and polity.

The following section illustrates the potential for legal ethics discourse to help address the problems identified by wellbeing advocates by contrasting Seligman's three (potentially individualising) diagnoses and solutions for the lawyer wellbeing crisis, and the socio-political insights and questions of lawyers' ethics discourses. This contrast shows how the questions posed by legal ethics literature might prompt the sociological imagination of the legal profession in responding to change and conflict.¹¹⁸

F Seligman's Three Diagnoses and Solutions for Lawyers: Wellbeing Discourse Contrasted with Legal Ethics Discourse

First, Seligman argues that lawyer depression is the result of law students and lawyers being selected or trained for a lawyer 'cast of mind'¹¹⁹ that is essentially risk focused and inherently pessimistic because it is technical, narrow and exclusively focused on foreseeing problems, conflicts and adversarial resolutions.¹²⁰

Seligman proposes as a solution that lawyers and law students can learn optimism and broader coping skills through various individual coping strategies or practices of resilience that include counselling, cognitive behavioural therapy, mindfulness meditation and other wellbeing resources. He suggests they can also learn flexibility to use pessimism when appropriate in specific professional situations, such as advising a client or preparing for a court case, while

118 The discussion of lawyers' ethics in the following sections is based loosely on the four approaches to legal ethics developed in Parker and Evans' legal ethics text as a convenient way to summarise many of the issues in the legal ethics literature: Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 32. The four ethical approaches were first set out in Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Legal Ethics' (2004) 30 *Monash University Law Review* 49. Of course, the legal ethics literature is much richer than just these four approaches and continues to evolve. The application of the four approaches is just an indication of the richness for the sociological imagination. For earlier attempts to make this sort of corrective in relation to legal education, see Andrew Goldsmith, 'Is There Any Backbone in This Fish? Interpretive Communities, Social Criticism, and Transgressive Legal Practice' (1998) 23 *Law and Social Inquiry* 373. See also Parker and Goldsmith, above n 96.

119 Rosen, Parker and Nielsen, 'The Framing Effects of Professionalism', above n 73, use this phrase.

120 Seligman, Verkuil and Kang, above n 1, 50.

maintaining optimism as the basic attitude towards their personal relationships and the management of their own careers.¹²¹

Legal ethics literature does not accept the assumption that the lawyer 'cast of mind' is inherently pessimistic. Much legal ethics literature is concerned precisely with the urgent question of how to conceptualise and communicate lawyers' social role so that it is not about adversarial advocacy in the narrowest, most technical and potentially socially negative sense – but rather to see lawyers as responsible also for helping clients comply with the law, engage in preventive and problem solving lawyering to achieve positive commercial and personal goals, and build good personal and business relationships.¹²² Legal ethics literature sees the lawyer's role as something to be proud of, not primarily because it is personally fulfilling or economically rewarding, but because the legal professional uses his or her personal skills to contribute to the advancement of law and justice. Legal professionals have a specific responsibility to make the law work as both a public good and in individual clients' lives to help people live together.

Second, Seligman argues that lawyer depression is caused by employed lawyers' lack of professional autonomy. Lawyers, especially young lawyers, as Seligman points out, work in situations 'characterized by high pressure and low decision latitude, exactly the conditions that promote poor health and poor morale'.¹²³ A similar critique might be applied to the modern university experience, with students working to support themselves and make themselves employable after university and managing high assessment loads.

To ameliorate this situation, Seligman proposes that lawyers should be offered personal enrichment opportunities within these firms so that they feel that they have a say in how things are decided and get to use their 'signature strengths' that make them feel valued as people.¹²⁴ They should be given more opportunity to connect with clients and colleagues as individuals. According to Seligman, this will help them perform better and bill more hours. Seligman certainly hopes that young lawyers might actually have the opportunity to change

121 Ibid 57–8. Other articles propose similar individual treatment responses to managing psychological distress and learning coping mechanisms. Eg, Hall calls for

explicitly encouraging initiatives to increase awareness of mental health issues by both staff and students, and establishing links between law schools and providers of professional counselling services within universities. Law students can also benefit from being taught specific mechanisms to cope with stress, anxiety, competition and depression: Hall, above n 17, 11–12.

