
The teaching of ADR in Australian law schools: Promoting non-adversarial practice in law

Kathy Douglas*

This article reports on research that gathered data relating to the teaching of alternative dispute resolution (ADR) in law schools in two States of Australia: Victoria and Queensland. Through semi-structured interviews and questionnaires, a number of themes were identified including the importance of preparing future lawyers for non-adversarial practice through ADR. The author argues that a national forum of ADR teaching is required to promote a community of practice in the teaching of ADR in law schools.

INTRODUCTION

The importance of dealing with conflict other than through litigation has been increasingly recognised both in Australia and internationally.¹ Macfarlane² has noted that legal education is a key site for the development of non-adversarial practice by law students. Non-adversarial practice might be described as a construction of legal practice where non-curial options are privileged over litigation and holistic problem-solving is encouraged. For example, Macfarlane's approach of "conflict resolution advocacy" evaluates the conflict, considers a range of options and appropriately counsels a client.³ One of the important approaches to non-adversarial practice, in addition to problem-solving courts and restorative justice, is the use of alternative (or, as it is increasingly known, "appropriate") dispute resolution (ADR).⁴ Recently, the National Alternative Dispute Resolution Advisory Council (NADRAC) in its report *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*⁵ called for the education of law students in ADR. This call has also come from Australian States, such as Victoria⁶ and New South Wales.⁷

The author's PhD thesis⁸ concerns the gathering of the stories of law teachers as to the content and pedagogies employed in courses dealing with ADR. This article is a summary of selected findings from the author's research. The focus of the study was upon courses in law programs in two states, Victoria and Queensland, and some non-law programs that law students could take as electives, dealing with non-curial dispute resolution. Courses studied also included subjects where ADR was combined with another legal discipline area such as civil procedure. First, relevant literature relating to ADR and legal education is discussed. Secondly, the methodology for the research is provided; and thirdly, selected data and findings are analysed. The author concludes that there is a need to better support the teaching of ADR through a national forum to share ideas relating to content and pedagogy in this area.

* Senior Lecturer, RMIT University; Nationally Accredited Mediator.

¹ King M, Frieberg A, Batagol B and Hyams R, *Non-Adversarial Justice* (Federation Press, 2009) Ch 1.

² Macfarlane J, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Columbia Press, 2008) pp 30-34. See also King et al, n 1, Ch 16.

³ Macfarlane, n 2, Ch 5.

⁴ King et al, n 1, Ch 1.

⁵ NADRAC, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in The Federal Jurisdiction* (September 2009) p 62, Recommendation 4.4.

⁶ Law Reform Committee, Parliament of Victoria, *Alternative Dispute Resolution and Restorative Justice* (September 2009) p 161, Recommendation 38.

⁷ *Letter from New South Wales Attorney-General John Hatzistergos to Australian universities* (17 May 2010).

⁸ Douglas K, *The Teaching of Alternative Dispute Resolution in Selected Australian Law Schools: Towards Second Generation Practice and Pedagogy* (PhD thesis, RMIT University, in progress).

ADR AND LEGAL EDUCATION

Lawyers are said to gain a “standard philosophical map”⁹ through their legal education. This map privileges the role of litigation in dispute resolution and arguably comes from the nature of legal pedagogy. The focus in law schools upon the teaching of appellate decisions and the use of the Socratic, or the similar case-based method has been said to promote an adversarial approach in students’ orientation to conflict.¹⁰ The work of Fisher et al¹¹ has shown that learning related to ADR can affect the conflict orientation of law students shifting them to a view of practice that is less adversarial. The mental health of law students is increasingly a concern in legal education. Importantly, Howieson and Ford have shown the benefits of the discipline area of ADR contributing to the mental well-being of students in law schools.¹² The need to include ADR in the legal curriculum has long been recognised and many commentators¹³ have advocated for law schools to systematically include the range of non-curial options, particularly negotiation,¹⁴ in the education of law students. Riskin argued early in the debate that negotiation sat easily with the traditional legal culture, as did arbitration with its focus on decision-making, and that law schools should see the importance, and transformative potential, of mediation in the legal curriculum.¹⁵ Similarly, Blaustone argued that mediation education provides the opportunity for students to engage with issues relating to party empowerment.¹⁶ Many writers have linked an understanding of ADR to the wider endeavour of assisting law students to develop into holistic problem solvers,¹⁷ modifying the traditional adversarial construct of the legal identity. Arguably, learning about ADR is not simply an end unto itself, but is positioned in the wider discourse of the changing professional identity of lawyers.

