

LETTING THEM LEARN HOW TO BE LAW STUDENTS:
STUDENT PERCEPTIONS OF ‘UNGRADED PASS/FAIL’
ASSESSMENT IN THE FOUNDATIONAL SUBJECT OF A
QUALIFYING LAW DEGREE

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ABSTRACT

The significant body of literature devoted to the first-year experience in law school points to the importance of an intentional and holistic approach to engage learners, facilitate support, and create a sense of belonging by fostering involvement, engagement and connectedness. In an effort to achieve these objectives, the assessment method in the foundational unit of the Juris Doctor at the University of Western Australia was changed to ‘ungraded pass/fail’ (‘UP/F’) in 2021. This article reports and reflects on the data from a study that sought to understand how the UP/F aspect of the unit was perceived and experienced by students. Some key findings include that the vast majority of respondents thought being assessed UP/F was fair and that it ‘levelled the playing field’. Most respondents also indicated that being assessed UP/F created a friendly atmosphere and helped them to focus on developing skills.

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I INTRODUCTION

There is relatively little reported scholarship on the first-year experiences of students who commence a qualifying law degree after having already earned an undergraduate qualification.¹ However, given the increasing numbers of Australian law schools offering a postgraduate Juris Doctor ('JD') degree, there is a need for research about how to best support these students as they transition to legal studies.² This article contributes to addressing that need. It does so by reporting the results from a study that sought to understand how JD students at the University of Western Australia ('UWA') perceived and experienced the foundational unit of the degree being assessed on an 'ungraded pass/fail' ('UP/F') basis.

The foundational unit in the JD at UWA — LAWS4101 'Foundations of Law and Lawyering' ('LAWS4101') — runs as a two-week intensive prior to Semester 1. Students come to the JD with a range of different backgrounds, experiences and skills.³ LAWS4101 aims to meet those students 'where they are' and build their knowledge, skills and confidence so that by the time the semester begins in earnest they are prepared to engage fully with their JD studies.

The authors of this article coordinate and co-teach LAWS4101. In 2021, we changed the assessment method in the unit to UP/F. Our motivations for the change stemmed from a desire to improve the first-year experience by creating an environment in which students felt most able to learn, develop skills, and form connections with each other.⁴ In designing our UP/F assessment structure, we were informed by the scholarship relating to grading, feedback and motivation in law schools and universities more broadly.⁵ Accordingly, all assessment items in the unit were returned swiftly with marks and feedback, but ultimately all students who passed overall had only 'ungraded pass' recorded on their transcripts.

Part II of this article sets out the relevant background relating to the first-year experience in law school and assessment in legal education. Part III then provides further context about the move to UP/F assessment in LAWS4101. The study's design is canvassed in Part IV, and the results are set out in Part V. Part VI then discusses the quantitative results with reference to some qualitative responses, noting that the vast majority of participants experienced and perceived the UP/F aspect of LAWS4101 positively. Most participants thought being assessed UP/F was fair, that it helped them focus on developing skills, and that it created a friendly

¹ Wendy Larcombe and Ian Malkin, 'The JD First Year Experience: Design Issues and Strategies' (2011) 21(1) *Legal Education Review* 2:1–22.

² *Ibid.*

³ *Ibid.* 7–11; see also Susan Armstrong and Michelle Sanson, 'From Confusion to Confidence: Transitioning to Law School' (2012) 12(1) *QUT Law & Justice Journal* 21, 33.

⁴ See, generally, Kate Galloway et al, 'Approaches to Student Support in the First Year of Law School' (2011) 21(2) *Legal Education Review* 235, 235.

⁵ See, eg, Steven I Friedland, 'Rescuing Pluto from the Cold: Creating an Assessment-Centered Legal Education' (2018) 67(2) *Journal of Legal Education* 592; Alison Bone and Paul Maharg, *Critical Perspectives on the Scholarship of Assessment and Learning in Law: Volume 1: England* (ANU Press, 2019); Gerald F Hess, 'Heads and Hearts: The Teaching and Learning Environment in Law School' (2002) 52(1–2) *Journal of Legal Education* 75.

atmosphere. Overall, the findings from this study suggest that moving to UP/F assessment in a foundational JD unit contributes to a positive first-year experience in law school.

II BACKGROUND

A *First-Year Experience in Law*

The body of literature relating to the first-year experience in law school is ‘significant and expanding’.⁶ The extant literature considers the challenges first-year law students encounter, what law students want and expect from their first-year experience, and how educators can provide their students with a successful transition to law school. Although LAWS4101 is only one part of the broader JD first-year experience at UWA, it is the stepping stone into the first year. LAWS4101 runs as a two-week intensive before Semester 1 and is the first unit that UWA JD students must take. The unit introduces JD students to fundamental legal skills and knowledge, to their law school and fellow students, and to studying law. It is a crucial part of the first year; therefore, this article sits squarely within the body of literature relating to the first-year experience in law.

1 *Challenges and Expectations*

As set out by Webster et al, first-year law students ‘are enthusiastic and ready to learn but face considerable social, academic and practical challenges’.⁷ The experience of adjusting to legal studies has been described as a ‘trial by fire’.⁸ A study by Armstrong, Campbell and Brogan found that two thirds of first-year students did not know how to approach the study of law and found studying law difficult.⁹ That study also found that first-year law students exhibit much higher levels of anxiety, uncertainty and disengagement than was reported in national surveys of all first-year students across various disciplines.¹⁰ Later research by Armstrong and Sanson found that one of the biggest challenges first-year law students face is coping with the volume of reading and other workload concerns, noting that ‘graduate students in particular felt pressured by the heavy workload’.¹¹ Armstrong and Sanson found that 41% of first-year student participants report being ‘completely overwhelmed’.¹²

⁶ Larcombe and Malkin (n 1) 1.

⁷ Adam Webster et al, ‘Enhancing the First Year Curriculum and Experience: Law School “Boot Camp”’ (2018) 28(1) *Legal Education Review* 1:1–24, 2.

⁸ Armstrong and Sanson (n 3) 34.

⁹ Susan Armstrong, Marnie Campbell and Michael Brogan, ‘Interventions to Enhance the Student Experience of a First-Year Law Degree: What They Really Wanted’ (2009) 2(1) *Journal of the Australasian Law Teachers Association* 135, 139.

¹⁰ *Ibid* 135.

¹¹ Armstrong and Sanson (n 3) 30.

¹² *Ibid*.

First-year law students are required to develop an entirely new skillset,¹³ and learning to think, feel and act like a law student is often difficult.¹⁴ As put by Christopher:

Learning lawyering skills, and becoming competent or proficient in them, is a struggle. Legal educators need to acknowledge that students struggle, to expect it, and to convey to students that their struggle is normal. In fact, it's productive — learning is hard, and lawyers learn and struggle throughout their careers.¹⁵

It has been accepted amongst the scholarly literature that assessment, grading and ranking are primary stressors for students across all disciplines and that this is undoubtedly the case for first-year law students.¹⁶ Some research indicates that these aspects of the university experience are particularly challenging for first-year law students because their expectations of their results may differ from their actual results.¹⁷ As put by Bromberger:

Most first-year law students (whether they come directly from high school or have completed an undergraduate university degree) are accustomed to receiving very high marks ... Yet, when they reach law school, the first assessment grade they receive is almost never comparable to that to which they have become accustomed ... Thus, the first experience at a law school learning task is almost universally disappointing to each student. This first and negative experience almost immediately creates an environment within a large section of the first-year law school cohort that produces low self-efficacy ...¹⁸

Indeed, the study by Armstrong and Sanson indicates a 'mismatch' between student expectations of their performance and the results they achieve, with some first-year law students expressing 'real surprise' about their results,¹⁹ which causes some to seriously question if they are 'smart enough' for law school.²⁰ This is particularly concerning because the wider literature on the first-year experience at university indicates that alignment between expected and actual results is a marker of a successful transition to higher education.²¹

Research focusing on the wants and expectations of first-year law students has found, perhaps unsurprisingly, that they would like further guidance on how to overcome the challenges discussed in this section. Armstrong, Campbell and Brogan report that nearly 60% of participants in their study said they want 'more help about *how* to be a law student'.²² Similarly,

¹³ Nikki Bromberger, 'Enhancing Law Student Learning — The Nurturing Teacher' (2010) 20(1–2) *Legal Education Review* 45, 54–5.

