

## **Incorporating Emotional Intelligence in Legal Education: A Theoretical Perspective**

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### **ABSTRACT**

*'Thinking like a lawyer' is traditionally associated with rational-analytical problem solving and an adversarial approach to conflict. These features have been correlated with problems of psychological, or emotional, distress amongst lawyers and law students. These problems provide a strong argument for incorporating a consideration of emotion into legal education. How to achieve this is a challenge for legal educators. Addressing that challenge, it is argued that emotional intelligence (EI) provides an existing and useful conceptual framework for acknowledging and incorporating emotion into legal education and practice. Advantages in adopting EI are argued. Goleman's model of EI is identified as the most readily accessible model for EI in law. Goleman's model is adapted and applied to clinical legal education as an optimal site for introducing law students to EI.*

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## Introduction

Emotional intelligence (EI) is about understanding the emotions we experience as individuals, and those of the people we relate to in such a way as to positively guide thinking and behaviour. Incorporating EI into legal curricula extends traditional legal education beyond its two dominant features, namely, an emphasis on rational-analytic problem solving and an adversarial approach to conflict. These features are integral to the traditional notion of 'thinking like a lawyer' (Sullivan et al, 2007; Mertz, 2007). The dominance of these features in law has been correlated with problems of psychological distress in law students and practitioners. These apparent threats to wellbeing draw critical attention to the need for legal educators to better equip students to meet the challenges that emotions play in professional practice. How to approach incorporating emotion into a legal curriculum becomes the challenge for legal educators. This article seeks to address that challenge by advancing emotional intelligence as an existing conceptual framework for emotion, drawn from positive psychology, which can be applied to legal practice and education. Specifically Goleman's (2004, 1995, 1998) model of EI is proposed as a suitable model and applied to clinical legal education.

Discussion is divided into three parts. In the first part, research that investigates the prevalence of psychological distress amongst lawyers and law students is reviewed. The extent to which this research establishes that 'thinking like a lawyer' causes emotional distress is then examined. Evidence of the negative impact of neglecting emotion in the law is argued as an impetus for incorporating EI in legal education. In the second part, the nature of emotional intelligence is examined and justified as a conceptual framework for incorporating emotion into legal education. Three advantages of using emotional intelligence as a conceptual framework for law are argued. In the final section Goleman's model of EI is applied to reflective practice in clinical legal education.

### Thinking like a lawyer: a threat to wellbeing?

The Council of Australian Law Deans' (CALD) standards for law schools provide that law schools are committed to and promote the well-being of staff (2009, cl 4.3.4) and that a:

"law school's commitment to sound educational methods and outcomes includes a commitment to, and the adoption of practical measures to promote student well-being, with particular reference to mental health and awareness of mental health issues." (2009, cl 2.9.1)

Wellbeing is generally equated with psychological wellbeing and a lack of wellbeing with psychological distress, exhibited by depression, anxiety and or stress. Wellbeing involves positive emotional states such as happiness, excitement and satisfaction.

Concern for the wellbeing of law students, legal academics and legal practitioners gained momentum in Australia following publication in 2009 of *Courting the Blues: Attitudes towards depression in Australian law students and lawyers*, by the Brain and Mind Research Institute (BMRI) of the University of Sydney (Kelk et al, 2009). This BMRI study was conducted in conjunction with the Tristan Jepson Memorial Foundation, which was established by the parents of Tristan Jepson, a young lawyer who took his own life having suffered depression. The researchers, Kelk and his colleagues, examined depression literacy and psychological distress amongst law students and legal practitioners. The sample consisted of 741 law students from 13 universities, 924 solicitors and 756 barristers. The study found that 35.2% of law students experienced high levels of distress compared with 17.8% of medical students

and 13.3% of the general population over 17 years of age. Of the sample of practicing lawyers, the study found that 31% of solicitors and 16.7% of barristers experienced high levels of distress compared with 13% of the general population over the age of 17 years. Prior to the BMRI study, a survey of Australian professionals conducted by Beaton Consulting (2007) revealed that when compared to the general population, professionals reported higher than average levels of depressive symptoms; and that lawyers reported higher rates of depression when compared with other professionals.