Recently in the United States, the influential 2007 report by the Carnegie Foundation on legal education¹⁸ emphasised the importance of legal skills and advocated for the return to some form of the “apprenticeship” style of legal education.¹⁹ In that report there was recognition of the value of ADR in the legal curriculum; it can be seen as an opportunity to engage students in active, experiential

⁹ Riskin L, “Mediation and Lawyers” (1982) 43 *Ohio State Law Journal* 29.

¹⁰ Riskin L and Westbrook J, “Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan” (1989) 39 *Journal of Legal Education* 509

¹¹ Fisher T, Gutman J and Martens E, “Why Teach Alternative Dispute Resolution to Law Students, Part 2: An Empirical Survey” (2007) 17(1-2) *Legal Education Review* 67.

¹² Howieson J and Ford W, “Teaching and Learning Skills: Increasing a Sense of Law School Belongingness” in *Student Engagement: Proceedings of the 16th Annual Teaching Learning Forum* (Perth, January 2007), <http://www.lsn.curtin.edu.au/tlf/tlf2007/refereed/howieson.html> viewed 20 February 2010. Students’ mental health is an issue included in the Council of Australian Law Deans (CALD) voluntary accreditation standards: CALD, *The CALD Standards for Australian Law Schools* (2009), Standard 2.3.3.

¹³ Sander F, “Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles” (1984) 34 *Journal of Legal Education* 229; Sacks A, “Legal Education and the Changing Role of Lawyers in Dispute Resolution” (1984) 34 *Journal of Legal Education* 237. For the Australian context, see Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Legal Education and Training* (1997) at [5.7].

¹⁴ Galanter M, “World of Deals: Using Negotiation to Teach about Legal Process” (1984) 34 *Journal of Legal Education* 268. Galanter points to the fact that negotiation and litigation are linked processes, which he describes as “litigotiation”. He states at 270: “A negotiation course provides an occasion for incorporating into our view of the legal world the other factors that interact with doctrine – uncertainty, delay and cost (and the institutional features that produce them); the structure and culture of law practice; and the goals, capabilities, vulnerabilities, and disparities of parties.”

¹⁵ Riskin L, “Mediation in the Law Schools” (1984) 34 *Journal of Legal Education* 268.

¹⁶ Blaustone B, “Training the Modern Lawyer: Incorporating the Study of Mediation Into Required Law School Courses” (1992) 21 *Southwestern University Law Review* 1317 at 1324.

¹⁷ For example, Kupfer Schneider A, “Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes” (2000) 5 *Harvard Negotiation Law Journal* 113; Nolan-Haley J, “Lawyers, Non-lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-solving Perspective” (2002) *Harvard Negotiation Law Review* 235.

¹⁸ Sullivan W, Colby A, Welch Wegner J, Bond L and Shulman L, *Educating Lawyers: Preparation for the Profession of Law* (2007) (the Carnegie Report). For another influential report focused upon active learning, see Stuckey R et al, *Best Practices for Legal Education: A Vision and a Road Map* (2007).

