The Teaching of Alternative Dispute Resolution in Selected Australian Law Schools: Towards Second Generation Practice and Pedagogy

This thesis is submitted in fulfillment of the requirements for the degree of Doctor of Philosophy

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Declaration by the Candidate

I, Katherine Douglas, declare that:

a) except where due acknowledgement has been made, this work is that of myself alone;

b) this work has not been submitted previously, in whole or part, to qualify for any other academic award;

c) the content of the thesis is the result of work that has been carried out since the official commencement date of the approved research program;

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For approximately the last thirty years alternative dispute resolution (ADR) has been used in courts in Australia to reduce the cost of justice and provide a speedy and informal alternative to litigation. Governments in Australia, both Federal and State, increasingly promote the use of ADR through policy and legislative initiatives. ADR theory and practice can contribute to the development of non-adversarial practice in law; an approach that privileges ADR options over litigation and better addresses clients’ needs including the emotional concerns inherent in many legal disputes. This kind of practice has been advocated in movements such as therapeutic jurisprudence. Additionally, emergent theory in negotiation and mediation, sometimes known as second generation practice and pedagogy, contends that these processes can lead to conflict transformation between parties, where there is fundamental change in the ways that parties perceive each other, the conflict and the larger societal issues that pertain to the dispute. Arguably, second generation practice differs from first generation paradigms in negotiation and mediation, because it is interactional rather than transactional and instrumental, relational rather than individualistic and does not privilege the rational over emotional concerns in conflict.

Despite the potential of ADR to contribute in a positive manner to law, lawyers and parties a number of initiatives in ADR have been subverted by the traditional adversarial mindset of many lawyers. The rise of evaluative mediation, where parties are advised about the likely court outcomes of a dispute and sometimes pressured to settle, means that in the court-connected context the potential of alternative processes can be compromised. Evaluative mediation undermines party self-determination and the experience of procedural justice, whereby parties experience benefits from a third party hearing the story of their conflict.

Legal education is a key site for the construction of legal practice. ADR in legal education is important to research in order to understand the ways that this area might better contribute to shaping the lawyers of the future. The teaching of ADR in legal education can contribute to law students developing a professional identity that
privileges non-adversarial practice, and understanding the full potential of negotiation and mediation. This approach accords with the therapeutic jurisprudence movement that aims to develop holistic practitioners in law. In Australia ADR is not a compulsory area of knowledge for accreditation as a lawyer, although recent law standards released in December 2010 include this discipline area in a variety of ways.

The aim of this research is to explore the content and pedagogies used by law teachers in teaching the discipline area of ADR. The research was primarily constructivist and considered the teaching of ADR in two states in Australia, Victoria and Queensland. The methodology adopted included both qualitative and quantitative data through interviewing or surveying twenty nine ADR teachers and the content analysis of thirteen ‘main’ course guides dealing with the area of ADR. The data was gathered in late 2007 and 2008. This thesis uses various theoretical lenses to analyse the data, including non-adversarialism, through the work of Julie Macfarlane and the discourses of legal education as articulated by Nickolas James. The thesis explores the complex forces affecting the place of ADR in legal education and makes a number of findings, including the need to formalise a community of practice of ADR teachers in Australia in order to promote the teaching of second generation practice and pedagogy in negotiation and mediation.
INTRODUCTION

The inspiration for my research into the teaching of alternative or appropriate dispute resolution (ADR) in law schools in two Australian states, Victoria and Queensland, arose out of insights from my own mediation practice. In my work as a mediator, originally with the Victorian Civil and Administrative Tribunal (VCAT) and currently with the Dispute Settlement Centre of Victoria, I frequently observe the conduct of lawyers in mediations. I noticed that many lawyers, exhibit an ‘adversarial’ mindset even when engaging in the non-adversarial process of mediation. An ‘adversarial’ approach may include the aggressive pursuit of their clients’ rights, a focus upon expounding the law, a preparedness to aggressively question the other party in the mediation, and a tendency to challenge every detail of the other side’s case.¹ I saw that lawyers, by pursuing these strategies, could stymie the progress in a mediation by focussing on rights to the detriment of relationship concerns between the parties. Lawyers often seemed reluctant to allow the parties to engage with each other and I observed that they sometimes expressed a preference for separating the parties early in the process, and asked the mediator to take offers and counter-offers between parties.² Some lawyers try to control the mediation and will not let the parties speak on their own behalf, seemingly due to a fear that their client may divulge information that could damage any subsequent litigation if the matter does not settle.³

My experiences of seeing the impact of adversarial lawyers on the mediation process led me to reflect upon what might encourage the development of a ‘litigious’ or adversarial mindset in sections of the legal profession. Law school is a major

¹ Christine Parker and Adrian Evans, Inside Lawyers’ Ethics (Cambridge University Press, 2007) 14.
³ Parker and Evans, above n 1, 127.
formative site for the development of the legal culture. Writers in the field have pointed to the experience of law school education as influencing the value system and intellectual approach of some law students to encourage a more adversarial orientation to conflict. Other aspects of personal identity, including race, ethnicity, gender, sexual preference, and disability, undoubtedly affect a law student’s orientation to conflict as well. Subsequent experiences of practice will also shape both the lawyer’s professional identity and their attitude to ADR. Yet, legal education is the most important site both for the development of approaches to conflict and for the construction of attitudes to ADR processes and, in particular, to the widely used options of negotiation and mediation for prospective lawyers. At present, however, ADR as a discipline is not a compulsory area of knowledge for admission to practice in the various states of Australia. Nor does there seem to be sufficient appreciation of the role of legal education in framing the lawyer’s approach to conflict, although this awareness is growing.