122 This fourfold description of lawyers' ethical role in society is based on Parker and Evans' simple summary of the legal ethics literature in terms of four approaches to lawyering: Parker and Evans, above n 118, 32. This is based on Parker, 'A Critical Morality for Lawyers', above n 118.

123 Seligman, Verkuil and Kang, above n 1, 50.

124 Ibid 59.

the way their firms work, at least a little, but recognises that the 'illusion of decision latitude' could be enough.¹²⁵

The legal ethics literature, however, raises the question of whether legal practice can any longer be organised in a way that supports the degree of independence, autonomy and personal resilience that lawyers need to fulfil their public professional roles. A repeated theme in the literature has been the problems for the traditional role of the lawyer as client advocate/representative and officer of the court where they do not actually have sufficient autonomy and independence to relate to clients, understand their situation and advise them strongly. The lack of lawyer autonomy and professionalism that has accompanied commercialisation and industrialisation of law is commonly noted in the literature, and the legal ethics literature points out that structural change at the social, economic and political level is probably necessary to address it.¹²⁶ Personal enrichment opportunities and the use of personal coping strategies cannot solve a problem that requires a collective solution.¹²⁷

Third, Seligman points to the problem of excessive adversarialism and lack of civility in the legal system. Seligman sees it as almost inevitable that the adversarial system makes lawyers aggressive and competitive because it exaggerates negative emotions. 'American law is to some extent a zero-sum game, and negative emotions flow from zero-sum games.'¹²⁸

Here Seligman comes to the central issue of legal ethics scholarship. He notes that there is a connection between the individual's experience of and satisfaction with professional life and the overall purpose of the profession. But

125 Ibid 59. Seligman argues that since it is the combination of high pressure and low decision latitude that is the problem, it can be ameliorated by law firm managements offering employee lawyers more personal control over their work flow also 'more substantive training, mentoring, a voice in management, and earlier client contact' and non routine tasks that use their 'signature strengths'. Seligman comments that this will make lawyers 'both more satisfied and more productive' and '[o]ver time, higher morale will translate into higher billing hours': at 58–9. 'Moreover', he comments:

research on the problem of decision latitude also tells us that the mere illusion of decision latitude has beneficial effects on morale. Perceived control can be just as effective an experimental condition as actual control. This means that efforts to meet and communicate about problems can have beneficial effects. Establishing a committee on associate morale, coupled with surveys and interviews of young associates, is one way to accomplish this result. But since young lawyers are a highly sceptical group, they will be quick to challenge attempts at talk and no action. The result may be that over time practices inimical to these attorneys' welfare will dissolve under scrutiny: at 59 (citations omitted).

126 See Parker and Rostain, above n 95; R E Rosen, 'We're All Consultants Now: How Change in Client Organizational Strategies Influences Change in the Organization of Legal Services' (2002) 44 *Arizona Law Review* 637; C Parker, R Rosen and V Nielsen, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation' (2009) 22 *Georgetown Journal of Legal Ethics* 201. See also Bagust, above n 97.

127 For some modest discussions of changes at law firm level that might be important, see C Parker et al, 'The Ethical Infrastructure of Legal Practice in Large Law Firms: Values, Policy and Behaviour' (2008) 31 *University of New South Wales Law Journal* 158. For more radical proposals, see Parker, *Just Lawyers*, above n 115.