¹⁹ Sullivan et al, n 18, Ch 1.

learning that promotes reflection on “professional identity, responsibility, and conduct”.²⁰ A recent Australian report into learning and teaching in law schools values experiential learning and the contribution such learning can make to the development of graduate attributes in law.²¹ Jones-Merritt argued that the renewed focus of legal education on professional identity gives ADR increased importance in the legal curriculum due to the vocational nature of this discipline area.²² Adams traced the teaching of ADR beginning with the introduction of subject by interested academics who offered upper level electives to the integration of ADR, especially negotiation and mediation, into substantive first year offerings.²³ He argued that ADR teaching has reached a plateau. More recent research, through the gathering of data from professional associations, confirms the continued teaching of ADR in United States law schools, but with only small increases in offerings.²⁴

The need to integrate has long been argued by well-known practitioners and theorists in ADR. For instance, Menkel-Meadow has pointed to the importance of ADR’s inclusion in the legal curriculum, not merely as an “add on”, but as part of the integration of a range of dispute resolution theory and skills for law students to master.²⁵ Riskin and Westbrook argued for integration²⁶ where ADR options are taught as part of substantive law subjects and obtained various grants to introduce this pedagogical approach in a range of United States law programs. More recently, advocates for the integrated approach still argue strongly that first year law programs should integrate ADR into their teaching.²⁷

In Australia, many universities include specific subjects,²⁸ parts of subjects,²⁹ or skills programs³⁰ that deal with ADR and include a focus in such areas as negotiation and mediation. These ADR courses may be compulsory or elective. They may be part of an integrated skills program along with other legal skills such as advocacy. ADR may be taught through a clinic approach.³¹ ADR education is also provided in post-graduate programs, pre-admission training in practical legal training courses and continuing professional development of lawyers.³² Practical legal training includes ADR due to the requirement that students master dispute resolution skills under national competency standards.³³ The

²⁰ Sullivan et al, n 18, p 114.

²¹ Owen S and Davis G, *Learning and Teaching in the Discipline Area of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment*, Australian Learning and Teaching Council and Council of Australian Law Deans (2009).

²² Jones-Merritt D, “Pedagogy, Progress and Portfolios” (2010) 25 *Ohio St Journal on Dispute Resolution* 7 at 8.

²³ Adams DS, *Alternative Dispute Resolution Programs in Law School Curriculum – What’s Next? Report for the ABA Section of Dispute Resolution* (2001), <http://www.abanet.org/dispute/adampaper.pdf> viewed 19 June 2010.

²⁴ Moffitt M, “Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)” (2010) 25 *Ohio St Journal on Dispute Resolution* 25. This article considers the various approaches to the teaching of ADR such as stand-alone courses or the integration into substantive law subjects.

²⁵ Menkel-Meadow C, “To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum” (1993) 46 *Southern Methodist University Law Review* 1995.

²⁶ Riskin and Westbrook, n 10.

²⁷ Lande J and Sternlight J, “The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering” (2010) 25 *Ohio St Journal on Dispute Resolution* 247.

²⁸ For example, La Trobe University has a compulsory first year course called “Dispute Resolution”: Gutman J, Fisher T and Martens E, “Why Teach Alternative Dispute Resolution to Law Students Part 1: Past and Current Practices and Some Unanswered Questions” (2006) 16(1-2) *Legal Education Review* 125.

²⁹ For example, where ADR is combined with civil procedure: Mack K, “Integrating Procedure, ADR and Skills: New Teaching and Learning for New Dispute Resolution Processes” (1998) 9 *Legal Education Review* 83; Sternlight J, “Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia” (2005) 80 *Notre Dame Law Review* 681.

³⁰ For a review of skills approaches see Hewitt A, “A Critique of the Assessment of Professional Skills” (2007) 17 *Legal Education Review* 143.

³¹ Giddings J, “Using Clinical Methods to Teach Alternative Dispute Resolution” (1999) 10 *ADRJ* 206.

³² See generally, Brabazon C and Frisby S, “Teaching Alternative Dispute Resolution Skills” in Sampford C, Blencowe S and Condlin S (eds), *Educating Lawyers for a Less Adversarial System* (Federation Press, 1999).