My own experience of law school was in the 1980s at Monash University where, at the time, there was neither an elective nor any compulsory course in ADR. Although the practice of ADR and mediation may have been mentioned in courses such as civil procedure, I cannot recall any lengthy engagement with this area of study. During my legal career, I developed an interest in criminal law and criminology, through my work as a solicitor with Legal Aid. This interest led me to teach socio-legal courses at RMIT University. Whilst undertaking a Master of Laws at Monash University in the early 1990s I became interested in mediation. I trained as a mediator with Lawyers


Engaged in Alternative Dispute Resolution (LEADR) and subsequently worked at the Victorian Civil and Administrative Tribunal (VCAT) on a sessional basis as a mediator. In 1995 I developed and taught a course in Mediation at RMIT and have since taught this discipline area to a range of students at both undergraduate and postgraduate levels. In 2008, after many years of teaching negotiation and mediation in socio-legal contexts, I began to teach negotiation and dispute resolution as part of the newly developed Juris Doctor program at RMIT. This is a postgraduate program that qualifies graduates to be admitted as a barrister and solicitor of the Supreme Court of Victoria after completion of a further practical training course.

My experience in the teaching, research and especially the practice of mediation led me to reflect upon the impact of law school on a lawyer’s orientation to conflict in the mediation process. My background contributed to my appreciation of the transformative opportunities that ADR, particularly negotiation and mediation, presents. Some writers argue that negotiation and mediation offer the opportunity for conflict transformation where parties are better able to recognise and have empathy with the concerns of another party and this approach can improve relationships. Negotiation and mediation practice can focus on the interactional aspects of a dispute rather than adopt an exclusively transactional approach that may lead to a myopic focus on settlement. A focus on settlement means the emotional and relationship concerns in conflict may often be neglected. In the literature of negotiation and mediation there is increasing debate about different models of practice; sometimes termed first and second generation practice and pedagogy. There has been an evolution of models of practice seeking an improved experience of negotiation and mediation due to a greater emphasis on party self-determination and procedural justice. Prominent academics and practitioners have argued that first generation practice is based on Western constructs in negotiation and mediation, primarily stemming from the Harvard integrative bargaining approach but also from

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8 Linda Putman, ‘Challenging the Assumptions of Traditional Approaches to Negotiation’ (1994) 10 Negotiation Journal 337.


10 Ibid 737-739.
other influences such as game theory.\textsuperscript{11} It is largely instrumental in focus: prioritising agreement, individualistic needs and rational decision-making.\textsuperscript{12} This generation of practice has the benefit of promoting non-adversarial, collaborative approaches to conflict that temper lawyers’ traditional adversarial approach to dispute resolution.\textsuperscript{13} Derivations of this approach include evaluative models that operate widely in court-connected contexts, but tend to compromise party self-determination and procedural justice.\textsuperscript{14} In contrast second generation practice is based on postmodernist relational world-views that prioritise relationships and do not focus so exclusively on problem-solving in negotiation and mediation, although solutions to conflict are found.\textsuperscript{15}

Second generation practice is presently operating on the periphery of practice. Notably there are a variety of ways of articulating this kind of practice and many do not reject first generation paradigms in their entirety. However, whatever the specifics of approach, second generation practice has the benefit of challenging dominant norms in negotiation and mediation and refocusing on the potential of these processes to deal with relationship dimensions of disputes, including the possibility of conflict transformation. It can assist with better practice interventions to deal with the issues of emotion, culture and power in conflict. Throughout this thesis I have used the terms first and second generation practice, but I acknowledge that any classification such as this is a heuristic device. I use the terms as a framing of differing and emergent


\textsuperscript{12} Michelle LeBaron and Mario Patera, ‘Reflective Practice in the New Millennium’ in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), \textit{Rethinking Negotiation Teaching: Innovations for Context and Culture} (DRI Press, 2009) 48.


\textsuperscript{15} Le Baron and Patera, above n 12.
practices in negotiation and mediation. However, practice in these areas cannot be so neatly defined and many negotiators and mediators draw on a range of theory and skills. My personal history as a mediator, and my reflection on practice led me to want to research the ways that ADR, particularly the theory and practice of negotiation and mediation, was being taught in law schools and whether law students were taught the differing approaches available in the field. I wished to understand the ways that ADR teachers constructed their teaching of ADR and the impact of wider discourses in legal education on the teaching of this discipline area.

During the progress of this thesis, begun part-time at La Trobe University (2002-2004) and continued at RMIT University (2005-2011), the stories of conflict resolution in the legal and justice system and government have changed considerably. In Australia during this period there has been a marked increase in the promotion of ADR in courts, and through government and industry initiatives. Arguably, the trends relating to the use of ADR in our legal and justice system have had an impact on the teaching of this discipline area in law schools in Australia as the greater use of the various alternative processes means that lawyers of the future need to understand the theory and practices of ADR. Recently ADR has received increased recognition in legal education through the finalisation in December 2010 of standards in the discipline area of law by the Australian Learning and Teaching Council (ALTC) as part of the Learning and Teaching Academic Standards Project. These standards will influence law school offerings and may even, in time, become the basis for renewed accreditation requirements for admission to practice as a lawyer in this country. There are six areas: knowledge, ethical disposition, thinking skills, research skills, communication and collaboration, and self-management. These standards include required learning in substantive law, legal skills (including ADR), generic graduate attributes and ethics.

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17 This issue will be addressed in chapter five of this thesis.