The Beaton and BMRI studies naturally generated real concern amongst the legal profession and academia in Australia. A number of studies of law students' experience followed the Beaton and BMRI studies in Australia in attempts to further investigate both the prevalence and possible causes of psychological distress. A study by Leahy and associates (2010), for example, found that indicators of distress were higher for law students than medical and psychology students though not significantly different than those for mechanical engineering students. In 2012 Larcombe and colleagues published a study of law students at Melbourne University. The sample consisted of 327 students across undergraduate and postgraduate law programs. The results showed that 27% of law students were experiencing depressive symptoms in the moderate to extreme range and 30% were experiencing moderate to extreme anxiety. According to the researchers, at "these levels, students' daily functioning - for example, their ability to concentrate, and to remember and process information - is likely to be adversely affected (Larcombe et al, 2012: 415). In a very recent study by Skead and Rogers (2015) in Western Australia, law students were found to score higher on measures of depression and anxiety than psychology students.

The significant and comparatively high levels of distress found amongst law students has led researchers to probe the attitudes of those students and the effects of the law school experience on wellbeing. A study conducted by Tani and Vines (2009) across all faculties of the University of New South Wales revealed significant attitudinal differences of law students compared to others. Law students were found to exhibit comparatively low levels of autonomy, being concerned more about their marks as a determinant of graduate employment than any intrinsic interest in learning or the nature of their studies; and comparatively high levels of competitiveness, disliking group work, seeing friendships in terms of networks to advance later careers and a greater likelihood to value the reputation of their university. The researchers conclude that such "differences suggest that inherent or learned personal characteristics may indeed have a significant impact on law students' likelihood of developing depression" (Tani and Vines, 2009: 25). The study did not probe these causes, however, and its results are equally suggestive of a competitive legal culture negatively impacting student wellbeing.

Two longitudinal studies of the impact of first year on law student wellbeing suggest that the experience of law school itself contributes to psychological distress. In a study of Monash Law School students, Lester and his colleagues (2011) found a statistically significant increase in indicators of depression experienced by students from the beginning to the end of the first year of study. Symptoms included "persistent lowered moods over a week, diminished energy, loss of pleasure and interest in activities, feelings of worthlessness, irritability and hopelessness" (Lester et al, 2011: 48). Similar results were found in a study conducted at the Australian National University (ANU) by O'Brien, Tang and Hall (2011) of law students. In that study students entering a law program demonstrated similar levels of depression and stress and somewhat higher levels of anxiety than community samples of comparable age. However students surveyed at the end of the first year showed marked increases in levels of depression and stress with similar levels of anxiety (2011: 55). These studies suggest that there may be something in the way law is taught with a view to how it is practiced that contributes to psychological distress.

The ANU study included an investigation of changes to law students' thinking styles in an attempt to correlate such changes with changes in measures of psychological distress. The investigators found that along with increased levels of stress and depression, students showed increased evidence of analytical thinking. Specifically the investigators plotted changes by measuring rational as distinct from experiential thinking styles. These changes were measured on the assumption that "emphasizing the rational mode while neglecting the experiential mode of thinking is consonant with the approach to law that teachers often refer to as *thinking like a lawyer*" (p. 55 emphasis in original) The rational scale used measured an individual's ability and tendency to think logically and analytically. The experiential scale measured a student's ability and preference to incorporate intuitive impressions and feelings into their thinking. In the end of first year sample, scores for rationality were significantly higher while scores for experiential thinking were significantly lower. The results suggest an inverse relationship between increased analytical (at the expense of experiential) thinking, and wellbeing. O'Brien and colleagues go further and suggest that traditional legal education, which emphasizes legal doctrine derived from appellate decisions determined in an adversarial context, poses a threat to wellbeing by divorcing students from access to experiential, intuitive and emotional, processing. The researchers assert that:

*"thinking like a lawyer* requires not only dispassionate analysis, but also pessimism and risk aversion... [Students] are not invited to empathize with the litigants, but to treat them as instruments of principle and precedent... law students learn to put hope, optimism, and trust aside" (2011: 57, emphasis in original).