128 Seligman, Verkuil and Kang, above n 2, 50.

instead he frames public good (the adversary system) and personal satisfaction (lawyer wellbeing) as inherently themselves adversaries: 'Lawyers are trained to be aggressive and competitive precisely because they must win the litigation game. This training, because it is fuelled by negative emotions, can be a source of lawyer demoralization, even if it fulfils a social function'.¹²⁹

Seligman goes on to ask an important question, but he frames it in terms of individual psychology: 'whether adversaries can be competitive without being pessimistic'.¹³⁰ Seligman suggests that law schools and law firms should teach lawyers that it is okay to be 'civil' and provide opportunities for lawyers to engage in alternative dispute resolution practice.¹³¹ Similarly, Allen and Baron suggest that law students will have a greater sense of wellbeing if they can focus on their own positive personal values and intrinsic motivations,¹³² rather than intense competition.

This is where legal ethics literature can be most helpful in addressing the discontent evidenced by the wellbeing crisis in a more sociologically imaginative way. Legal ethics literature argues that, in the practice of law, it is not enough to simply seek to inculcate a purely personal ethics and individual motivation and value. No matter what their other differences on the precise contours of lawyers' ethics, most legal ethics scholar see lawyers' private service provision as inherently part of a collective endeavour in a public system of justice in which they can take pride. It is not merely a matter of private civility tempering the negative emotions that are the cost of our adversarial system. Even the most ardent proponent of the lawyers' role as adversarial advocate for his or her client recognises that the practice of law is a collective professional endeavour in the public good. That is, even when the lawyer is acting as a client advocate, they are doing so because it is a public good to have lawyers available to help citizens navigate the legal system and protect their rights.¹³³

Ethics scholars who emphasise the role of lawyers as responsible officers of the court,¹³⁴ or moral activists responsible for representing underrepresented causes and ensuring the social justice of the legal system,¹³⁵ go even further in arguing that lawyers have public ethical duties to make the legal system work according to the spirit of the law, or indeed to pursue substantive justice even where the legal system operates unjustly. Those who advocate for the practice of

129 Ibid 61.

130 Ibid 62.

131 Ibid.

132 Allen and Baron, above n 1, 285.

133 See Stephen Parker, 'Islands of Civic Virtue: Lawyers and Civil Justice Reform' (1997) 6 *Griffith Law Review* 1. For summaries of the legal ethics literature see: Parker, *Just Lawyers*, above n 115; Parker and Evans, above n 118.

134 See, eg, W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press, 2011).

135 See, eg, David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988).

caring or relational lawyering point out that lawyers can fulfil their role as counsellors and problem-solvers without always using adversarialism.¹³⁶

In short, as even this brief summary suggests, discourses on the social ethics of the legal profession already suggest a much richer range of roles and associated ethics that lawyers can, do and should use beyond narrowly technical client service. These are the type of substantive questions – and differences of approach to lawyers' role – that can be discussed and debated to help lawyers understand and feel that their individual roles contribute to a broader, more meaningful project in society. Individual resilience is just one resource in connecting the individual experience of being a professional to working out how, individually and collectively, to help create better institutions that can help lawyers, law students, legal academics better pursue legal justice.¹³⁷

IV CONCLUSION

At its best, the wellbeing literature reframes and situates traditional professional ethical concerns at the individual psychological level and thus connects individuals' feelings and experiences with broader ethical concerns facing the profession. Legal ethics may have spent so much time focusing on the social role and function of the legal profession, that it sometimes forgot the individual humanity of the lawyer him or herself. The lawyer wellbeing movement is a welcome corrective to that failure in legal ethics discourse. It reminds legal ethics scholars of the need to include questions about how the individual lawyer can maintain their humanity and relationships while exercising their public professional role. But professional legal ethics points out that the experience of being a lawyer should not just be about individual wellbeing. It should be about the wellbeing of the profession and the law as a whole.