18 Australian Learning and Teaching Council, Learning and Teaching Academic Standards Project: Bachelor of Laws: Academic Standards Statement (2010). At the time of writing Juris Doctor postgraduate law standards were being developed based on the undergraduate law standards.

19 Ibid 8-11.
In the Australian context, there is some earlier research at a law school in Victoria by Tom Fisher, Judy Gutman and Erika Martens that points to the benefits of studying ADR. This research showed a shift in students’ attitudes to legal practice through the experience of undertaking a first year compulsory course in ADR. In this research the majority of students in this study demonstrated a shift from a largely adversarial approach to litigation, to an approach that privileged collaborative problem-solving. My study explores the other dimension of the educational experience, as I focus on the stories of the law teachers of ADR in universities in two states of Australia. I investigate the experiences of twenty nine law teachers primarily through a constructivist approach using a mixed method methodology. I analyse the content and pedagogy of ADR courses and explore the stories of the ADR teachers, including the lived experience of teaching the discipline in a law school. This is a new approach to researching ADR learning and teaching, and the experiences of ADR teachers, in law schools in the Australian context. The focus of this thesis is on the Australian states of Victoria and Queensland and it maps the teaching of ADR in six law programs in each of the two states. As a law teacher of ADR in Victoria I have been able to bring an understanding of the complexity of the lived experience of teaching in this area. I have examined the stories of the law teachers, distilling themes and revealing findings about teaching practice and outcomes. My aim is that by disseminating my findings I may encourage reflexive practice amongst ADR teachers, assist with ADR curriculum development and inspire a reconsideration of the place of ADR in legal education.

In addition to local relevance, the fact that ADR is not generally limited by jurisdictional concerns other than the law relating to mandated schemes, confidentiality and enforcement means the outcomes have international relevance. The insights gained from this research will be of interest to those in other Western countries with similar law degree programs. I integrate the data gathered for this study


21 Detail of the methodology is provided in chapter two of this thesis.
with the literature on ADR and legal education, with a focus on Australia and the United States. I draw especially from the research literature in the United States as many of the innovations in ADR are also developing in that country. The early chapters of this thesis provide a comprehensive literature review and methodology (1-4). These chapters are followed by analysis of the data from this study integrated with the literature (5-7) and lastly my conclusions are addressed in the final chapter (8). In some chapters I consider the data from a number of critical perspectives. For instance, I devote a separate chapter (5) to the important concept of non-adversarial practice and the ways that ADR teachers promote this concept in their classrooms. I particularly consider ADR content and pedagogy, such as role-plays, that contribute to shaping lawyers of the future. I later reconsider this data in a chapter that deals with the discourses of legal education as applied to ADR (6), dealing with vocational concerns relating to the place of ADR in the legal curriculum. Issues of curriculum and learning and teaching strategies, such as role-plays, are again considered in my discussion of ADR pedagogy, (7), where I expand on the pedagogical benefits that ADR teaching provides. My approach is to use various theoretical lenses to analyse the data, including non-adversarialism, primarily through the work of Julie Macfarlane\textsuperscript{22} and the discourses of legal education as articulated by Nickolas James.\textsuperscript{23} I use these differing perspectives so that I may better explore the complex forces affecting the place of ADR in legal education. This research aims to assist law schools with curriculum review and to raise awareness regarding the potential of ADR to contribute to a new professional identity for lawyers of the future. It will also assist policy makers assessing the direction of ADR and considering the acceptance of dispute resolution initiatives in our legal and justice system. I begin this thesis with a discussion of the rise of ADR and the evolution of first and second generation practice

\textsuperscript{22} Macfarlane, above n 4.

CHAPTER 1
ADR IN AUSTRALIA

1.1 INTRODUCTION
Dispute resolution in Australia encompasses a spectrum of processes that range from
adjudicative through advisory to facilitative according to the level of intervention of
the third party. Non-curial options across this spectrum are often grouped under the
term ADR.¹ Although this term was originally understood to mean ‘alternative’
dispute resolution², increasingly ADR refers to ‘appropriate’ dispute resolution.³

There are various definitions of ADR and in an effort to set a benchmark for practice
the National Alternative Dispute Resolution Council (NADRAC) provided the
following description:

ADR is an umbrella term for processes, other than judicial
determination, in which an impartial person assists those in a dispute to
resolve the issues between them. ADR is commonly used as an
abbreviation for alternative dispute resolution, but can also be used to
mean assisted or appropriate dispute resolution. Some also use the term
ADR to include approaches that enable parties to prevent or manage
disputes without outside assistance.⁴

ADR generally includes mediation, conciliation, early neutral evaluation and case

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¹ Hilary Astor and Christine Chinkin, Dispute Resolution in Australia (LexisNexis Butterworths, 2nd ed, 2002) 81.
² In Australia concerns over the term have been voiced for some time: Laurence Street, ‘The Language of Alternative Dispute Resolution’ (1992) 66 The Australian Law Journal 194. Astor and Chinkin note that the term ADR has also been used to denote ‘assisted’, ‘appropriate’, ‘administrative’, and ‘amicable’: Ibid 78.
⁴ National Alternative Dispute Resolution Advisory Council (NADRAC), Dispute Resolution Terms (2003) 4. Astor and Chinkin note that any definition of ADR is ‘culturally and contextually specific’ and that the term is evolving: Astor and Chinkin, above n 1, 79.
conferencing, and often negotiation. This research focuses especially on negotiation and mediation as these are the most used processes as alternatives to litigation.