³³ Australian Professional Legal Education Council, *Competency Standards for Entry Level Lawyers* (2000) p 20.

place of ADR in legal education in Australia is arguably gaining more importance due to the continued increase in the use of dispute resolution options in courts and government initiatives.³⁴

There have been recent moves to reflect on the teaching of the two dispute resolution options of negotiation and mediation. A series of conferences has been devoted to the teaching of negotiation and mediation originating in the United States but including participants from around the world.³⁵ These conferences encourage critique of present day practice and pedagogy. For instance, there have been moves to promote second-generation practice and pedagogy that includes postmodernist and social constructionist perspectives, moving away from the dominance of western constructs in negotiation.³⁶ In the Australian context research is needed to explore the best ways to teach negotiation and mediation and other ADR options. The particular concerns and practices of ADR law teachers is a topic of significance for research. It is important to understand the ways that ADR is being taught and the theories and models that are used. In order to be reflexive regarding the place and teaching of ADR in legal education, the author has undertaken research into the present content and pedagogy of ADR teaching in selected Australian law schools.

METHODOLOGY

A qualitative approach was primarily adopted for the study. The data was gathered by interviewing teachers in Victorian and Queensland law schools who taught in the discipline area of ADR. The focus of the research was upon academic courses dealing with ADR rather than integrated or stand-alone skills regimes. Twenty-four participants were interviewed in late 2007 and throughout 2008.³⁷ Each participant had taught an ADR course (or similar subject matter) in a university in one of the two States and some participants had taught in a number of different States. The majority of these taught in a law school. Some quantitative data, relating to such issues as the age and experience of participants was gathered for the study. Survey material was obtained from five participants in Queensland who it was not possible to interview.³⁸ One additional academic from New South Wales was interviewed as part of the study due to that participant being named by other interviewees as important to contact and interview. Included in the ADR courses that formed part of this research were those that dealt with ADR alone, those which combined civil procedure with ADR³⁹ or a similar term in the title, those which dealt with non-adversarial justice as the focus of the subject, or those where this area was combined with ADR. Each participant was chosen through a perusal of law program websites or was suggested by other participants and an email enquiry was sent inviting them to be part of the research. There were 13 courses in law schools discussed in detail in the research and a contents analysis was conducted on the course guides of these subjects.

Interviews lasted approximately 30 to 60 minutes and were conducted face to face or by telephone. Interviews were taped, transcribed and manually coded. To preserve anonymity, the identities of the participants were separated from the data and coded with a "V" indicating Victoria or a "Q" indicating Queensland. For the additional participant from New South Wales, an "N" was used.

³⁴ Douglas K, "Shaping the Future: the Discourses of ADR and Legal Education" (2008) 8(1) QUT Law and Justice Journal 138.

³⁵ For a series of negotiation conferences, promoted through Hamline Law School in the United States: *Second Generation Global Negotiation Education*, http://www.law.hamline.edu/dispute_resolution/second_generation_negotiation.html viewed 18 March 2010. The first conference was in Rome in May 2008 and was followed by a conference in Istanbul in 2009; the next is scheduled to be in Beijing in May 2011. A book has resulted: Honeyman C, Coben J and De Palo G (eds), *Rethinking Negotiation Teaching: Innovations for Context and Culture* (2009). For a recent mediation conference hosted by Harvard University in the United States: Mediation Pedagogy Conference (Cambridge, 15-16 May 2009), <http://www.pon.harvard.edu/daily/mediation-pedagogy-conference> viewed 18 March 2010.

³⁶ Fox K, "Negotiation as a Postmodern Process" Honeyman C, Coben J and De Palo G (eds), *Rethinking Negotiation Teaching: Innovations for Context and Culture* (2009) p 45.

³⁷ Findings are confined to the time that the research was undertaken in late 2007 and 2008. The content and practices of law courses in this discipline area may have changed since the gathering of the data.

³⁸ Some surveys were returned in 2009.