There is a danger that the alarming statistics and resultant moral panic that have been created about lawyer wellbeing will further privatise away lawyers' and law students' ethical responsibilities for the profession and for the role of law in society. The ways that lawyers and academics talk and write about these issues are powerful – they create discourses that frame the way young lawyers see their situation, and the ways that the profession and public respond. It is important to note dissatisfaction with legal professional roles and jobs, and respond compassionately and appropriately to individual distress. It is also important to notice that these statements of distress and discontent raise fundamental and

136 See, eg, Thomas L Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (Brigham Young University Press, 1981).

137 One of the authors of the *ANU Study* has recently published a follow-on study exploring these issues by looking at how a law school might help enhance wellbeing by funding student activism and social justice programmes in the law school: Townes O'Brien, above n 111, 57–8.

enduring questions about the role of the legal profession and the rule of law in society. We should be extremely wary of the possibility that instead we are creating a regime that treats, manages and palliates lawyers and law students in distress so that they can cope with getting back to work in a system that is itself broken.

APPENDIX 1: SCHOLARLY ARTICLES AND MAJOR SPEECHES AND REPORTS ON LAWYER AND LAW STUDENT WELLBEING IN AUSTRALIA 2005 TO SEPTEMBER 2014¹³⁸

2004
Allan, Judy and Paula Baron, 'Buttercup Goes to Law School' (2004) 29 <i>Alternative Law Journal</i> 285
2005
James, Colin, 'Seeing Things as We Are: Emotional Intelligence and Clinical Legal Education' (2005) 8 <i>International Journal of Clinical Legal Education</i> 123
James, Colin and Jenny Finlay-Jones, 'I Will Survive: Strategies for Improving Lawyers' Workplace Satisfaction' (Paper presented at the University of Newcastle, 1–3 December 2005)
Seligman, Martin, Paul Verkuil and Terry Kang, 'Why Lawyers Are Unhappy' (2005) 10 <i>Deakin Law Review</i> 49
2006
Nil.
2007
Baron, Paula, 'Thriving in the Legal Academy' (2007) 17 <i>Legal Education Review</i> 27
Beaton Consulting, 'Annual Professions Survey' (Research Summary, beyondblue, April 2007) < http://www.beatonglobal.com/pdfs/Depression_in_the_professions_survey.pdf >
Lewis, Julie, 'Parents Speak Out about the Law and Depression' (2007) 45 <i>Law Society Journal</i> 24
2008
Carrick, Damien, Interview with Ian Chung, Paul Menzies, Lil Vrklevski, Marie Jepson, and Ian Hickey (ABC Radio National Law Report, 25 March 2008)
James, Colin, 'Lawyer Dissatisfaction, Emotional Intelligence and Clinical Legal Education' (2008) 18 <i>Legal Education Review</i> 123
James, Colin, 'Lawyers' Wellbeing and Professional Legal Education' (2008) 42 <i>The Law Teacher</i> 85

¹³⁸ AGIS and Google Scholar searches for articles with [lawyer or law student] plus [wellbeing, psychological distress or depression] plus [Australia] in the title or subject from 2005 onwards. Only articles and speeches focused on the experience of Australian lawyers or law students are included in this table. Articles published in international journals that meet these criteria are included.

2009

Briton, John, 'Lawyers, Emotional Distress and Regulation' (paper presented at the Bar Association of Queensland 2009 Annual Conference, Gold Coast, 8 March 2009)

Hall, Kath, 'Do We Really Want to Know? Recognising the Importance of Student Psychological Wellbeing in Australian Law Schools' (2009) 9 *QUT Law and Justice Journal* 1

Kelk et al, Norm, 'Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers' (Report, Brain and Mind Research Institute, University of Sydney, January 2009)

<<http://www.cald.asn.au/docs/Law%20Report%20Website%20version%204%20May%2009.pdf>>

Tani, Massimiliano and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19 *Legal Education Review* 3

2010

Ball, Matthew, 'Governing Depression in Law Students and the Shaping of Legal Personae' in Selvaraj Velayutham, Norbert Ebert and Sheila Watkins (eds), *Proceedings of TASA Conference 2010: Social Causes, Private Lives: The Australian Sociological Association Annual Conference* (Australian Sociological Association, 2010) 1

Bromberger, Nikki, 'Enhancing Law Student Learning – The Nurturing Teacher' (2010) 20 *Legal Education Review* 45