The results of studies in Australia reflect much earlier findings in the United States (see Dammeyer and Nunez, 1999; Daicoff, 1997). A series of studies by Benjamin and colleagues (Benjamin, Kaszniak, Sales, and Shanfield, 1986; Benjamin, Darling and Sales, 1990; Beck, Sales and Benjamin, 1995) document the prevalence of psychological distress amongst lawyers and law students. As early as 1986, Benjamin surveyed a sample of 706 law students and graduates at the University of Arizona Law School. The researchers found that 17-20 per cent suffered from depression compared with 3-9% of the general population of industrial nations at the time. The authors point to the singular emphasis in legal education on the development of analytical skills, and suggest that the "unbalanced development of student intellectual skills at the expense of interpersonal skills appeared to impair psychological well-being" (p.11). Mertz (2007) investigated first year contract law classes across eight law schools in America. She found that despite differences in teaching styles, students were commonly taught to 'think like a lawyer' by adopting strictly analytical and strategic approaches, ignoring their own values and divorcing themselves from any feelings of empathy and compassion. According to Mertz, students were taught a 'combative dialogue' that provided no space for issues of morality and fairness, or sensitivity to human suffering.

Mertz's findings are consistent with the work of positive psychologist, Martin Seligman, and colleagues (2004, 2001), who argue that there three reasons for lawyers' unhappiness. The first is that lawyers are selected for their pessimism and this generalizes to the rest of their lives. Pessimism is associated with a lawyer's need to consider all the risks associated with any course of action and to communicate those risks to their clients. The second is that early career lawyers are faced with high stress and low decision latitude in hierarchically structured and demanding law firms. The third is the adversarial nature of legal practice that requires a winner and a loser – a zero-sum game – and promotes the negative emotions of anger, anxiety and sadness.

Parker (2014) questions the empirical basis of assertions of a crisis of wellbeing in the law. She reviews the Australian research and argues that it is not conclusive in

establishing that lawyers and law students suffer psychological distress at significantly higher rates than other groups of professionals, students and the general population. She argues that the research is also not conclusive in establishing that legal work and education are the causes of distress. Parker points to methodological limitations of existing studies raising questions as to the validity and reliability of results. She argues that the survey instruments used (DASS and K-10) are designed to measure symptoms common to the population at large for which heightened measures represent the *risk* of illness, such as clinical depression and anxiety, but which are not conclusive of the existence of clinical distress. She also details the use of non-representative convenience sampling across studies, as distinct from probability sampling, revealing limitations as to the generalisability of results. Parker concludes that while research does show that law students and practitioners suffer 'worrying' symptoms of psychological distress, the comparative prevalence of that distress and its causes are unclear.

A very recent study of wellbeing compares the wellbeing of law students with students of diverse programs at both undergraduate and graduate levels at the University of Melbourne (Larcombe, Finch and Sore, 2015). The study surveyed 4,700 students across six faculties/ schools. The results support research indicating that law students experience high levels of psychological distress. However the results show no significant differences in measures of distress experienced by non-law students, challenging the proposition that 'thinking like a lawyer' produces psychological distress. The study does not however specifically probe the causes of distress. The investigators are careful to note that while 'thinking like a lawyer' may be too narrow a focus to attribute to students' experience of distress they "are not saying that discipline-specific sources of stress are not impacting law students – including high competition for certain learning and employment opportunities as well as the technical, adversarial mode of thinking privileged in legal analysis" (Larcombe et al, 2015: 266).

Another recent study of organizational factors affecting the wellbeing of professionals by Michalak (2015) found that lawyers suffer significantly lower levels of wellbeing than non-lawyers. Results revealed that lawyers were more likely than other professionals to be exposed to risk factors including incivility, verbal abuse, emotional neglect, mistreatment overall, bullying and harassment as part of legal work place culture. These results reflect an earlier study by James (2008). James surveyed graduates of the University of Newcastle Law School and found that they experienced high levels of stress on entering the profession. According to his analysis threats to wellbeing were attributable more to conditions of employment than the nature of legal work itself.

Without further empirical research it is not possible to conclusively assert that lawyers and law students suffer higher rates and degrees of psychological distress than other professionals and student cohorts. Nor it is possible to conclusively attribute legal reasoning and the adversarial nature of our legal system to that experience of distress. Nonetheless the existing research has been sufficient to raise real concern within the profession and the academy demonstrated by establishment of the 'Wellness in Law Network'<sup>1</sup> and inclusion of wellbeing in the CALD standards referred to above.