ADR is not a recent invention: throughout history dispute resolution processes have been used, in a wide variety of forms, in traditional communities around the world including Indigenous communities in Australia. Since the 1980s the Western approach to conflict has been increasingly influenced by the use of interest-based negotiation and mediation. This has led to significant interest in the use of ADR processes in court and to assist in settlement of litigation. In this chapter, I discuss the rise of ADR in courts and court-connected contexts and then provide an overview of the current state of ADR in Australia. Next I discuss negotiation and mediation, the two processes in ADR that are the focus of the research in this thesis and explore the dominant practice paradigm currently underpinning these two processes. I term common practice in these two areas as first generation practice. I contrast the dominance of first generation practice with the evolution of second generation practice in negotiation and mediation informed by critical theory. I use these terms to describe and discuss dominant and evolving practices, but acknowledge that

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5 Tania Sourdin, *Alternative Dispute Resolution* (LBC Thomson, 3rd ed, 2008) 3. Also discussed in this thesis, and operating as sub-sets of negotiation and mediation respectively, are collaborative law and victim offender mediation or conferencing. Collaborative law is a four way negotiation process where lawyers and clients collaborate in holistically dealing with a legal problem: Ibid ch 4. Victim offender mediation deals with the third party facilitation of conflict following a criminal offence. In Australia, the third party facilitation of conflict relating to crimes is often termed ‘conferencing’ or ‘group conferencing’. This process generally includes a wider group of participants than victim offender mediation, such as family members and support workers, but shares many common attributes: Peter Condliffe, ‘Putting the Pieces Together: The Opportunity for Restorative Justice in Victoria’ (2005) 79 Law Institute Journal 54. Conferencing is also increasingly used in schools and workplaces: Declan Roche, ‘Dimensions of Restorative Justice’ (2006) 62 Journal of Social Issues 217. The various approaches to negotiation and mediation will be discussed in more detail in chapter three of this thesis.


demarcating theory and practice in this way is a heuristic device that does not adequately explain the subtleties of practice. I use the terms first and second generation to assist me in analysing emergent ideas in negotiation and mediation. I next link understandings of negotiation and mediation with lawyers’ legal education and discuss the importance of ADR in legal education to the development of new paradigms of lawyers’ practice. I conclude this chapter with an exploration of the need to research legal education in relation to ADR teaching.

1.2 THE RISE OF ADR

The contemporary trend to use ADR in legal and justice systems began in the United States and was followed in Australia with the large-scale inclusion of ADR, primarily through mediation, in court-connected programs. ADR has also been adopted in industry schemes, community and interpersonal contexts, and in environmental and business disputes. Progressively, ADR has become institutionalised into our Australian legal and justice system through such initiatives as court directed mediation and pre-litigation procedures that include ADR. Increased use of ADR, and mediation in particular, has led Australian mediators to adopt a voluntary national mediator standards and accreditation system. This system is complemented by a compulsory accreditation system for family dispute resolution practitioners whose roles blend mediation, conciliation and advisory practices. Under the Family Law (Family Dispute Resolution Practitioners) Regulations 2008, the accreditation system for family dispute resolution practitioners requires a Vocational Graduate Diploma in

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10 See for a discussion of the history and growth of ADR in Australia: Astor and Chinkin, above n 1, ch 1.
Family Dispute Resolution, or completion of the national voluntary scheme and six modules of the diploma. Those already practicing in the field must complete three modules of the diploma.\(^\text{13}\)

In the last thirty years there have been significant changes to the Australian legal and justice system through the growth of ADR and the move to case management of litigation. These changes affect legal practice and influence the ways that law schools prepare students for practice.\(^\text{14}\) Additionally, there have been developments in alternative paradigms of practice through the adoption of restorative justice, therapeutic jurisprudence and preventative law in the justice system.\(^\text{15}\) Amongst other goals, these processes modify traditional litigious frames of lawyers’ practice. Many changes to dispute resolution in courts reflect the underlying dominant premises of the ADR movement, such as collaborative problem solving, and provide an alternative construction of the role of the lawyer that is more holistic in its approach to legal problems and includes attention to emotion.\(^\text{16}\) Australian academics Michael King, Arie Frieberg, Becky Batagol and Ross Hyams argue that there has been increasing criticism of adversarialism:

Contemporaneously, this period has also seen the emergence and development of new paradigms of justice: restorative, therapeutic, managerial, technocratic, collaborative, participatory and others. Some overlap, some are complementary and some are in conflict. Some of

\(^{13}\) Family Law (Family Dispute Practitioners) Regulations 2008; see also Australian Government, Attorney General’s Department, Family Dispute Resolution Practitioner Accreditation


these new paradigms reflect a dissatisfaction or frustration with the adversarial system and the way that it resolves, or fails to resolve, conflicts.\(^\text{17}\)

The widespread growth in ADR and the use of mediation and other processes in court-connected contexts, has led to a change in the professional identity of lawyers.\(^\text{18}\) Lawyers’ understanding of ADR may affect the construction of their identity and influence the ways that they practice.\(^\text{19}\) This growth in the use of ADR in the Australian legal and justice system means that law students need to understand a variety of options in ADR,\(^\text{20}\) including mediation. In the Canadian and United States context where ADR processes are also increasingly common, Julie Macfarlane\(^\text{21}\) posits that legal education is a highly significant influence in lawyers’ concepts about

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\(^\text{17}\) King, et al, above n 3, 1


\(^\text{20}\) There are a number of ADR options including facilitative processes ie negotiation, facilitation, partnering, conferencing, mediation; advisory processes ie conciliation, neutral evaluation, case appraisal, dispute counseling, expert referral and determinative approaches ie expert determination, independent fact finding, mini trial, arbitration: see generally NADRAC, above n 4. Students arguably also need to understand new problem solving courts and non-adversarial justice, see King et al, above 3, ch 16.