³⁹ Subjects dealing with civil procedure that included ADR as a topic were not included in this study. Only those combination ADR and civil procedure courses that identified ADR as a substantive part of the course were included.

Coding also included numbering of the universities from each State from 1 to 6 and the page number of the quote was also included. If there was more than one participant from each university, this was indicated by the addition of an alphabetical letter from (a) onwards.

One of the aims of the research was to gain insights into the practices of ADR teachers in law schools, exploring the community of practice in the selected States. It is a limitation of this research that it was not conducted throughout Australia. Additionally, the research did not attempt to establish the “best” way to teach ADR in law programs and did not consider whether a stand-alone or an integrated approach to teaching this discipline area was more effective. Rather, the aim was to gather the stories of ADR teachers, their lived experiences, and to describe and discuss a number of themes that arose from the data. Selected themes⁴⁰ relevant to the non-adversarial practice of law are discussed in the next section of this article.

SELECTED DATA AND FINDINGS

The value of ADR to non-adversarial practice

All the participants in the study recognised the value of ADR in litigation processes. This is not surprising given that the majority of teachers interviewed taught the subject ADR as a stand-alone course and thus could be expected to be committed to alternative processes in law. However, teachers who taught a combination of civil procedure and ADR (three in number in this study) also expressed support for ADR processes as reflected in these comments by two of the teachers:

It’s professionally negligent in my view to not inform clients of the risks of litigation and of the alternatives to going to litigation. And professionally negligent of lawyers to advise or not to advise clients of the possibility that they should try and settle a case as best they can rather than you know close their eyes and go all the way to the court of law. I think what I aim to do in my classes and keeping my background as a practitioner is to let the students know that there is a genuine alternative to going to litigation (V6(a) p 12).

[D]ispute resolution is a core part of lawyering. It’s not the sort of add-on you do at the end. It’s actually what most cases look like and you want people to have an experience of that straight off (V5(c) p 1).

Of those teachers who taught ADR in a stand-alone course, a common view was that ADR promoted non-adversarial practice:

[I]t’s about the students gaining an awareness of the limitations of litigation models, the potential for making use of other processes and the need to fit the approach to the context (Q3(a) p 17).

Additionally, participants linked non-adversarial practice to the need to provide holistic problem-solving for clients:

Well it’s linked to being focused on what is of most concern to a client but also to the others involved so it’s not just providing advice to your clients it’s encouraging your client to think about the other people who are going to be affected by a given situation. And ADR is really important in encouraging clients to think more carefully about just what it is that they need to be addressing (Q3(a) p 2).

However, although teachers were committed to the use of ADR in promoting non-adversarial practice in law, many were sceptical regarding the effect of ADR in legal practice.

Views of the legal profession and ADR

In the data, participants were asked their views about the legal profession’s approach to dispute resolution. Largely the participants were of the view that although the legal profession had made some strides towards the acceptance of ADR, there was still room for improvement. For example, one participant, who combined civil procedure with ADR, commented upon the lawyer’s frame of practice. He noted that generally lawyers had an adversarial frame of practice, and contrasted this frame with the needs and perspectives of parties:

⁴⁰ Due to constraints of space, issues relating to whether ADR should be a stand-alone course or integrated, or whether ADR should be compulsory or elective in the legal curriculum are not discussed in this article. Issues relating to the models of negotiation and mediation used in the various courses in this study are also not addressed in detail in this article.

[F]rom a lawyer's point of view, a dispute is resolved if it's litigated where the judge makes their decision. Now... if you know anything you know that [litigation] doesn't necessarily resolve it either ... So what's the element of success? And is it an external thing or ... do you ask the parties? Do you ask both parties, one party? (V5(a) p 35).

Another participant commenting on the lawyer's adversarial frame of practice argued that ADR still operated on the periphery of legal practice:

I think that the ADR, the way it's formed about the profession, is "yes, it's a good idea, and sometimes we have to do this, and we'll shunt it off to the professionals to do it". So I think there's an acceptance that ADR is an acceptable part of the legal landscape, but it's not something that a lot of lawyers themselves feel it's part of what they do (V1(b) p 5).