The fact that lawyers and law students experience significant psychological distress points to the neglect of emotion in the law. The trend to date has been to address this neglect by introducing students to strategies of self-care, either as embedded in curriculum design (Huggins et al, 2011) or as aspects of pastoral care (Lester et al,

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2011). As Parker (2014) has argued, this approach places responsibility for wellbeing on the individual. It does so by framing the issue as a question of 'resilience', or an individual's capacity to cope with the demands of education and practice. Parker cautions that attention should be given to the collective, social, economic and political forces that shape our justice system and lawyers' roles within it, in order to avoid

"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." (2014, 1136).

Parker (2014) contends that questions of psychological wellbeing in the law need to be evaluated and debated within a 'sociological imagination' incorporating a discourse in legal ethics. Wellbeing and the erosion of students' existing ethics and idealism, due to conventional approaches to legal education and an increasingly competitive job market, have been a central concern of humanizing projects in legal education evident in the United States (Krieger, 2008; Glesner-Fines, 2008; Winick, 2010-2011). Emotion, or the emotional dimension of human experience, is likewise an important consideration for legal education and practice. Its importance is not limited to issues of individual wellbeing. It extends to newer approaches to legal practice, expanded constructions of justice and wider views of the lawyer-client relationship (discussed below). Emotional intelligence offers an existing conceptual framework, derived from positive psychology, through which to incorporate emotion into legal practice and education. The nature of EI and advantages in adopting it as a framework for emotion in the law are examined below.

### **Thinking like an emotionally intelligent lawyer**

What is emotional intelligence? Emotional intelligence is a construct developed within the discipline of positive psychology as a subset of social intelligence, defined as "the ability to understand and manage people" (Salovey and Mayer, 1989-90:187 citing Thorndike and Stein, 1937, 275). As a type of social intelligence, emotional intelligence is partly about the emotions we experience in relationship with others. At the same time it is a characteristic similar to other individualised constructs such as reasoning, thinking and conscientiousness, and shows differentiation between individuals. Salovey and Mayer (1989-1990, 189) define emotional intelligence as the "*ability to monitor one's own and others' feelings and emotions, to discriminate among them and to use this information to guide one's thinking and actions.*" (emphasis in original).

Models of emotional intelligence derive from research on the role of non-cognitive factors in helping people to succeed in life generally and in the workplace in particular. Spielberger (2004) identifies three categories of models of EI from the literature: the ability model, the trait model and mixed models. According to the ability model, advanced by Salovey and Mayer (1997, 1990), emotional intelligence consists of set of four distinct yet related abilities: perceiving emotions, using emotions, understanding emotions and managing emotions. The trait model proposed by Petrides and associates (2007) defines emotional intelligence as "a constellation of emotion-related self-perceptions located at the lower end of personality" (p. 16). This model identifies fifteen facets of emotional intelligence, including the perception, expression, management and regulation of emotion.

Mixed models include those proposed by Bar-On (1997) and Goleman (1995, 1998), who introduced emotional intelligence to popular culture. The Bar-On model (Bar-On, 1997) identifies five dimensions of emotional intelligence, namely, intrapersonal, interpersonal, stress management, adaptability, and general mood. These dimensions further encompass a range of mental abilities and a wide range of personal qualities,

such as optimism, independence and happiness. Goleman's model (1998) identifies emotional intelligence as a range of competencies and skills that drive performance. Goleman isolates five dimensions of emotional intelligence categorised into two areas, namely, personal competence, which encompasses self-awareness, self-regulation and motivation, and social competence, which includes empathy and social skills (see Table 1 below). Goleman's model offers the most accessible conceptual framework for the purposes of legal education. It is readily adaptable for those purposes because it identifies components of EI as competencies that can be learned and demonstrated.