their roles in practice, and their interaction with clients. She argues that these concepts need to change to suit the new dynamics of legal practice. Recently, in Australia, Tom Fisher, Judy Gutman and Erika Martens demonstrated a link between non-adversarial orientations and concepts of conflict in legal education. Their research explored the impact of a first year compulsory subject entitled ‘Dispute Resolution’ on the legal and conflict frameworks of students at La Trobe University in Victoria. In this subject, students learned ADR processes and practiced mediation and negotiation skills. The results of this research revealed that after learning ADR, students shifted to more collaborative frameworks than those they demonstrated at the beginning of the course. This research followed a study by Ronald Pipkin in the United States that showed similar benefits for law students when studying ADR, combating the traditional adversarial constructs in legal education. The teaching of ADR can be said to be part of new trends in legal education that better prepare students for practice. Movements in the law and legal education, such as therapeutic jurisprudence, advocate improved teaching in law schools to assist students to understand the full dimensions of legal practice including the emotional and psychological needs of clients.

In terms of practice the place of ADR court-connected contexts, and what these processes are trying to achieve is contested. There are differing views as to what ADR can achieve in the legal and justice system. ADR grew out of a number of different

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and competing interests. Some proponents value the potential for ADR to provide dispute processes that are vested in the community and outside the restrictions of the legal system. Others see the efficacy of courts and other institutions adopting ADR in order to reduce court lists and provide for speedier engagement with disputes. The role of lawyers in ADR is crucial to the success of court-connected processes. Although some research has been undertaken into the effects of ADR on the management of litigation and the ways lawyers practice in the context of ADR, ongoing research is needed to examine the responsibilities of lawyers in dispute resolution, assessing their role as gatekeepers and exploring their influence on clients.

Some commentators criticise the acceptance of ADR in our legal and justice systems.

27 Bush, above n 25, 711-713.
28 Astor and Chinkin, above n 1, 7-10. Marc Galanter has argued that the perception that litigation is ‘exploding’ in the United States is overstated: Marc Galanter, ‘Reading the Landscape of Disputes” What we Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society’ (1983) UCLA Law Review 4. Recently, in the United States, there appear to be less trials due to the operation of ADR: Kimberlee Kovach, ‘The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice’ (2005) 7 Cardozo Journal of Conflict Resolution 27.
29 William Felstiner, Richard Abel and Austin Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...’ (1980-1981) 15 Law and Society Review 631, 645. Felstiner et al argue that legal claims emerge from our construction of events. Potential litigants must see an event as causing harm and blameworthy, and lawyers frame such experiences into a legal category that can form the basis of litigation. Recent research suggests that the impact of lawyers affect the clients’ view of mediation and the clients’ opportunity to improve the relationship with the other party(s): Jean Poitras, Arnaud Stimec and Jean-Francois Roberg, ‘The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?’ (2010) 26 Negotiation Journal 9,12-14. Tamara Relis argues that the approach of the lawyer to mediation will impact upon the dispute and the lawyers’ approach may vary according to the gender of the lawyer with the female lawyer being more collaborative and relationship focused: Tamara Relis, Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties (Cambridge University Press, 2009) 245. In the context of family law Australian research has shown family lawyers to assist clients in decision making in mediation, adding value to the process and promoting non-adversarial strategies: Becky Batagol and Thea Brown, Bargaining in the Shadow of the Law: The Case of Family Mediation (Themis Press, 2011).
For instance, Robert Abel\textsuperscript{30} argues that the use of private ordering, that is, decisions, and solutions reached outside the public realm of the court, results in power shifting to the bureaucracy and away from the courts, with the potential likelihood that disadvantaged groups are discouraged from pursuing their legal entitlements.

Similarly, Owen Fiss warns of the dangers of a settlement culture in the law. In his seminal essay on the theme, he argues ‘Against Settlement’\textsuperscript{31} and voices a variety of concerns such as the fear that imbalances in resources prevent the poorer party in litigation from gathering and analysing sufficient information to assess the case against them and to make a judgement of fair settlement terms. Financial pressure may thus result in the acceptance of a relatively low amount, or encourage a race to an early settlement rather than a full exploration of options. Further, the high cost of litigation may force settlement even where a party has a meritorious claim.\textsuperscript{32} The experience of a trial tests evidence and assertions in a way that most private ordering processes cannot achieve. He argues that ensuring compliance of consent orders that are later breached may pose difficulties for courts where there has been no trial process.\textsuperscript{33}

According to Fiss, courts have a normative role in society to deliver judgements that provide authoritative statements of shared societal values.\textsuperscript{34} This opportunity is diminished where there is a widespread focus on speedy settlement promoted by private ordering processes. The cost imperatives of courts, with long backlogs of cases, mean that private ordering is promoted and litigants and society in general are thus denied experience of the court system.\textsuperscript{35} Although Fiss rejects an adversarial approach to law for its own sake, he argues that legal education requires law students to be adept at litigation so that they can advocate appropriately for their clients’


\textsuperscript{32} Ibid 1076-1078

\textsuperscript{33} Ibid 1083.

\textsuperscript{34} Ibid 1085.