¹⁴ See, generally, Mary Heath et al, 'Learning to Feel Like a Lawyer: Law Teachers, Sessional Teaching and Emotional Labour in Legal Education' (2017) 26(3) *Griffith Law Review* 430.

¹⁵ Catherine Martin Christopher, 'Normalizing Struggle' (2020) 73(1) *Arkansas Law Review* 27, 28.

¹⁶ Hess (n 5) 78; Webster et al (n 7) 17; Bromberger (n 13) 55.

¹⁷ Armstrong and Sanson (n 3) 31.

¹⁸ Bromberger (n 13) 55.

¹⁹ Armstrong and Sanson (n 3) 31.

²⁰ *Ibid* 39.

²¹ See, eg, Kerri-Lee Krause et al, *The First Year Experience in Australian Universities: Findings from a Decade of National Studies* (Final Report, Australian Government, Department of Education, Science and Training, 2005); Richard James, Kerri-Lee Krause and Claire Jennings, *The First Year Experience in Australian Universities: Findings from 1994 to 2009* (Report, Centre for the Study of Higher Education, March 2010).

²² Armstrong, Campbell and Brogan (n 9) 139.

the later study by Armstrong and Sanson found that first-year students want more guidance about *how* to engage in their core learning and assessment tasks, remarking that this is particularly important for student cohorts with ‘varied prior learning experience’.²³ Other research in this area has noted that academic staff also believe it is the responsibility of the first-year program to help students develop the foundational skills and awareness they will need for the remainder of their legal studies.²⁴

2 *Approaches to Design and Delivery*

According to Kift, who has contributed enormously to the scholarship on transition pedagogies, the first-year experience

should be engaging, inclusive, relevant and social for all students ... It must be all of these things so that the students who have been accepted into our university programs are supported to learn and, thus, are successful, retained and graduate ...²⁵

In an earlier publication, Kift, Nelson and Clarke emphasise the importance of a first-year curriculum that is intentionally designed to:

1. engage new learners in their learning and mediate support for that learning ...
2. [facilitate] awareness of and timely access to ... support services; and
3. [create] a sense of belonging through involvement, engagement and connectedness ...²⁶

Fostering a sense of belonging is necessary to prevent first-year students from becoming isolated and disengaged.²⁷ Promoting engagement also requires providing students with safe learning spaces to explore their potential and creativity.²⁸

Writing of the first-year experience in law school specifically, Galloway et al state that ‘students are most engaged and on-topic in an environment where they are not stressed or in fear of humiliation’, noting that positive learning environments are characterised by an absence

²³ Armstrong and Sanson (n 3) 34.

²⁴ Rachel Bradshaw et al, ‘Renewal of the LLB Transition Curriculum for the New Quality Regime’ in Leon Wolff and Maria Nicolae (eds), *The First-Year Experience in Law School: A New Beginning* (Halstead Press, 2014) 130, 135–7.

²⁵ Sally Kift, ‘A Decade of Transition Pedagogy: A Quantum Leap in Conceptualising the First Year Experience’ (2015) 2 *HERDSA Review of Higher Education* 51, 54.

²⁶ Sally Kift, Karen Nelson and John Clarke, ‘Transition Pedagogy: A Third Generation Approach to FYE: A Case Study of Policy and Practice for the Higher Education Sector’ (2010) 1(1) *International Journal of the First Year in Higher Education* 1, 4.

²⁷ Sally Kift and Rachael Field, ‘Intentional First Year Curriculum Design as a Means of Facilitating Student Engagement: Some Exemplars’ (Conference Paper, Pacific Rim First Year in Higher Education Conference, 29 June–2 July 2009) 6.

²⁸ *Ibid* 7.

of pressure, stress and despair.²⁹ Indeed, whilst creating the best environment for effective learning is a pressing matter for all educators, it has been described as ‘particularly stark’ when teaching first-year law students who experience heightened anxiety levels.³⁰

Much has already been written about the various strategies, services and design choices that might help to achieve the above objectives in a first-year law program. They include, for example, providing students with opportunities to learn how to learn,³¹ scaffolding student learning of skills and content,³² giving meaningful and early feedback,³³ and providing integrated pastoral support.³⁴

It is important to note that the vast bulk of scholarship on the first-year experience in law school relates to undergraduate Bachelor of Laws (LLB) students whose first year in law school is often also their first year in higher education.³⁵ By contrast, JD students are postgraduate students who have completed an undergraduate qualification before commencing the course. It is, therefore, fair to ask whether the scholarship applies to the JD context. As set out by Larcombe and Malkin, the answer to that question is ‘yes’:

Students commencing studies in law as graduates are still involved in a process of transition: to the new disciplinary environment and its methods of inquiry; to learning how knowledge is constructed and communicated within law; and to becoming identified with the legal community and the professional careers for which the course is preparation. Further, graduate-entry students are similarly diverse in their expectations, preparedness, backgrounds and interests — in some ways, this ‘diversity’ may be even more pronounced in a commencing graduate-entry cohort ...³⁶

Whilst the needs of JD students are not identical to those of LLB students, ‘the commonalities are likely to outweigh the differences’.³⁷ It is still the case in a graduate-entry law program that students have different starting points, and thus first-year teachers must be sensitive to varying frames of reference, competencies and needs.³⁸

²⁹ Galloway et al (n 4) 243 citing Sarah Moore and Nyiel Kuol, ‘Matters of the Heart: Exploring the Emotional Dimensions of Educational Experience in Recollected Accounts of Excellent Teaching’ (2007) 12(2) *International Journal for Academic Development* 87, 92.

³⁰ Bromberger (n 13) 54–5.

³¹ Armstrong, Campbell and Brogan (n 9) 146.

³² Bradshaw et al (n 24) 134–8.

³³ Bromberger (n 13) 56.

³⁴ Galloway et al (n 4) 239–40.

³⁵ See, eg, Armstrong and Sanson (n 3) 27.

³⁶ Larcombe and Malkin (n 1) 7–11.

³⁷ *Ibid* 8–9.

³⁸ Webster et al (n 7) 2. See also Heath et al (n 14) 442.

B *Teaching, Learning, Grading and Assessing*

Although the first-year experience must encompass more than teaching, learning, grading and assessing, these are undoubtedly core aspects of any university course. Thus, the broader literature in these areas also forms part of the background of this article.

Our students are, after all, at law school to learn. Educators cannot meaningfully strive to improve their students' experience at law school without considering how our teaching practices impact student learning and wellbeing. As Friedland observes:

Teaching and learning remain the core elements of law school. While it is easy to slip into conflating the two as a single entity, they are generally separate activities. Just because teaching is taking place does not mean learning is occurring as well.³⁹

Law teachers can devote all the time in the world to teaching, but to determine whether learning is occurring, we need some assessment method. How we assess learning will also determine what is learned, as assessment 'drives what, how and how much students study'.⁴⁰ Law school assessment has received much attention from academics and accreditation bodies,⁴¹ and law teachers know its importance to students.⁴² As Bone and Maharg argue:

The processes by which law schools make judgments upon their students is one of the most important activities that law school staff undertake, with effects that can be long-lasting on their students.⁴³

Although the importance of law school assessment is widely recognised, not least because of its impact on students, Zimmerman notes that there is 'remarkably little' research considering law students' perspectives on assessment.⁴⁴ However, as discussed above, we do know that the *grades* attached to assessments generate great stress for law students.⁴⁵ Grades can also cultivate a competitive atmosphere that inhibits collegiality and collaboration, exacerbating the already intensely competitive atmosphere of many law schools.⁴⁶ Importantly, there is evidence that grading focuses student attention on superficial learning necessary to receive a good grade

³⁹ Friedland (n 5) 596.