Field, Rachael 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 *International Journal of the First Year in Higher Education* 65

Hall, Kath, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 19

Kelk, Norm, 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

Leahy et al, Catherine, 'Distress Levels and Self-Reported Treatment Rates for Medicine, Law, Psychology and Mechanical Engineering Tertiary Students: Cross-Sectional Study' (2010) 44 *Australian and New Zealand Journal of Psychiatry* 608 (the 'University of Adelaide Study')

Sharpe, Michelle, 'The Problem of Mental Ill-Health in the Profession and a Suggested Solution' in Francesca Bartlett, Reid Mortensen and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge, 2011) 269

2011

Bergin, Adele, *Stress and the Legal Profession: Explaining Psychological Distress, Alcohol Misuse, and Job Dissatisfaction in Lawyers* (Honours Thesis, University of Queensland, 2011)

Castan et al, Melissa, 'Early Optimism? First-Year Law Students' Work Expectations and Aspirations' (2010) 20 *Legal Education Review* 1

Daicoff, Susan, 'The Future of the Legal Profession' (2011) 37 *Monash University Law Review* 7 (note that this includes information about both American and Australian lawyers)

Galloway et al, Kate, 'Approaches to Student Support in the First Year of Law School' (2011) 21 *Legal Education Review* 235

Kendall, Christopher, 'Report on Psychological Distress and Depression in the Legal Profession' (Report, Law Society of Western Australia, March 2011)

Lester, Anthony, Lloyd England and Natalia Antolak-Saper, 'Health and Wellbeing in the First Year: The Law School Experience' (2011) 36 *Alternative Law Journal* 47

Medlow, Sharon, Norm Kelk and Ian Hickie, 'Depression and the Law: Experiences of Australian Barristers and Solicitors' (2011) 33 *Sydney Law Review* 771

Orenstein, Joel, 'The Mindful Lawyer: Meditation and the Practice of the Law' (2011) 85 *Law Institute Journal* 40

Townes O'Brien, Molly, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37 *Monash University Law Review* 43

Townes O'Brien, Molly, 'Walking the Walk: Using Student-Faculty Dialogue to Change an Adversarial Curriculum' (2011) 1 *Journal of the Australian Law Teachers Association* 129

Townes O'Brien, Molly, 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

Townes O'Brien, Molly, Stephen Tang and Kath Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing May Begin in Year One' (2011) 2 *International Journal of the First Year in Higher Education* 49

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APPENDIX 2: PRACTICAL AND POLICY RESPONSES ON LAW STUDENT AND LAWYER WELLBEING

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Inter-state/National Programs		
Australian Law Students' Association	Depression in Australian Law Schools: A Handbook for Law Students and Law Student Societies (2011)	http://alsa.net.au/oldsite/images/2011/ALSA%20Depression%20Handbook.pdf
Wellness Network for Law	Blog and networking events (eg, conferences) to connect legal professionals and academics	http://wellnessforlaw.com
College of Law with Allens Linklaters, Ashurst, Clayton Utz, Herbert Smith Freehills, and King & Wood Mallesons	Resilience@law program	http://www.collaw.edu.au/about-us/education-philosophy/resiliencelaw/
Tristan Jepson Memorial Foundation	Annual lecture and general programs including the 'Psychological Wellbeing: Best Practice Guidelines for the Legal Profession'	www.tjmf.org.au http://www.tjmf.org.au/raise-the-standard/
FoolKit: The Free Legal Toolkit	Wellbeing and life balance page	http://www.foolkit.com.au/vic/lawyers/your-wellbeing