\textsuperscript{35} Ibid 1088-1089.
rights.\textsuperscript{36} Yet an over-emphasis on the potential for ADR to offer a diminished experience of justice may prevent appreciation that ADR processes can not only provide speedier, more cost effective processes, but also potentially offer more empowering alternatives to litigation.\textsuperscript{37} The court system is not necessarily accessible by many prospective litigants due to the prohibitive costs of litigation.\textsuperscript{38} ADR does provide a cost effective alternative to those who cannot afford litigation and generally these processes can be convened more quickly than a court hearing. However, the kind of ADR experience that parties are offered is important when considering the benefits of these processes. For example, there is a danger that litigation paradigms will co-opt and transform processes such as mediation so that they mirror the traditional adversarial legal approach to dispute resolution.\textsuperscript{39} An adversarial approach to mediation jeopardises the possible benefits of the process such as self-determination for parties by introducing rights-based and combative tactics to the mediation room. The institutionalisation of mediation has resulted, in some court-connected programs, in the rise of an evaluative, as opposed to a facilitative, model of mediation.\textsuperscript{40} In the facilitative model there is an emphasis on party empowerment where parties make their own decisions

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\textsuperscript{36} Ibid 1089. \\
\textsuperscript{37} For the benefits of mediation, including generally high party satisfaction rates: Laurence Boulle, \textit{Mediation: Principles, Process, Practice} (LexisNexis, Butterworths, 3rd ed, 2011) ch 1. Relis argues that ADR and in particular mediation, can assist with integrating client’s ‘legal and non legal interests’; promoting an ‘ethic of care’ in line with the aims of therapeutic jurisprudence: Relis, above n 29, 15. \\
\textsuperscript{38} Astor and Chinkin, above n 1, 27. In the Victorian context a major report into the civil legal system established that cost considerations mean that many meritorious claims are not litigated: Victorian Law Reform Commission (VLRC), \textit{Civil Justice Review: Report} (2008) 77. \\
\textsuperscript{40} Nancy Welsh, ‘The Thinning Vision of Self-determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?’ (2001) 6 \textit{Harvard Negotiation Law Review} 1, 23. In Victoria recent research has pointed to the use of evaluative mediation in some contexts in the Supreme and County Courts and the negative impact upon the parties’ experience of the process (although overall satisfaction with mediation was evident in the research): Tania Sourdin and Nikola Balvin, ‘Mediation in the Supreme and County Courts of Victoria: A Summary of the Results’ (2009) 11 \textit{Alternative Dispute Resolution Bulletin} 41.
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by engaging in collaborative problem solving. In the evaluative model, parties are given advice by the mediator about such issues as the likely court outcomes should the parties proceed to trial. Sometimes in evaluative mediation, the mediator exerts pressure on the parties to settle, thus diminishing party self-determination and decision-making. In forms of mediation other than evaluative or settlement-focused approaches, including the facilitative model, reaching party consensus and self-determination are central.

ADR processes can thus be used to decrease pressure on courts but may not effectively provide litigants with alternative processes that enhance party self-determination. Such approaches to ADR may, in fact, undermine the quality of justice provided by our legal system. Evaluative mediation in the court-connected context may decrease parties’ experience of procedural justice. Research shows that being able to tell their story in full during a process and being treated with respect by a third party can sometimes be more important to parties than the ultimate outcome of a dispute. Research into procedural justice indicates that litigants wish to feel heard by the authority figure of a third party when engaged in dispute resolution of some

46 Ibid.
If a litigant believes that a process accords with procedural justice they will be more likely to ‘live with’ the decision and thus also to carry out any court orders. Nancy Welsh argues that the experience of procedural justice for litigants should be built into court-connected mediation processes. Some models of mediation, such as the facilitative model, are said to include procedural justice, but other models also encourage more comprehensive storytelling from parties that provides these procedural benefits.

Despite the significance of procedural justice to parties it is difficult to convince some sections of the legal profession of the benefits of this approach for their clients. This is because ideas of party empowerment and self-determination are concepts integral to many facilitative ADR processes, particularly mediation, yet for many lawyers ADR processes are primarily focussed on the settlement of a dispute. Parties’ experience of ADR will be affected by the kind of practice that they participate in. Where lawyers dominate, as in courts, the focus has usually been around achieving settlement through evaluation.

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52 Bush, above n 25, 734-735.
53 Ibid 734. There has been some success in the Australian family law jurisdiction with party satisfaction with mediation, although there are still concerns, such as the issue of violence: Astor and Chinkin, above n 1, ch 10.
According to Leonard Riskin and Nancy Welsh,\(^{54}\) problem definition is the major dilemma facing courts, blocking the provision of procedural justice through mediation. Riskin and Welsh point to the tendency for the problems or issues in mediation in court-connected civil contexts in the United States to be constrained to substantive or rights aspects of the dispute.\(^{55}\) Such a narrow definition generally does not include the emotional issues surrounding legal disputes and excludes any focus on the ‘satisfaction’ or procedural justice aspects of a client’s experience of mediation. This restricted definition tends to reflect lawyers’ traditional bilateral negotiation practices, that is, it may lead to such practices as the avoidance of joint meetings in favour of keeping the parties in separate rooms. Riskin and Welsh argue that:

> [s]uch procedures typically exclude a consideration of the parties’ motivations. In addition, they usually emphasise private caucuses rather than joint session, and offer few, if any, opportunities for the parties to speak or listen to each other directly.’\(^{56}\)

In a recent Australian example of this trend to narrow problem definition Tania Sourdin’s\(^{57}\) evaluation of mediation in the Supreme and County Courts in Victoria found that, in some instances, mediation processes included limited party statements (where legal representatives would dominate the opening statements), restricted use of interest-based bargaining approaches and extensive use of shuttle negotiation techniques. Sourdin’s research shows that:

> Some mediations may be conducted in a way that is more comfortable for lawyers, rather than disputants. Lawyers choose the mediators and lawyers therefore play an important role in determining the process adopted.\(^{58}\)

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\(^{55}\) Ibid 864. The authors do not address family law mediation in their discussion due to the particular relationship concerns of that jurisdiction: 864.