⁴⁰ Rob Wass et al, 'Annoyance and Frustration: Emotional Responses to Being Assessed in Higher Education' (2020) 21(3) *Active Learning in Higher Education* 189, 190.

⁴¹ Bone and Maharg (n 5) 15.

⁴² Olympia Duhart, 'It's Not for a Grade: The Rewards and Risks of Low-Risk Assessment in the High-Stakes Law School Classroom' (2015) 7(2) *Elon Law Review* 491, 504.

⁴³ Bone and Maharg (n 5) 15.

⁴⁴ Emily Zimmerman, 'What Do Law Students Want: The Missing Piece of the Assessment Puzzle' (2010) 42(1) *Rutgers Law Journal* 1, 4.

⁴⁵ Nathan A Preuss, 'Applying Motivation Theory to Improve 1Ls' Motivation, Self-Efficacy, and Skill Mastery' (2022) 114(1) *Law Library Journal* 59, 59.

⁴⁶ Duhart (n 42) 492.

and can have a negative impact on overall learning outcomes.⁴⁷ Despite this, graded assessment is ubiquitous in modern universities and most law schools.⁴⁸

While grading can have a variety of negative impacts on student wellbeing and learning, the literature regarding assessment in law schools consistently supports the value of feedback.⁴⁹ Traditionally, law school assessments were dominated by the end-of-semester examination,⁵⁰ though in Australian law schools, the examination is now rarely the sole assessment item.⁵¹ Exams are usually summative assessments, providing feedback (in the form of a grade) only once all teaching and learning have finished. On the other hand, formative assessments offer students feedback while learning is still in process.⁵² Formative assessment allows students to practice skills, receive feedback, and then act on that feedback to improve their performance.⁵³ Completing formative assessment and receiving and reflecting upon feedback does not just assess learning; it is itself a learning experience. As Hess observes, ‘the importance of formative feedback for student learning cannot be overestimated’.⁵⁴ Constructive formative feedback increases students’ intrinsic motivation.⁵⁵ It may be even more effective if it is ungraded so that students focus on the suggestions for improvement and not the mark received.⁵⁶ As Hess explains:

The quality of students’ learning is closely tied to their motivation. Motivation is enhanced more by the chance to achieve rewards than the desire to avoid punishment. ... Motivation can be extrinsic (motivation for grades, money, or other rewards) or intrinsic (motivation based on curiosity, interest, and the desire to learn). Although both types of motivation can aid learning, students perform better when their motivation is intrinsic.⁵⁷

Formative assessment increases intrinsic motivation because it usually has little or no impact on students’ final grades and removes the fear of ‘punishment’ in the form of failure or a poor

⁴⁷ Annemette Kjærgaard, Elisabeth N Mikkelsen and Julie Buhl-Wiggers, ‘The Gradeless Paradox: Emancipatory Promises but Ambivalent Effects of Gradeless Learning in Business and Management Education’ [2022] *Management Learning* 1, 2.

⁴⁸ Tony Harland et al, ‘An Assessment Arms Race and Its Fallout: High-Stakes Grading and the Case for Slow Scholarship’ (2015) 40(4) *Assessment & Evaluation in Higher Education* 528, 529; Andrea A Curcio, ‘Assessing Differently and Using Empirical Studies to See If It Makes a Difference: Can Law Schools Do It Better?’ (2009) 27(4) *Quinnipiac Law Review* 899.

⁴⁹ Armstrong and Sanson (n 3) 40; Hess (n 5) 86; Margaret Ryznar and Yvonne M Dutton, ‘Lighting a Fire: The Power of Intrinsic Motivation in Online Teaching’ (2020) 70 *Syracuse Law Review* 73, 85.

⁵⁰ Carol Springer Sargent and Andrea A Curcio, ‘Empirical Evidence that Formative Assessments Improve Final Exams’ (2012) 61(3) *Journal of Legal Education* 379, 380.

⁵¹ Kelley Burton, ‘Measuring and Enhancing the Authenticity of an Examination and Other Assessment Tasks’ (2015) 8(1–2) *Journal of the Australasian Law Teachers Association* 25, 28.

⁵² Derek Luke, ‘From Filling Buckets to Lighting Fires: The ABA Standards and the Effects of Teaching Methods, Assessments, and Feedback on Student Learning Outcomes’ (2019) 81(1) *University of Pittsburgh Law Review* 209, 223.

⁵³ Tony Harland and Navé Wald, ‘The Assessment Arms Race and the Evolution of a University’s Assessment Practices’ (2021) 46(1) *Assessment & Evaluation in Higher Education* 105, 112.

⁵⁴ Hess (n 5) 106.

⁵⁵ Ryznar and Dutton (n 49) 85.

⁵⁶ Sargent and Curcio (n 50) 382.

⁵⁷ Hess (n 5) 99.

grade. It can also enhance students' interest and desire to learn by allowing them to test their understanding and learn from their mistakes.⁵⁸ Conversely, summative assessment measures students' learning at the end of a unit of study and is not directed toward encouraging further learning or helping students improve.⁵⁹

Thus, we can draw three main ideas from the existing literature. First, assessment is necessary to ensure that learning does take place. Second, grading negatively impacts student wellbeing and may also negatively affect learning. Third, formative assessment improves learning and increases motivation as it decouples the significant benefits of feedback from the negative impacts of grading. In response, several researchers have proposed and experimented with gradeless learning.⁶⁰ In law schools, student and lecturer expectations, institutional and accreditation requirements, employer preferences, and general inertia present significant hurdles to gradeless learning.⁶¹ However, in the right circumstances, low- or no-stakes assessment can work well.⁶² A common model of gradeless learning records student performance on a pass/fail basis.⁶³ Some models have additional bands, for example, pass/fail/distinction, but adding passing levels is undesirable because this just replicates the logic of the grading process.⁶⁴ Models that allow students to choose between having their final mark or an ungraded pass/fail ultimately show on their transcript may be criticised for similar reasons.⁶⁵

The pass/fail approach is particularly appropriate in professional schools where achievement to a minimum standard is required for admission to the profession, and professionals must continue learning throughout their careers.⁶⁶ Therefore, an ungraded pass/fail assessment structure — especially one that involves the provision of feedback and indicative grades — offers law teachers the ability to preserve the benefits of formative assessment and feedback whilst avoiding the detrimental effects of grading. As Duhart argues: 'Law school will always

⁵⁸ Duhart (n 42) 508.

⁵⁹ Luke (n 52) 222.

⁶⁰ See, eg, Kjærgaard, Mikkelsen and Buhl-Wiggers (n 47); Preuss (n 45); Stuart Tannock, 'No Grades in Higher Education Now! Revisiting the Place of Graded Assessment in the Reimagination of the Public University' (2017) 42(8) *Studies in Higher Education* 1345; Muireann O'Keeffe, Clare Gormley and Pip Bruce Ferguson, 'Moving the Focus from Grades to Feedback: A Case Study of Pass/Fail Marking' (2018) 11(1) *Practitioner Research in Higher Education* 70; Robert A Bloodgood et al, 'A Change to Pass/Fail Grading in the First Two Years at One Medical School Results in Improved Psychological Well-Being' (2009) 84(5) *Academic Medicine* 655; Chris McMorran and Kiruthika Ragupathi, 'The Promise and Pitfalls of Gradeless Learning: Responses to an Alternative Approach to Grading' (2020) 44(7) *Journal of Further and Higher Education* 925.