Similarly, a teacher noted that learning of collaborative problem-solving approaches in ADR would not necessarily alter the privileging of litigation as the dominant paradigm of legal practice:

[Even] though lawyers are embracing ADR ... if they come to the negotiation with an adversarial mindset, then what's the use of knowing anything about win/win or lose/lose? (V2(a) p 22).

The privileging of litigation paradigms means that there may be an impact upon the way that ADR is practised in the legal context.⁴¹ One teacher noted the colonisation of mediation by lawyers:

Some firms in Melbourne who don't even take their clients into mediation, they keep them right outside. Others take them in and the client doesn't get to say anything ... I mean, all professions will embrace new things if they have to and then they will transform it into what they're used to and what they feel comfortable with (Q2(a) p 7).

Some of the teachers in this study argued that ADR, although important in dispute resolution, was not always appropriate. For example one participant argued:

[F]or some litigants an adversarial process may be the only way of resolving their problems ... some people do want to have the vindication of a court hearing and a judgment in their favour, so one has to look at the different aspects of the different approaches and see how they fit in with the particular problem a person has (V2(c) p 2).

Similarly, another participant noted that a range of approaches are important in dispute resolution and that litigation should not be sidelined when considering options:

I mean, one of my worries about ADR, just as I'm concerned about litigation, is that there'll be people who think that ... [you're like] trick ponies; they seem to think you use the one mechanism in every situation. That's seriously flawed – there is no one mechanism that is going to be well suited to all situations, it just doesn't work like that (Q4(a) p 2).

Teaching about lawyers and ADR

A number of the teachers interviewed for this study did reflect upon the fact that they were not systematic in their teaching regarding the appropriate role for lawyers in ADR. While supportive of the use of ADR processes in litigation, they were less clear regarding the appropriate role of lawyers engaged in ADR and how that could best be taught to law students. For example, two participants in this research saw the lawyers' role as important, but largely ill defined:

[Re] lawyers roles in mediation because I think that's something that we don't teach a lot of, at least I haven't seen taught a lot of, and that's what they really want to know – that's what they're going to be doing (Q1(b) p 3).

[I]n my view, there's not much good literature on it. I've tried various things, and I don't really like what I've found ... So we end up not having specific literature, but we end up talking about it. And we talk about it from a practical point of view and from a theoretical point of view, should they [lawyers]

⁴¹ In the Australian context, writers have commented upon lawyers who co-opt the process of mediation to mirror litigation. For example, an adversarial approach to mediation can rob clients of the benefits of the process and undermine the Law Council's guidelines relating to lawyers' behaviour in mediation: Callaghan P, "Roles and Responsibilities of Lawyers in Mediation" (2007) 26 *The Arbitrator and Mediator* 39. A major study in Victoria found that lawyers influence the mediation process and may reduce party engagement: Sourdin T, *Mediation in the Supreme and County Courts of Victoria* (2009). See also in the Tasmanian context: Rundle O, "Barking Dogs: Lawyers Attitudes Towards Direct Disputant Participation in Court Connected Mediation of General Civil Cases" (2008) 8(1) *QUT Law and Justice Journal* 77.

even be there. What about models where they're not allowed? Okay, what's the difference? What are the advantages and disadvantages? Why is it good to have a lawyer there? So we do talk about that, because it's a great chance to reflect on the role of a lawyer, quite apart from the ADR context (V5(b) p 9).

Other teachers were clearer in regards to what they taught about the role of the lawyer in ADR, but only two teachers included the role of the lawyer in the role-play simulations. Generally the role of the lawyer was discussed in lecture/seminar material:

[W]e teach short courses as a profession on representing clients in mediation and negotiation so ... it's a top up theme (Q4(b) p 8)

I think the lawyer's role, that that comes out in a negotiation reading, which we have, which is, and from a book called *Beyond Winning: The Challenge of Dispute Resolution* (V5(a) p 15).