\(^{56}\) Ibid 866.

\(^{57}\) Tania Sourdin, Mediation in the Supreme and County Courts of Victoria (2009).

\(^{58}\) Ibid iv.
Sourdin’s research found that parties expressed satisfaction with mediation in the courts, but that the process they experienced did not allow them to participate fully. The report recommends, amongst a number of initiatives, the requirement that only mediators accredited under the National Mediation Standards be permitted to mediate in the Supreme Court to incorporate an element of quality assurance in the mediation program.\(^\text{59}\) The report also includes recommendations relating to greater court oversight in relation to mediation, as well as various initiatives to attempt a shift in the culture of lawyers practising in the court.\(^\text{60}\) These findings from the evaluation of mediation practices in Victoria are mirrored in research in Tasmania.\(^\text{61}\) In interviews with solicitors operating in the Tasmanian Supreme Court jurisdiction, Olivia Rundle found that these lawyers were mainly concerned with achieving settlement. The lawyers were often reluctant to involve clients in opening statements, citing concerns that clients might divulge information that may later harm their legal case.\(^\text{62}\) In this context the model used resembled the evaluative approach, where party participation is not prioritised. The approach of the lawyers accorded with the aims of the court to achieve efficient and timely settlement.\(^\text{63}\) These recent reports of lawyers’ practice in Australian mediation highlight the need to broaden the focus from the frame of legal issues to include the wider dimensions of conflict in court-connected contexts. The research in Victoria and Tasmania also demonstrates the predominance of the evaluative and settlement models of mediation in courts and implies the influence of the lawyers’ frame of practice.

Whether a process can be empowering for a party, and driven by more than merely the desire to achieve settlement, will be influenced by the model of ADR adopted as there are now a number of models that resist the court-connected settlement orientated

\(^{59}\) Ibid.

\(^{60}\) Ibid.


\(^{62}\) Ibid 81-86.

\(^{63}\) Ibid 88-90. The approaches could also been categorised as the settlement model. Notably, according to Boulle mediators can move through a range of practice models in the one mediation: Boulle, above n 37, 43.
approach. For instance, some proponents of mediation suggest that the promise of this process is to transform human conflict and to contribute to citizens being better able to deal with disputes.\textsuperscript{64} The realisation of these opportunities depends on the model practiced by ADR practitioners, the place of ADR in institutionalised settings, and also requires a focus on maximizing self-determination and bettering relationships.\textsuperscript{65} There are now a variety of mediation models that favour a relational focus, with the aim of shifting away from the settlement imperative of much of court-connected ADR.\textsuperscript{66} However, it is acknowledged that such relationship framed approaches will not be suitable for every legal dispute. Clients may be focussed on achieving settlement without any interest in having an ongoing relationship with the other party to the conflict.

Robert Baruch-Bush argues that mediator efforts in the past to break away from the influence of courts have not met with success.\textsuperscript{67} Mediation practice that influences parties to settle is due to the managerial needs of courts to reduce caseloads. This imperative has distorted previous efforts by mediators to steer clear of settlement-orientated practice. Bush argues that attempts to break free of courts, to move out of their orbit, is only possible where there is a pluralism of practice and more recent models operate separately from the courts.\textsuperscript{68} He is understandably pessimistic

\textsuperscript{64} Robert A Baruch Bush and Joseph P Folger, \textit{The Promise of Mediation: The Transformative Approach to Conflict}, (Jossey-Bass, revised ed, 2005). The authors advocate a process that results in the moral growth of participants brought about by shifts in recognition and empowerment. These kinds of shifts provide both private and public benefits as conflict is transformed for the individual and more widely citizens are educated to deal with conflict in a manner that includes respect for others: 80-83. This edition provides examples and a case study to support the transformative model. There is also a first edition: Robert A Baruch Bush and Joseph Folger, \textit{The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition} (Jossey-Bass, 1994). For analysis of the theoretical basis of settlement driven models and contrasting approaches such as transformative mediation: Dorothy J Della Noce, Robert A Baruch Bush and Joseph P Folger, ‘Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy’ (2002) \textit{3 Pepperdine Dispute Resolution Law Journal} 39.

\textsuperscript{65} Bush, above n 25, 705-709.

\textsuperscript{66} Ibid 739-742.

\textsuperscript{67} Ibid 739.

\textsuperscript{68} Ibid 767-768.
regarding the colonisation of mediation by courts however, I would argue that emergent models of mediation can influence practice in court-connected contexts in helping government, policy makers and the legal profession consider the relationship dimensions of conflict. Although many players in disputes including mediators, lawyers and clients will aim to achieve settlement attention should be paid to the emotional dimensions of disputes and relational concerns.

This frame of current ADR practice, particularly in regards to mediation can be traced, in part, to lawyers’ initial legal education.\(^69\) This is because the experience of legal education promotes an adversarial frame of practice, a ‘standard philosophical map’ that privileges a rights-based focus in dispute resolution.\(^70\) To encourage greater attention to the wider concerns of conflict, courts, lawyers and mediators need to be open to outcomes that are more than settlement orientated. They need to be educated about emergent theory and practice in ADR, including newer models of mediation. In this way ADR practice in courts may change, either through influence on present dominant models or through the practice of emergent models, and thus provide their clients with a greater experience of procedural justice and increased self-determination. However, currently these emergent models, which can be termed second generation practice, are rarely practised in court-related contexts in Australia.\(^71\) In the next section of this chapter I discuss present day ADR practice in Australia in detail.