**Table1:**  
*Components of Emotional Intelligence*

COMPONENTS OF EI		Definition
Intrapersonal dimensions	Self awareness	The ability to recognize our moods, emotions and drives and their effect on others.
	Self regulation	The ability to control or redirect disruptive impulses and moods The propensity to suspend judgment – to think before acting
	Motivation	A passion to work for reasons that go beyond money and status A propensity to pursue goals with energy and persistence
Interpersonal dimensions	Empathy	The ability to understand the emotional make up of other people Skill in treating people according to their emotional reactions
	Social skills	Proficiency in managing relationships and building networks An ability to find common ground and build rapport

Source: Adapted from Goleman (2004:3)

Whichever model is ascribed to, emotional intelligence is foremost about feelings. To be emotionally intelligent signals an ability to monitor feelings, our own and those of others, and to use this information to respond in appropriate and effective ways. For educators it is important to recognise that measures of emotional intelligence are not fixed. EI is recognised as a set of learned skills (Salovey and Mayer, 1989-1990; Weisenger, 1998; Goleman, 2004; Montgomery, 2008) that can be incorporated into educational programs, including legal education.

Emotional intelligence has been positively correlated with academic and professional success. Leading researchers have concluded that EI may be a better predictor of success than IQ. Research connects emotional intelligence to achievement, career success, wellbeing and leadership (Salovey & Mayer, 1997; Goleman 1995, 1997; Weisenger, 1998). A professional legal career requires more than simply 'thinking like a lawyer.' Lawyers need to be able to build and maintain working relationships with their clients, legal colleagues and other professionals. They need to develop suitable communication skills that foster these relationships. Such skills extend beyond pure legal reasoning and an adversarial approach to conflict (Hyams, 2011). Emotion is one dimension of any human relationship. It has traditionally been avoided in legal professional relationships as messy, unpredictable and an intrusion into the rational and orderly processes of legal advice and advocacy. Yet, according to Silver,

"Legal education should prepare students for the emotional dimensions of lawyering. We fail our students if we fail to prepare them for the impact of their

emotional lives, as well as those of their clients, on the practice of law. Legal education should cultivate emotional intelligence” (1999: 1174)

There are at least three advantages to including EI in legal education and practice. First and foremost, EI centralises emotion. It recognizes the emotional dimension of human experience and endeavour and as such confirms its relevance to the business of legal practice. This recognition reflects a growing awareness of the role of emotion in client satisfaction and its incorporation as an important element in expanding approaches to practice. In the negotiation literature, for example, Shapiro (2006) argues that negotiators need to demonstrate emotional intelligence in order to satisfy the goals of parties, which are both affective and instrumental. Negotiation is an essential skill for lawyers but is not taught as a core, compulsory component of a law degree in Australia. Emotion is well recognized as a consideration in Alternative (or Appropriate) Dispute Resolution (ADR) processes (Douglas and Batagol, 2010). Mayer (2000), a leading practitioner and writer in the field, identifies three dimensions of conflict and conflict resolution, namely, cognitive (perception), emotional (feeling), and behavioural (action) dimensions. ADR is increasingly relied upon in our justice system and as a result there are calls for its inclusion as a mandatory component of study (Duffy and Field, 2014). Emotional intelligence has been identified as an important competency in the most often used form of ADR, namely, mediation (Duffy, 2010).

Non-adversarial justice (King et al, 2009) and the comprehensive law movement (Daicoff, 2004; Lam, 2011) incorporate an appreciation of the role of emotion in defining legal problems, engaging processes of resolution and achieving legal outcomes (King 2008). These newer approaches, which include ADR, problem-solving courts, indigenous sentencing courts, diversion programs, holistic law, preventive law, procedural justice, creative problem solving, restorative justice and therapeutic jurisprudence have expanded and refocused traditional views of our justice system and consequently challenged conventional understanding of ‘thinking like a lawyer’. Restorative justice, for example, is premised on an understanding that a legal wrong may cause emotional as well as physical and or material harm that needs to be addressed if problems are to be resolved (King, 2008). Therapeutic jurisprudence “examines the law’s effect on the wellbeing – including the emotional wellbeing – of its subjects” (King 2008, 1097-98). A key tool in these non-traditional approaches has been identified as emotional intelligence (King, 2008).

A second advantage of EI is that it conceptualises intrapersonal and interpersonal dimensions of emotional experience. The intrapersonal dimension of EI points to the wellbeing of individuals in terms of their private, personal experiences. Goleman identifies three personal competencies associated with this dimension – self-awareness, self-regulation and motivation. Considerable attention has been given to fostering wellbeing in law at this intrapersonal level. Examples include exploring resilience, mindfulness, self determination theory, hope theory and strengths theory (Martin, 2014; James, 2011; Huggins et al, 2011). Fostering EI has also been argued as one strategy to promote individual wellbeing in law (Martin, 2014; James, 2008).