In two of the courses that combined civil procedure and ADR, the teachers did not specifically address the role of the lawyer in ADR in the curriculum, although this role may be considered in class discussion. One course that combined civil procedure and ADR did purposefully consider the lawyer's role, but did not address it any great depth. Generally, in this study, those teachers who combined civil procedure and ADR did not include the range of learning and teaching practices that teachers in stand-alone ADR courses did include, although the exception was one Victorian course that included role-plays in the teaching of the curriculum. In the next section of this article, more detail is given relating to ADR learning and teaching strategies.

ADR LEARNING AND TEACHING STRATEGIES

The teachers in this study who taught ADR as a stand-alone course in their law program showed a thoughtful approach to curriculum design. Experiential learning was the norm in these subjects.⁴² The most common learning and teaching strategy utilised by the ADR teachers as part of this study was role-plays.⁴³ The model used when playing out the role-plays was largely the integrative/facilitative model. In addition to this model, some teachers used other approaches. For instance, one teacher had made a DVD which showed the distributive approach to negotiation as the focus of a role-play and also for the same facts the integrative approach to highlight the need to make choices in practice regarding which model to utilise. Another course included a restorative justice conferencing role-play as well as the facilitative model to alert students to the differing dynamics of this approach and the wider group of participants that are often included in conferences. The inclusion of the lawyer as a separate role in the role-plays was not common, although it did occur in some instances. Law teachers' reference to lawyers and non-adversarial practices in lecture material and tutorial discussion was widespread and this objective appeared in many course guides.

Other learning and teaching approaches included lectures and tutorials, small group work in relation to questions, reading packs that were used in tutorial discussions, training DVDs, use of popular culture movies to generate discussion in relation to conflict, use of improvisation in the role-plays and use of online learning. One innovative option was the use of clinic opportunities to allow students to observe ADR processes. Another course in the study included the option of students completing a placement at a justice agency which could include an ADR agency or a court that used mediation. The teachers of ADR in stand-alone courses that were part of this study all expressed a keen interest in learning and teaching and most valued small classes in order to achieve high levels of learning. Some teachers in stand alone ADR courses that were undergraduate expressed frustration with cost cutting in much of present day legal education that has put under threat experiential learning through role-plays. This is due to the high costs of small tutorials that are frequently used when role-plays are debriefed and where outside coaches are brought in to teach and assess students. A participant told the story of her previous teaching arrangements that had to be changed due to cost

⁴² Experiential learning is well documented in the teaching of negotiation and mediation: See respectively Conley Tyler M and Cukier N, "Nine Lessons for Teaching Negotiation Skills" (2005) 15 *Legal Education Review* 61; Greenbaum EH, "On Teaching Mediation" (1999) 2 *Journal of Dispute Resolution* 115.

⁴³ There has been recent criticism of the over-reliance of role-play in negotiation teaching: Alexander N and LeBaron M, "Death of the Role-play" in Honeyman et al, n 35, p 179-199.

concerns:

Then there was a weekend role-play assessment and so students came in, Saturday, Sunday and there were a range of coaches and assessors and that's a very expensive exercise when you start talking about 200 students. So it ran in first year but then Head of School said this is too expensive and so we had to modify [it], so what we did was reduce the number of seminars. Well we reduced it in the sense of, just trying to think of how we dealt with it, we changed from having a weekend seminar, role play assessment to doing the role play assessment in the seminar sort of program. And so the teachers did it without having to bring in additional coaches all for that one day (V2(a) p 7).

Another participant described how she was told to re-structure her ADR course to accommodate large numbers and thus to delete role-plays and other experiential learning from the curriculum:

[I] was specifically requested to turn skills courses (small group teaching) into a theory course in large lecture format - 150 + students (Q1(d) p 4)

Similarly, a participant noted that she was asked to reduce the experiential learning and thus limit the cost of an elective course in ADR. A new elective course was developed to achieve this aim:

[The head of school] asked to devise a unit that would teach the ADR skills more cheaply because the existing unit was a very resource intensive unit (Q2(a) p 7).