⁶¹ Kaci Bishop, 'Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience' (2018) 70(4) *Arkansas Law Review* 4:959–1005.

⁶² Kelsey Chamberlin, Maï Yasué and I-Chant A Chiang, 'The Impact of Grades on Student Motivation' [2018] *Active Learning in Higher Education* 1, 13; Duhart (n 42) 508.

⁶³ O'Keeffe, Gormley and Ferguson (n 60) 71.

⁶⁴ Tannock (n 60) 1351.

⁶⁵ David J Malan, 'Toward an Ungraded CS50' (Conference Paper, Association for Computing Machinery Technical Symposium on Computer Science Education, virtual event, 13–20 March 2021) 1–2 <<https://doi.org/10.1145/3408877.3432461>>.

⁶⁶ O'Keeffe, Gormley and Ferguson (n 60) 71; Bloodgood et al (n 60); McMorran and Ragupathi (n 60) 926.

be difficult. And it should be challenging. But the high-stakes law school culture should not infect the assessment process.’⁶⁷

III MOVING TO UNGRADED PASS/FAIL IN LAWS4101

We first taught LAWS4101 together in February 2020. The incoming cohort was, on the whole, hardworking, highly motivated, and successful in prior academic study, and we were pleased with the standard of performance across all assessment items. However, despite the attention devoted to soft skills and student wellbeing over the intensive, we observed high anxiety levels and some unpleasant competitiveness emerging amongst the cohort. We also noticed — and this was consistent with our experience teaching in other JD units and the literature on assessment — that students tended to focus on grades to the exclusion of almost everything else. Any work, topics or activities that were not graded were not ‘worth’ anything and therefore did not need to be taken as seriously. Conversely, graded work generated a great deal of anxiety, and students seemed to focus on what was necessary for a high mark rather than the skills and knowledge it required them to develop.

Based on these observations and our review of the literature, we developed a proposal to change the unit to UP/F, which we planned to put before the Law School’s Learning and Teaching Committee in early 2021 so that the change could be made for 2022. However, before the formal approval process could even commence, an unexpected Covid-related lockdown in February 2021 required us to move the entire first week of LAWS4101 in that year to online teaching. In response, we were able to obtain expedited approval to assess LAWS4101 as UP/F in 2021 to mitigate any unfair disadvantage some students might suffer because of the rapid shift in teaching mode. The change was communicated to students as an accommodation due to exceptional circumstances, and students seemed to accept it on that basis.

By 2022, the Learning and Teaching Committee had approved our proposal to implement UP/F assessment in LAWS4101 on an ongoing basis. Accordingly, LAWS4101 was also assessed UP/F in 2022, but this was not described to students as an accommodation. Instead, we explicitly communicated to students the pedagogical reasons for assessing the unit UP/F. For example, in the introductory lecture, we explained to students:

This unit teaches you how to ‘do’ law school and how to be a future lawyer ... and it feels quite unfair and antithetical to the unit’s aims for us to say, on the one hand, that we’re teaching you how to do those things and that this is a safe space to learn how to do that ... yet on the other hand, for us to grade you on how well you do as you’re learning to be a law student.

This change in messaging seemed to positively affect students’ attitudes toward the UP/F assessment mechanism, as discussed in Parts V and VI below.

⁶⁷ Duhart (n 42) 516.

Students completed three required assessment items in LAWS4101 in 2021 and 2022. The UP/F assessment structure meant that the grade recorded on students' transcripts was either 'ungraded pass' or 'fail'. However, each assessment item was fully evaluated, awarded an indicative mark (out of 100%), and returned with feedback. The feedback was detailed, and we gave students ample opportunity to meet with us individually to discuss their performance and, if necessary, seek clarification of the feedback. Our decision to award these indicative marks and provide feedback — irrespective of the unit ultimately being assessed as UP/F — was guided by the literature. We wanted to maximise the benefits of gradeless learning by providing genuine opportunities for improvement whilst also grounding expectations (given the 'mismatch' between expected and actual marks observed in the literature).⁶⁸ In 2021 the assessment items were a group assessment (which involved writing a judgment), a 'mock exam' (to allow students a low-stakes trial of this ubiquitous law school assessment), and a legal memorandum. In 2022 we replaced the memorandum with an online legal research exercise. Students knew that so long as they passed each assessment item, the precise mark awarded for each item was for their information only and would not be formally recorded.

IV THE STUDY

A *Aims*

An overarching aim of our study was to obtain information that would help guide and inform future decisions about assessing LAWS4101 as UP/F. In particular, the study sought to understand how LAWS4101 students perceived and experienced the UP/F aspect of the unit. We were also keen to understand whether different demographic groups within the LAWS4101 student cohort had differing views in this regard.

B *Method*

In February 2021 we collaborated with a qualified and experienced empirical researcher⁶⁹ to design a survey instrument to help us understand how students perceived and experienced the UP/F aspect of the unit. The survey asked participants to indicate their agreement on a Likert scale (from 'strongly disagree'; 'somewhat disagree'; 'neither agree nor disagree'; 'somewhat agree'; to 'strongly agree') for each of the following statements:

1. Being assessed UP/F was fair.
2. Being assessed UP/F created a level playing field.
3. Being assessed UP/F helped me focus on developing skills.
4. Being assessed UP/F created a friendly atmosphere.
5. Being assessed UP/F made the unit feel like a waste of time.

⁶⁸ Sargent and Curcio (n 50) 382; Armstrong and Sanson (n 3) 31, 40.

⁶⁹ We thank Associate Professor Jill Howieson for sharing her empirical research expertise in co-designing the survey instrument.

6. I would have preferred that LAWS4101 was fully graded.
7. I liked knowing the mark I would have received (that is, the grade for each task).
8. I was ok with my mark for LAWS4101 not showing on my transcript.

Participants were also asked to respond to two open-ended questions — the first asking why they thought being assessed UP/F was fair or unfair, and the second asking if there was anything else they wanted to share about being assessed UP/F. Participants were also asked to provide brief, relevant demographic information. Overall, the survey was designed to take 5 to 10 minutes to complete.

In March 2021, after all classes and assessments in LAWS4101 had concluded, we emailed all students enrolled in the unit that year to invite them to participate in the online survey using Qualtrics. We repeated this with the 2022 LAWS4101 cohort in March 2022, after the conclusion of LAWS4101 classes and assessments that year. Again, we emailed all students enrolled in the unit that year to invite them to participate in the online survey using Qualtrics. The 2021 and 2022 cohort datasets were kept separate.

Participation was voluntary and anonymous. All participants provided express consent to being involved in the study before participating. No personal identifying information was included in the data collection, and all data is reported here in group-form only.

C Ethics Approval

This study complied with the National Health and Medical Research Council of Australia's *National Statement on Ethical Conduct in Human Research* (2007). We obtained institutional ethics approval from the UWA Human Research Ethics Office prior to commencing the study.⁷⁰

D Limitations

This study is limited in several ways. First, the data is self-reported and is therefore shaped by participants' subjective perceptions. Further, as participation was voluntary, selection bias may affect the reliability of the findings. The findings relate to a single unit taught in one law school. Although each Australian law school has a foundational unit similar to LAWS4101 in their qualifying law degree, the findings from our study may not be generalisable to other law school contexts. This is especially so given that some research relating to Australian law students has

⁷⁰ 'Exploring Student Perceptions of Ungraded Pass/Fail Assessment in a Foundational Law Subject', RA 2021/ET000188, UWA Human Research Ethics Office.

found that perceptions and experiences may differ between JD and LLB cohorts.⁷¹ Therefore, the findings may be more relevant to the 17 other Australian universities that offer a JD.⁷² Finally, despite our best efforts to conduct this research in an unbiased manner, our conscious and unconscious biases and preferences may have influenced the study’s design and the way we interpreted the data.