The interpersonal dimension of EI points to an individual’s emotional experiences in interaction with others. Here, as well as the relevance of emotion to newer approaches in law, emotion’s relevance to conventional legal practice is evident. Emotional intelligence is a framework that focuses attention on the lawyer-client relationship and the relevance of emotion in that relationship. The lawyer-client relationship is a pivotal context for legal practice and hence a critical focus for legal education. Within the context of that relationship, the legal practitioner gathers the relevant facts, determines a relevant legal cause of action and pursues a likely legal remedy. The stories, or narratives, presented by clients will inevitably have an emotional dimension (Hyams, 2011). Often that dimension will be a response to conflict with another party

or involve attempts to avoid conflict in the future. Where there is conflict a range of difficult and perhaps strong emotions may be felt and expressed including, anger, frustration, confusion and sadness. A practitioner needs to be able to work with such feelings. A lawyer's interaction with the client is purposive and importantly his/her task is to filter the client's story for 'material' facts relevant to legal advice and representation. At the same time the lawyer's role is above all client centred. It is about taking instructions from a client about how to proceed. In achieving this end a practitioner needs to assist a client to explore the implications of pursuing any available remedy, including the emotional impact. In Goleman's model, this interpersonal dimension of EI is translated to social competence, which includes empathy and social skills.

A third advantage of adopting EI as a framework for emotion in the practice of law is that it exemplifies reflective practice, which is increasingly recognized as integral to effective legal practice and education (Christenson and Kift, 2000; Burton and McNamara, 2009; Field, 2007). EI is centrally about a capacity to reflect upon one's own and another's emotions in order to guide behavior. Reflective practice is a process of continuous improvement that, as originally conceived by Schon (1983), encompasses reflection-in-action and reflection-on-action. In Schon's seminal work he argues that professional knowledge is more than technical rationality or the rational application of theory (in a legal context, of legal principles) to practice. Professional knowledge, according to Schon (1983, 1987), develops as a result of reflection in and on practice. Reflection furthers the development of practice wisdom in which tacit knowledge, or intuition, and artistry play a part and which sit beyond mere rational analysis.

Schon's thesis can be extrapolated to a consideration of emotion and its value in legal practice. Emphasis on rational-analytical problem solving reflects a perceived dichotomy between reason and emotion in which "getting emotional is often viewed as an impediment, an obstacle to the ostensible superiority of rational thinking" (Shapiro, 2002: 67-68). Emotion is often associated with human weakness, loss of control, impulsiveness and short sightedness (Shapiro, 2002). However, studies in leadership assert that emotion is an integral component of cognitive processes. Relying on developments in neuroscience, such studies suggest that feelings are necessary to make good decisions (George 2000; Goleman 1995). Furthermore, an emotional dimension to learning is now recognized. For example, according to the theory of learning advanced by Illeris (2003),

"all learning includes three dimensions, namely, the cognitive dimension of knowledge and skills, the emotional dimension of feelings and motivation, and the social dimension of communication and cooperation - all of which are embedded in a societally situated context." (p. 396)

Professional legal practice necessitates a commitment to continued professional development, or life long learning. Reflective practice is one component of that ongoing development (Burton and McNamara, 2009). The reflective perspective integral to developing and sustaining emotional intelligence can be readily incorporated into a reflective practice that is consistent with continuing professional development.

### **Emotional intelligence in clinical legal education**

Understanding and developing emotional intelligence is ideally suited to an experiential learning environment (Cain, 2004). For an optimal learning experience, emotions need to be experienced, observed in others to be appreciated for their relationship context and reflected upon to be assessed for their impact. Clinical legal education offers an optimal site for learning about and developing emotional

intelligence. Central to clinical experience is a student's direct contact with clients and the establishment of a (student) lawyer-client relationship. Whether that relationship spans a telephone call, one face-to-face interview or ongoing contact, it represents a central focus of legal practice. Within that relationship emotions are experienced and impact upon the dynamic of practice and its outcomes.