Where courses were full fee paying, such as in a Juris Doctor program, or where the ADR course had the enrolment numbers capped, cost issues relating to teaching were not such a concern. As indicated in those courses that combined civil procedure and ADR, there was not a focus upon experiential learning (except in one case) and therefore cost issues were not commented upon in this context. Notably, although role-plays were not undertaken in these combined civil procedure and ADR courses, experiential ADR learning opportunities were available in other linked courses or in a skills program.

CONCLUSION

In summary, the findings of this research, described in part in this article, show that ADR teachers in stand-alone ADR courses and those combined with civil procedure offerings, value ADR and non-adversarial practice in law. Some teachers expressed doubt about the degree to which ADR is fully adopted in the legal profession. They spoke of the need to discuss a range of ADR options in their courses and the importance of the use of litigation in some disputes. The curriculum of the stand-alone ADR courses, and one combination civil procedure and ADR course, dealt with the role of the lawyer in ADR but often did not address this concern in experiential learning. These same teachers did show a sophistication in their teaching and learning strategies, drawing upon a range of approaches with a focus upon role-plays using the facilitative model. On occasion other models were discussed in class and some teachers used more than one model in the role-plays. For some teachers in this study cost was a major concern in providing experiential learning opportunities that promote non-adversarial practice through the use of role-plays. In particular, the results of this research showed that many teachers in this study evidenced a commitment to non-adversarial practices that resist and challenge traditional adversarial constructs in legal practice and in the teaching of law. The teachers in this study who taught ADR as a stand-alone course, and one teacher who combined ADR with civil procedure, were attempting to change students' orientation to conflict so that students' valued ADR, whilst still understanding the importance of the role of courts and the option of a court hearing. This research shows the role of ADR courses in providing a sustained engagement with, and promotion of, non-adversarial practices in law.

As noted, the data discussed in this article relates to only two States in Australia. In order to more fully engage with curriculum concerns in ADR and the potential this area has to contribute to non-adversarial practice in law, a national forum,⁴⁴ similar to the United States efforts in the teaching of negotiation and mediation in universities, is required. This approach will better promote a community of practice amongst ADR teachers and encourage them to share ideas to strengthen

⁴⁴ Some attempt has been made to create a forum on ADR teaching at the Australasian Law Teachers Association in 2009 and 2010, but the forum argued for here is a wider enterprise.

learning and teaching initiatives. The approach of a community of practice⁴⁵ allows for the free exchange of ideas amongst peers. In this way learning objectives relating to the teaching of non-adversarial practice will be better articulated and learning and teaching strategies, such as role-plays that include the role of the lawyer, could be encouraged. Such a group could also lobby for appropriate funding of experiential learning options. Role-plays are the “signature pedagogy”⁴⁶ of ADR and must be properly funded. The forum should include all civil procedure teachers (whether these teachers specifically combine with ADR or not) and those teaching first year courses that may integrate ADR into introductory law subjects. Other interested teachers, such as family law teachers who include family dispute resolution in their subjects, could also be invited. There is a need to engage all of the law teachers who include some level of ADR content in their courses. In this way, a mapping and integrating of ADR into the legal curriculum may be assisted and the promotion of non-adversarial practice in law is more likely to be achieved.

⁴⁵ Lave J and Wenger E, *Communities of Practice: Learning, Meaning and Identity* (1998). This idea relates to a group who shares a passion for something they do and learn how to do it better through interaction. See also Macfarlane, n 2, p 34.

⁴⁶ Some discipline areas develop signature pedagogies that are “types of teaching that organize the fundamental ways in which future practitioners are educated for their new professions”: Shulman L, “Signature Pedagogies in the Professions” (2005) 134(3) *Daedalus* 52 at 52.