Author/organisation	Program/speech title	Sourced at
FoolKit: The Free Legal Toolkit	Law school students page	http://www.foolkit.com.au/nsw/lawyers/students
survivelaw.com	survivelaw.com 'wellbeing' thread	http://survivelaw.com/index.php/blogs/well-being
thedesk.org.au	General support services for tertiary students, recommended on most law society websites	https://www.thedesk.org.au/about
New South Wales		
New South Wales Bar Association	Bar Care	http://barcare.org/wordpress/about
Law Society of New South Wales	Members assistance program	See, eg, http://www.lawsociety.com.au/ForSolicitors/professionalsupport/supportingyou/mentalhealthwellbeing/index.htm
Law Society of New South Wales	The Lawyer's Guide to Sanity, Profitability and Wellbeing: Seminar Series	http://www.lawsociety.com.au/ForSolicitors/professionalsupport/supportingyou/Wellbeing/index.htm
Law Society of New South Wales	Young Lawyers mental health for students website page	http://www.lawsociety.com.au/about/YoungLawyers/MentalHealth/Forstudents/index.htm
University of New South Wales Law Faculty	'When Things Go Wrong' student help page	http://www.law.unsw.edu.au/current-students/surviving-thriving/when-things-go-wrong
Queensland		
Queensland Law Society	Love Law, Live Life: Resilience and wellbeing resources for the legal profession	http://www.qls.com.au/For_the_profession/Love_Law_Live_Life
Bar Association of Queensland	BarCare: providing free counselling and support to Queensland barristers	See, eg, http://www.qldbar.asn.au/index.php/membership/services
Queensland Law Society	LawCare: member assistance program providing free professional and confidential counselling service for solicitors and their immediate family members	http://www.qls.com.au/For_the_profession/Practice_support/Schemes_services/LawCare
University of Queensland Law Students Society	Allens & UQLS Mental Health in the Legal Profession Equity Awareness Event	http://uqls.com/?s=wellbeing ; see PowerPoints at http://uqls.com/wp-content/uploads/2012/09/Allens-UQLS-Mental-Health-Event_Combined-Slides_Compresed.pdf

Author/organisation	Program/speech title	Sourced at
Bond University Law Faculty	First Year Experience in Law: A New Beginning? Conference, 2 July 2011	http://bond.edu.au/faculties-colleges/faculty-of-law/events-and-competitions/BD3_014693
Bond University Law Faculty	Stress relief 'puppy days'	See, eg, http://www.news.com.au/business/your-business/stress-relief-puppies-procrastination-classes-for-pressured-uni-students/story-fn9evb64-1226621872291
Victoria		
Law Institute of Victoria in Collaboration with the Victorian Bar)	Wellbeing and the Law Foundation	http://www.watfoundation.org.au/default.aspx
Law Institute of Victoria	Victorian Lawyers' Health Line	https://www.viclawyershealth.com.au/Home
Law Institute of Victoria	Insight Mental Health Awareness & Suicide Prevention - Workshop	http://www.liv.asn.au/Professional-Development/whatsOn-Calendar?evpage=CPDDetail&function_code=CPD14W2901/CPD14W2901&eventid=CPD14W2901
Law Institute of Victoria	Health and wellbeing: workplace and personal stress, depression, alcohol and drugs fact sheets	Fact sheets available at http://www.liv.asn.au/Practice-Resources/Practice-Support/Health-and-Wellbeing
Law Institute of Victoria	LIV Mental Health and the Legal Profession: A Preventative Strategy Report	http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Health-and-Wellbeing
Melbourne University Law Student Society (Melbourne Law School)	Mindfulness sessions	http://mulss.com/education/mindfulness
Melbourne University Law Student Society (Melbourne Law School) with Prof Larry Krieger, Florida State University	Wellbeing Project 'booklets'	See 'Law Student Wellbeing' at http://www.law.unimelb.edu.au/jd/jd-newsletter/news3-2012.html#wellbeing
Monash University Faculty of Law	Counselling sessions for law students	http://www.law.monash.edu.au/current-students/resources/support-services/manage-stress/index.html
Monash University Faculty of Law	Mindfulness for Academic Success program	http://www.monash.edu.au/counselling/academic-support/mindfulness.html
Victorian Bar Association	Health crisis counselling service/'Bar Care' scheme	http://www.vicbar.com.au/information/personal-helpline