Learning about EI in a clinical program can be coupled with learning about reflective practice. The use of reflective journals, portfolios, diaries, reflective reports and notebooks are commonly used in clinical legal education programs to assist students to gain insights into their practice experiences (Burton and McNamara, 2007; Hyams, 2010). From a review of the literature, Burton and McNamara (2009) conclude that:

“reflection requires purposeful thinking and contextualising of what is already known, relating learning to existing knowledge, values and beliefs, considering a range of solutions or options and developing one's previous knowledge, values and beliefs” (175).

For the development of emotional intelligence, reflection requires a student to think about their personal experience and communication of emotion, a client's experience and expression of emotion and the relevance of those experiences to issues of practice. Questions about and insights into relevant knowledge, values and beliefs will be accompanied by emotional responses within the dynamics of practice. The aim of reflection is to filter emotional responses in such a way as to positively direct thinking and behaviour. Reflective written exercises enable students to record their experiences, gain insight from them and use that insight to guide future action.

Bourner (2003) proposes a series of twelve questions for use as a reflective exercise with application to varying practice contexts. The questions canvass, inter alia, knowledge, values and beliefs, self assessment of strengths and weakness and includes one question about feelings, namely:

How do you feel about that experience now compared with how you felt about it at the time? (Bourner, 2003: 271)

A reflective exercise for the purposes of EI would enable a wider and more in depth review of feelings experienced during practice. Bourne's approach provides a useful starting point. In the table below a series of questions relevant to each of the components of emotional intelligence identified by Goleman (2004, 1998, 1995) are identified. The central column identifies practice issues relevant to each component of EI, which inform the questions posed. The issues and questions raised in the table are not exhaustive. They are merely illustrate links between questions about emotion and issues of practice and could be expanded by instructor and students alike.

**Table 2:**  
*A Reflective Practice Design for Emotional Intelligence*

COMPONENTS OF EI	ISSUES IN PRACTICE	QUESTIONS
Self awareness	Bias	What feelings were you aware of during your interaction with this client? What values, beliefs, assumptions and or personal experiences may have prompted those feelings?
Self regulation	Client service	Were you able to acknowledge yet put aside or redirect any extraneous feelings? What helped you to do so?
Motivation	Legal ethics and law reform	What issues of legal ethics and or law reform were raised by your work with this client?
Empathy	Relationship building	What emotions were expressed by this client? How did you respond to those emotions? Were you able to 'stand in the shoes of your client'?
Social skills	Communication	Did you feel a sense of rapport with this client? What indicated that to you? What verbal and nonverbal cues did you use to foster active listening?

By way of example, links between components of EI, issues of practice and questions about emotional experience, illustrated in the table, are examined below:

### **Self awareness**

An important issue for practice is to avoid conflicts of interest. Conflict checks are routinely made to ensure that the same practitioner or firm does not represent both parties in a matter. Representing a client where personal gain may be a by-product is to be avoided. Emotional responses can also introduce bias. Negative reactions can taint the quality if not the substance of advice given. Negative emotions may be generated by past experience, cultural or situated bias or by assumptions about what is or ought to be. A practitioner and student's task is to develop awareness of any such biases, to question the basis of them and avoid any negative impact upon their clients. The questions above prompt investigation of possible bias. Consistent with issues of bias in this broader sense, the Queensland Law Society's (QLS) 'Guide to Client Care' (2014) suggests that practitioners: "Identify and address any assumptions – both the client's and your own – that could lead to later misunderstandings or tensions" (p.3)

### **Self regulation**

An important focus for the lawyer-client relationship is not merely the substance and procedure of the law, but client service. The QLS Guide to Client Care (2014) emphasizes client service and communication. A practitioner might find him/herself frustrated, irritated or even angry with a client due to their own biases or the attitude and or conduct of a client. The primacy of serving the interests of the client demands that the practitioner subjugates their emotional experience for the client's benefit. Mindfulness is a technique useful for facilitating emotional awareness and detachment (Martin, 2014). Skill in acknowledging a client's emotional experience and responding positively and productively can be learned with guidance, and from experience. A client's expression of negative emotion may be useful feedback. As noted by the QLS Guide (2014): "Client feedback and complaints information, as well as your own observations, should give you the information to identify strengths and weaknesses in your service, and to continuously improve" (p.3).