E Participants

As noted, we invited all students enrolled in LAWS4101 in 2021 and 2022 to participate in the study. There were 214 participants in total — we had 119 responses in 2021 and 95 responses in 2022. When combining the 2021 and 2022 cohorts, overall 72 participants held a law-related undergraduate qualification (a degree with a Business Law or Law and Society major), whilst 142 participants did not. Full demographic information of each participant group is set out in Table 1.

Table 1: Participant demographics

		2021	2022
Proportion of total LAWS4101 cohort	Total cohort (number of students)	297	220
	Participant group (number of students)	N = 119	N = 95
	Proportion of total cohort participating	40.1%	43.2%
Age (in years)	20–21	40.3%	32.7%
	22–24	31.1%	34.7%
	25–29	11.0%	8.4%
	30–39	15.1%	8.4%
	40–49	1.7%	10.5%
	50–59	0.8%	4.2%
	60+	0.0%	1.1%
Number of years since last enrolled in a university course	< 1 year	68.1%	54.7%
	1–3 years	13.5%	20.0%
	4–6 years	9.2%	9.5%
	7–10 years	4.2%	6.3%
	> 10 years	5.0%	9.5%
Undergraduate qualifications held (note that some)	Bachelor of Arts (Law & Society major)	20.2%	12.6%
	Bachelor of Arts (other major)	30.3%	33.7%

⁷¹ See, eg, Alex Steel, Anna Huggins and Julian Laurens, ‘Valuable Learning, Unwelcome Assessment: What LLB and JD Students Really Think about Group Work’ (2014) 36(2) *Sydney Law Review* 291, 301–21; Alex Steel and Anna Huggins, ‘Law Student Lifestyle Pressures’ in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 50; Meredith Blake et al, ‘Student and Staff Experiences of Online Learning: Lessons from Covid-19 in an Australian Law School’ (2022) 32(1) *Legal Education Review* 129.

⁷² In addition to the University of Western Australia, the following Australian universities also offer a Juris Doctor degree: Australian National University; Bond University; Deakin University; Flinders University; Griffith University; La Trobe University; Macquarie University; Monash University; RMIT University; University of Canberra; University of Melbourne; University of New South Wales; University of Newcastle; University of Southern Queensland; University of Sydney; University of Technology Sydney; Western Sydney University.

participants held multiple undergraduate qualifications)	Bachelor of Commerce (Business Law major)	19.3%	14.7%
	Bachelor of Commerce (other major)	10.1%	18.9%
	Bachelor of Business	1.7%	1.1%
	Bachelor of Biomedical Science	1.7%	3.2%
	Bachelor of Economics	1.7%	3.2%
	Bachelor of Philosophy (Honours)	1.7%	2.1%
	Bachelor of Science	16.8%	16.8%
	Other Bachelor degree	9.2%	8.4%
	Professional degree	2.5%	2.1%
Weighted average mark (out of 100) in the degree completed most recently before commencing JD	65–69	14.3%	5.3%
	70–74	31.9%	29.5%
	75–79	24.4%	26.3%
	80–84	13.4%	15.8%
	85–89	2.7%	2.1%
	90–95	1.7%	0.0%
	Prefer not to say	11.6%	21.0%

As set out in Part V below, we ultimately analysed the data by separating the 2021 and 2022 cohorts, as well as the law undergraduate and non-law undergraduate groups. We chose to analyse the data by year cohort because we were curious about whether the changed circumstances and messaging for each year made any difference to student perceptions. We also wondered whether students without a law-related qualification might be more likely to experience UP/F positively, as those with a law-related qualification would presumably be more familiar and confident with the content taught in the unit.

V QUANTITATIVE RESULTS

A *Fairness and ‘Levelling the Playing Field’*

We asked participants whether being assessed UP/F was fair and whether it created a ‘level playing field’. As seen in Figure 1, the vast majority of participants across both years agreed that it was fair: 90% in 2021 and 98% in 2022. Interestingly, in 2022 no participants perceived being assessed UP/F as unfair — this may be due to the shift in messaging and circumstances from 2021 to 2022 (as discussed in Part III).

A slightly smaller majority of participants across both years agreed that being assessed UP/F created a level playing field: 83% in 2021 and 93% in 2022.

Figure 1: Perceptions of fairness and levelling of the playing field by year cohort

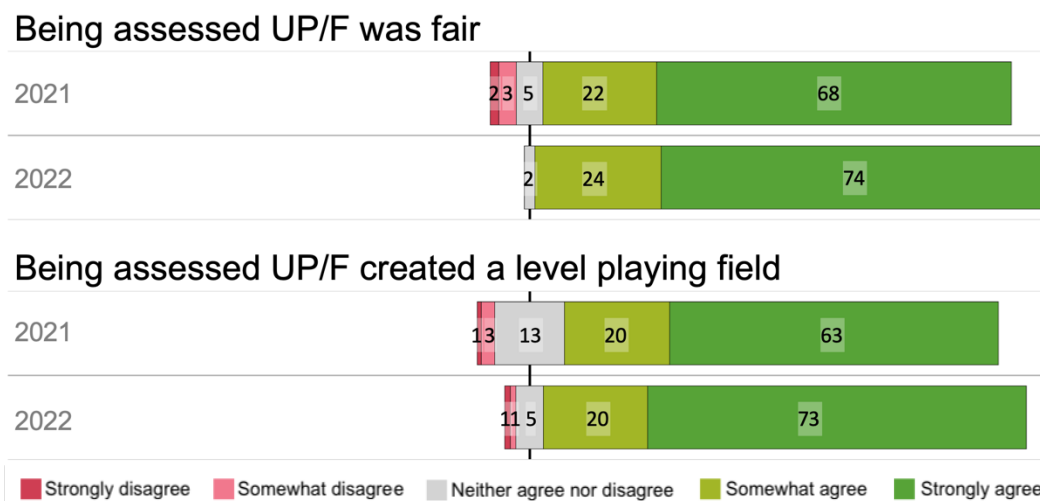
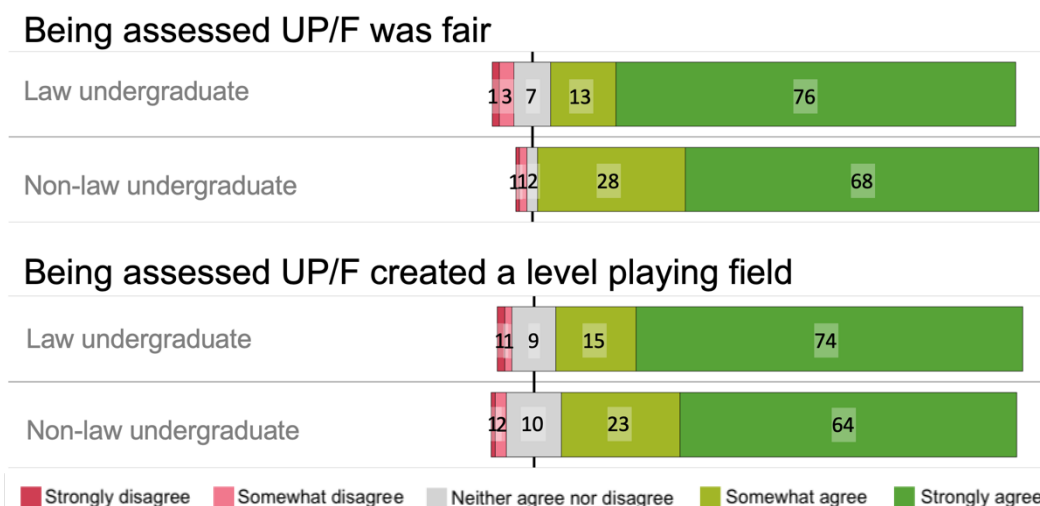


Figure 2 combines the 2021 and 2022 results and separates those who held a law-related undergraduate degree from those who did not. There was more agreement that being assessed UP/F was fair amongst the cohort that did not hold a law-related qualification (96%), than those who had previously studied a Business Law or Law and Society major (89%). Interestingly though, when considering whether being assessed UP/F levelled the playing field, there was slightly more agreement amongst those *with* a law-related qualification (89%) than those without (87%). Though not a statistically significant difference, we expected that those without a law-related qualification would be more likely to agree that being assessed UP/F levelled the playing field.

Figure 2: Perceptions of fairness and levelling of the playing field by undergraduate qualification



B Unit Experience

We asked participants three questions about their experience in LAWS4101: whether being assessed UP/F created a friendly atmosphere; whether it helped them focus on developing skills; and whether it made the unit feel like a waste of time.

Figure 3 shows the responses to these unit experience questions separated by year cohort. Across both years, an overwhelming majority of participants agreed that being assessed UP/F created a friendly atmosphere: 92% in 2021 and 96% in 2022. Further, it is worth noting that a very high proportion of participants across both years strongly agreed with this: 79% in 2021 and 82% in 2022.

In 2021, 90% of participants agreed that being assessed UP/F helped them to focus on developing skills, whilst an overwhelming 98% of the 2022 cohort agreed with this. With this in mind, it is unsurprising that the vast majority of participants across both years disagreed that being assessed UP/F made the unit feel like a waste of time. Only 6% of participants in 2021 and 4% in 2022 agreed that being assessed UP/F made the unit feel like a waste of time, with most participants in each year strongly disagreeing with this.

Figure 3: Unit experience by year cohort

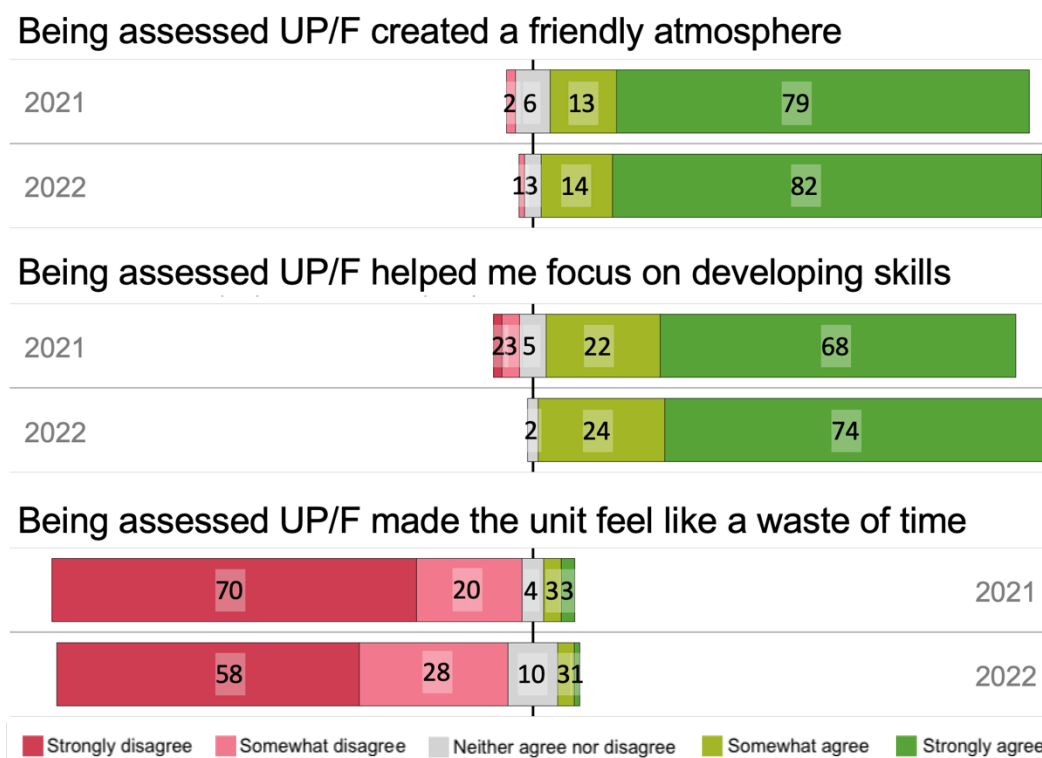
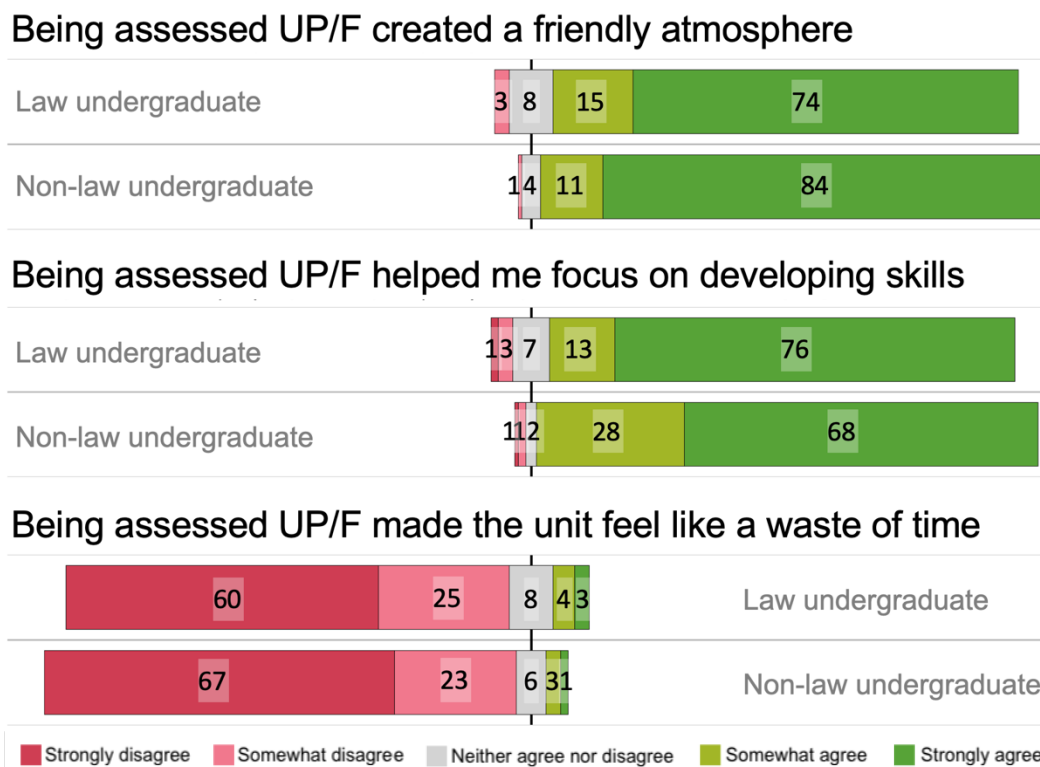


Figure 4 shows the responses to the same unit experience questions but separates those who held a law-related undergraduate degree from those who did not. In the group without a law-related qualification, participants agreed that being assessed UP/F created a friendly atmosphere (95%) and that it helped them focus on developing skills (96%), compared to 89%

in the group with a law-related qualification for both statements. Only 4% of those without a law-related qualification agreed that being assessed UP/F made the unit feel like a waste of time, compared to 7% of those with a law-related qualification.