**Motivation**

Goleman's (2004) description of motivation as a component of EI favours motivation that exists apart from money and status. Legal professional identity, ethics and the pursuit of a just society are factors that motivate legal practitioners. A client's apparent experience of injustice can trigger strong emotional reactions in the client and their lawyer. These reactions can act as positive motivating factors for action on behalf of a client and for input into law reform.

**Empathy**

Empathy is the capacity to 'stand in the shoes of another'. It is an emotional connection that communicates understanding without over-identification. Empathy is synonymous with compassion and it is an essential ingredient in relationships of trust (Egan, 2002). Expression of empathy is important in building rapport with a client. According to the QLS Guide (2014), clients "do not just need technical skills, they also need the good feelings, positive experiences and confidence that go with it" (p. 3).

**Social Skills**

Client-centred practice requires actively listening to a client's narrative. Active listening is a concentrated skill encompassing verbal and nonverbal communication skills (Egan, 2002). According to Strasser and Randolph (2004: 42) clients want to be "*truly heard, and understood, and accepted*" (emphasis in original). Lawyers need to demonstrate effective communication skills in order to understand both the factual and affective dimensions of their client's experience. As noted in the QLS Guide (2014): "Whatever the progress of the matter, if you cause the client stress or frustration by poor communication or administration, you are not providing a good service" (p.1).

**Conclusion**

Threats to wellbeing provide an important and critical justification for including emotion in legal curricula. Existing empirical research suggests that legal practice and education pose threats to wellbeing due to an emphasis on the traditional mode of 'thinking like a lawyer'. Critique of Australian empirical studies suggests significant methodological limitations for those studies. These limitations cast doubt on assertions that lawyers and legal students suffer greater emotional distress than other professional groups and student cohorts in Australia. Existing studies have not sufficiently probed the causes of psychological distress to demonstrate that legal reasoning and an adversarial culture are direct causes of psychological distress amongst lawyers and law students. Nonetheless, there is a consensus amongst the legal academy and practitioners that levels of distress are critically concerning and that there exists a real possibility that distress is due in part to the conventional approach to 'thinking like a lawyer'.

The neglect of emotional wellbeing in the culture of legal education and practice is pointedly suggested by empirical studies since the mid-80's in the United States and in the last decade in Australia. The existence of measurable distress, whatever the precise cause, provides justification for considering the emotional dimension of experience as a component of legal education.

Emotional intelligence provides a conceptual framework from which to give space to the reality of human emotional experience. It is a framework that is developed, relevant and practice-oriented. There are at least three identifiable advantages for using EI as a framework for emotion in legal education and practice.

The first advantage is that EI deals centrally and explicitly with emotion. EI is therefore consistent with newer approaches to law and legal practice, such as non-adversarial justice and the comprehensive law movement, which offer perspectives that incorporate emotions as central considerations. These perspectives evidence shifts away from the traditional view of 'thinking like a lawyer' and provide further justification for explicit inclusion of emotion in legal education. A further advantage is that emotional intelligence is constructed as integral to intra and interpersonal experience. Issues of the wellbeing of individual legal practitioners and law students can be located within the realm of intrapersonal experience. Within this realm development of EI is one strategy that can foster wellbeing. Wellbeing is also relevant to the lawyer-client relationship. EI provides a framework within which to acquaint students with the need to address the emotional impact of legal problems and remedies in the context of actual practice. Finally EI is integrally about reflection on emotions, our own and those of others, in order to guide our behaviour. As such, EI is readily incorporated into a reflective legal practice. Reflective practice is a standard long evident in the law and more recently given explicit recognition in legal education. Incorporating reflection on the emotions of practitioner and client extends legal practice beyond traditional boundaries to 'thinking like an emotionally intelligent lawyer.'

Clinical legal education programs provide optimal sites for learning about and developing emotional intelligence. EI can be incorporated into exercises designed to foster reflective practice. Components of EI can be related to issues arising in client care and communication, ethics and law reform. A series of reflective prompt questions has been suggested above, which are aimed to facilitate reflection on the emotional responses of clients and practitioners and the impact of those emotions on legal practice.

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