Figure 4: Unit experience by undergraduate qualification



C Grades and Marks

We asked participants three questions relating specifically to their grades and marks in LAWS4101: whether they would have preferred that the unit was fully graded; whether they liked knowing the mark they would have received for each task; and whether they were ok with their final mark not showing on their transcript.

As shown in Figure 5, most participants in both 2021 (70%) and 2022 (70%) disagreed that they would have preferred if LAWS4101 were fully graded. In 2021, an overwhelming majority of 96% of participants agreed that they liked knowing the mark they would have received for each task, compared to 89% in 2022. Most participants across both years also agreed that they were ok with their final mark for LAWS4101 not showing on their transcript: 73% in 2021 and 68% in 2022.

Figure 5: Grading preferences by year cohort

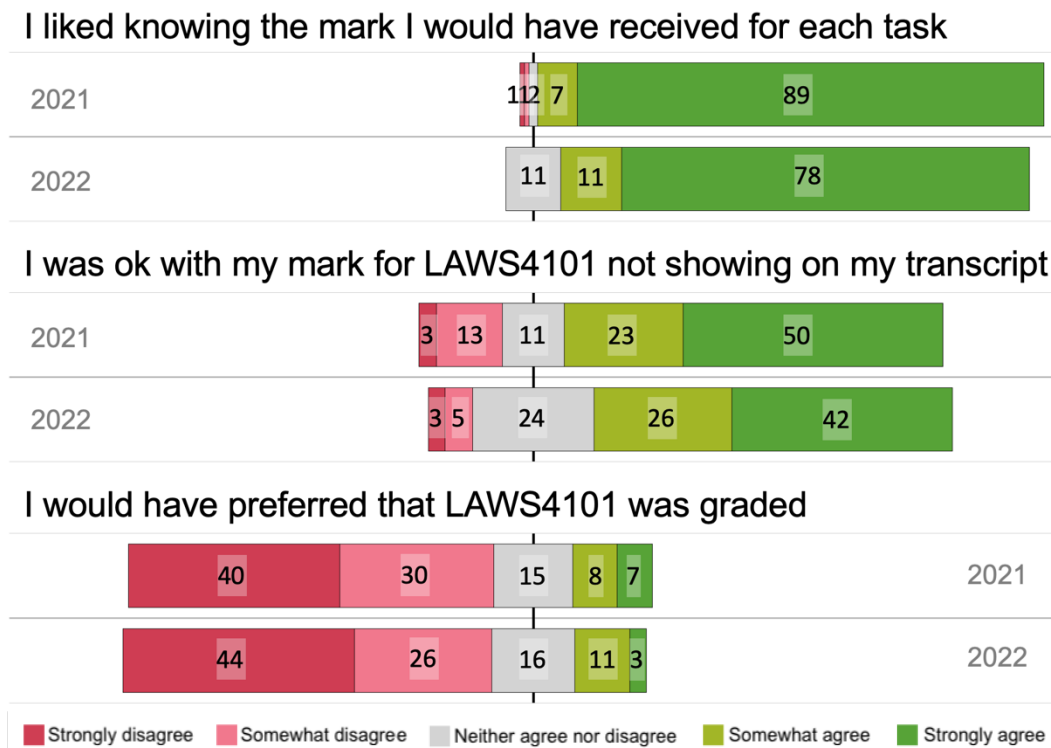
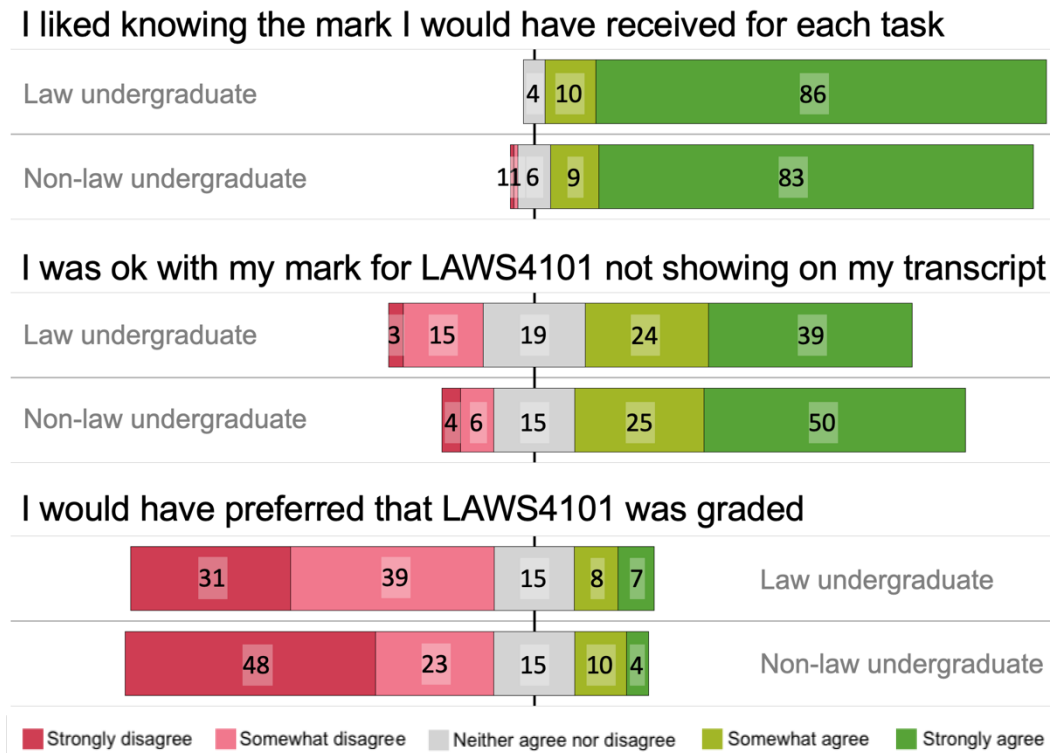


Figure 6 shows that 70% of those with a law-related qualification and 71% of those without disagreed that they would have preferred if LAWS4101 were fully graded. A large majority in both groups agreed that they liked knowing the grade they would have received for each task: 96% of those with a law-related qualification and 92% of those without. Whilst a majority from each group agreed that they were ok with their final mark for LAWS4101 not showing on their transcript, there was a lower rate of agreement amongst those with a law-related qualification (63%) as compared to those who did not have a law-related qualification (75%).

Figure 6: Grading preferences by undergraduate qualification



VI DISCUSSION AND QUALITATIVE RESPONSES

It is clear from the quantitative results that the vast majority of students responded positively to being assessed UP/F. It is interesting that perceptions of fairness and unit experience were slightly stronger in 2022 than in 2021. The difference in messaging — from an accommodation due to challenging Covid-related circumstances (2021) to a pedagogical choice (2022) — may have contributed to this difference. The 2021 cohort also had to deal with significant disruption to the unit and their lives due to the Covid-related lockdown.⁷³ As the 2022 unit was not disrupted in the same way, it is not surprising that students had a greater opportunity to experience a friendly atmosphere and to focus on developing skills.

This Part discusses the quantitative results in light of themes that emerged from qualitative responses to the survey’s open-ended questions. Most participants chose to respond to the open-ended questions in the survey, with responses coalescing around perceptions of fairness and reports of the unit experience. This Part draws on quotes that are representative of the general themes and sentiments expressed by participants, but it does not intend to comprehensively analyse the qualitative responses.

⁷³ See, generally, Blake et al (n 71).

A Fairness

A vast majority of participants, irrespective of year cohort and undergraduate background, either agreed or strongly agreed that being assessed UP/F was fair. These qualitative responses are representative of those who thought UP/F assessment was fair:

It made me feel like I wasn't being punished for doing a non-law undergraduate degree.

Everyone [had] an equal playing field to try new things. For a lot of people this would be the first time writing in a certain style ... it gives them a chance to adapt without harsh penalties.

Despite studying really hard for the exam, I still failed because it was completely different to anything I'd ever done. The UP/F gives me a chance to fix my marks and not have this affect my transcript.

It was a low pressure way to engage with new material without starting off the year with immense stress in what is already an intimidating unit for some.

It's good for students to get a feel for the subject rather than being thrown in the deep end.

These responses are significant given the literature's acknowledgement that the transition to law school must be suited to the needs of students who come from a diverse range of backgrounds and experiences.⁷⁴ The results indicate that the UP/F assessment mechanism helped lay the foundation for an effective and positive first-year experience.⁷⁵

Notably, no participants in 2022 thought that UP/F assessment was unfair. Very few participants in 2021 thought UP/F assessment was unfair (six participants disagreed or strongly disagreed with the statement that it was fair). However, some participants who neither agreed nor disagreed with the statement that UP/F was fair did express some perception of unfairness in their qualitative responses. This comment by a participant in 2021 is typical of the reasons offered for this perceived unfairness:

I think there should have been an option to have it as a regularly graded unit. I put in the exact same effort as if it were graded ... because I had to make sure I passed. UP/F makes it such that I have to put in effort, but I am then not rewarded for that effort. I would rather have the option to choose, even if it's only available before the course starts, to have my grades count.

There are two sentiments here: students should be able to choose whether a grade would show on their transcript, and reward for effort should take the form of a grade. These sentiments were common in responses from students who strongly disagreed, disagreed, or neither agreed nor disagreed with the statement that UP/F assessment was fair.

⁷⁴ Webster et al (n 7) 2; Heath et al (n 14) 442.

⁷⁵ Galloway et al (n 4) 243; Kift, Nelson and Clarke (n 26) 4; Armstrong and Sanson (n 3) 24, 28–9.

Many students expressed a desire to choose whether to be assessed UP/F or have their grades recorded, even when they agreed that the UP/F assessment was fair. This expectation is only apparent in the responses from 2021, perhaps because UWA had allowed students to choose between UP/F and traditional grading in all their 2020 units due to the disruption caused by the Covid-19 pandemic.⁷⁶ Offering students a choice in this respect would require us to run the unit exactly as if it were a traditional graded unit, and then some students could then elect not to have their precise grade show on their transcript. Students would still be relying on extrinsic motivation (being rewarded with grades), but the fear of being ‘punished’ for a poor grade would be alleviated. While students’ desire for choice is understandable, especially given the institutional context, we feel that an optional UP/F assessment structure negates much of the anticipated positive impact of moving to gradeless learning. Research reporting on the experience at the National University of Singapore, which adopted optional pass/fail grading for first-year, first-semester students in 2014, supports this view.⁷⁷ As we did not observe this sentiment in the 2022 responses, it seems the change in messaging and the emphasis on the pedagogical reasons for UP/F assessment successfully improved student perceptions of fairness.

The other sentiment that comes through strongly in responses from both 2021 and 2022 is that UP/F assessment means hard work is not ‘rewarded’. Even some participants who thought the assessment structure was fair expressed this sentiment. For example, two participants in the 2022 cohort, who agreed that the UP/F assessment was fair, noted that ‘I don’t think it necessarily rewarded people who put in more effort’ and that it was ‘potentially unfair for students who wanted to get a good mark to boost their WAM’. Similarly, a participant in 2021 observed that UP/F assessment ‘doesn’t really reward those who put in the work to excel’. This sentiment is unsurprising. As noted in Part II, university teachers have traditionally relied on extrinsic motivators, like grades, to ensure that students complete assigned tasks and meet requisite standards. Prior research shows that addressing student concerns about a lack of reward for excellence is a common challenge when moving to gradeless learning.⁷⁸ This may be partially ameliorated by adopting another method of rewarding high performance.⁷⁹

B *Unit Experience*

The strong indication that UP/F assessment contributed to creating a friendly atmosphere is significant in the context of the literature emphasising the importance of connectedness and building strong support networks in the first year at law school.⁸⁰ Many participants discussed the impact of the assessment mechanism on the cohort atmosphere when the survey asked if there was anything else they wanted to share. For example:

⁷⁶ See, generally, Blake et al (n 71) 157.

⁷⁷ McMorran and Ragupathi (n 60) 928.

⁷⁸ O’Keeffe, Gormley and Ferguson (n 60) 76.

⁷⁹ Ibid.

⁸⁰ Kift, Nelson and Clarke (n 26) 4; Armstrong and Sanson (n 3) 24, 28–9.

It felt like we were all in it together, it encouraged friendships and teamwork ...

[It] was a clever strategy to introduce students to law and each other before the inevitable competitiveness begins — this unit has enabled us to see each other as fellow students rather than potential competition in the long run.

Similarly, we were pleased to see that participants felt being assessed UP/F allowed them to focus on developing skills — another aspect of the first-year experience that much of the literature regards as essential.⁸¹ Looking at the qualitative responses, it appears that UP/F assessment contributed to creating an environment where students felt comfortable learning. For example:

It gave us a chance to learn without the intense pressure of failure ... so this was a great way to develop skills ...

[I]t really lessened my anxiety and allowed me to focus on learning ... I retained so much more because the pressure was off. I feel very well placed to tackle my other units this semester because I was given this solid foundation in a low-pressure environment.

This is consistent with the literature canvassed in Part II, which contends that positive and effective learning environments are characterised by an absence of pressure, stress and despair.⁸²

VII CONCLUSION

Scholarship of teaching and learning in law consistently emphasises the significant personal, professional and intellectual challenges law students face, especially in their first year.⁸³ The literature acknowledges that law school environments can be isolating, overwhelming, competitive and stressful.⁸⁴ Many students feel immense pressure to succeed and are fearful of falling short.⁸⁵ Students enter law school with various personal, professional and educational backgrounds, and all must rapidly transition to ‘thinking like lawyers’.⁸⁶ Conscious of these challenges, we changed the assessment structure of a foundational first-year JD unit to UP/F and asked students how they felt about it. Overwhelmingly, they felt good about it. They thought this change was fair, helped create a level playing field, and fostered a friendly atmosphere. They found it helped them to focus on developing their skills and did not think that UP/F assessment made the unit feel like a waste of time. These findings are significant in light of the literature — they suggest that moving to UP/F assessment in a foundational JD unit can help address many of the challenges new law students face. They indicate that UP/F assessment contributes to a positive first-year student experience, reduces stress, and assists students with their transition to legal study. The findings from this study suggest that there is

⁸¹ Bradshaw et al (n 24) 134–8; Armstrong, Campbell and Brogan (n 9) 139.

⁸² Galloway et al (n 4) 243; Moore and Kuol (n 29) 92.

⁸³ Webster et al (n 7) 2.

⁸⁴ Duhart (n 42) 492.

⁸⁵ Armstrong and Sanson (n 3) 39.

⁸⁶ See, generally, Heath et al (n 14).

merit in future research that evaluates the appropriateness of UP/F assessment in the foundational units of other law degrees (eg, the LLB), as well as in other (non-foundational) law units.

We do not (yet) propose a radical overhaul of assessment culture that would have law schools disavowing grades altogether. However, the potential benefits to student wellbeing and the learning environment indicate that some extension of this approach beyond a foundational unit is worth considering.