1.3 ADR IN AUSTRALIA

In Australia, growth of ADR occurred from the 1970s and early 1980s in neighbourhood or community justice centres, in industrial conciliation and in family law. The court systems in Australia then adopted ADR, primarily using mediation processes in case management to encourage swifter processes and higher rates of

\(^{69}\) Macfarlane, above n 18, 33.


settlement of disputes.\textsuperscript{72} In both Victoria and Queensland, the two states of Australia in which I undertook research for this thesis, there has been significant growth in court initiatives relating to ADR.\textsuperscript{73} Concurrent with the growth in the use of ADR there has been a rise in the jurisdiction of tribunals, such as the Commonwealth Administrative Appeals Tribunal (AAT).\textsuperscript{74} In 1998, the Victorian Civil and Administrative Tribunal (VCAT) was established with a broad jurisdiction.\textsuperscript{75} More recently in 2009, Queensland introduced a similar tribunal, the Queensland Civil and Administrative Tribunal (QCAT).\textsuperscript{76} Tribunals offer more relaxed rules relating to evidence than courts; they facilitate self-representation by litigants and also provide the opportunity for parties to attend mediation. In addition to ADR processes and tribunals, Australian governments have also introduced new problem-solving courts.\textsuperscript{77} These courts have been initiated in the criminal justice area to deal with drugs, family violence, and mental health concerns, as well as to encompass some areas of civil law, such as housing and debt matters.\textsuperscript{78} For example, in the Victorian Neighborhood Justice Centre, the magistrate deals holistically with court users’ problems in both the civil and criminal jurisdictions using therapeutic jurisprudence, restorative justice and

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\textsuperscript{73} VLRC above n 38, ch 4.

\textsuperscript{74} Astor and Chinkin, above n 1, 6-13.

\textsuperscript{75} Victorian Civil and Administrative Tribunal Act 1998 (Vic). This legislation brought together a number of smaller tribunals into one tribunal. Mediation is routinely used at VCAT: Iain Ross, ‘A Centre of Excellence in ADR’ (2009) 83 \textit{Law Institute Journal} 34, 36.

\textsuperscript{76} Queensland Civil and Administrative Tribunal Act 2009 (Qld); Bobette Wolski, ‘Reform of the Civil Justice System 25 Years Past: (In)adequate Responses from Law Schools and Professional Associations? (And How Best to Change the Behaviour of Lawyers) (2011) 40 \textit{Common Law World Review} 40, 47.

\textsuperscript{77} King et al, above n 3, ch 9.

\textsuperscript{78} Ibid ch 9-11. Some writers identify these problem-solving courts with the philosophy of therapeutic jurisprudence although the evolution of these courts may be more about the pragmatic incorporation of judging approaches that achieve better results for court users: Arie Freiberg, ‘Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?’ (2003) 20 \textit{Law in Context} 6, 9.

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mediation. The philosophies of problem-solving courts have much in common with some of the approaches in ADR, particularly mediation, and their judicial officers need highly developed communication skills and a solution-focused approach. Despite these healthy initiatives promoting party empowerment and non-adversarial approaches, practice in Australia in processes such as mediation frequently undermine party self-determination. As indicated earlier in this chapter, Sourdin’s and Rundle’s recent research shows mediation in court-connected contexts in Victoria and Tasmania focuses primarily on rights with little party engagement in the process. In response to the slow adoption of ADR in Australia, successive government reviews of litigation have been critical of lawyers’ resistance to alternative processes. This resistance is ongoing in sections of the legal profession and may be due to the perception of a threat from ADR. Some groups view ADR as restricting the opportunity for lawyers to conduct litigation, due to high settlement rates resulting


82 See for example; Australian Law Reform Commission, Managing Justice: A Review of the Federal Civil Justice System (2000); Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System (1999); VLRC, above n 38, ch 4; Law Reform Committee, Parliament of Victoria, Alternative Dispute Resolution and Restorative Justice (2009), ch 1-5.
from processes such as mediation.\textsuperscript{83} Also, deficiencies in legal education and consequent lack of awareness by lawyers of the values, philosophy and processes of ADR result in a focus on the adversarial system and appellate decisions with insufficient emphasis on ADR.\textsuperscript{84}

There have been recent legislative initiatives to address the persistent adversarial frame of practice of Australian lawyers. For example, in Victoria there have been changes to civil procedure through the \textit{Civil Procedure Act 2010} (Vic). Under s 1(2) of this Act there is an enhancement of court case management powers with the prioritisation of ADR and the early facilitation of disputes. This legislation attempts to promote access to justice through the improved use of case management and ADR.\textsuperscript{85} However, after a recent change of government, one of the key features of the new civil procedure legislation, pre-litigation requirements, was repealed. Under Chapter 3 of the Act lawyers were required to engage in negotiation and information sharing prior to litigation. This initiative was repealed by the \textit{Civil Procedure and Legal Profession Amendment Act 2011} (Vic), due to criticism by Victorian lawyers that the pre-litigation requirements were too burdensome on the legal profession and may add

\textsuperscript{83} Caputo, above n 19.

\textsuperscript{84} Lawyers are influenced by lawyers in their area, professional codes, the culture of the law firm they practice for and their own identity: Macfarlane, above n 18, 34-46. In Australia procedural reforms that prioritise ADR and case management have not necessarily been similarly promoted in professional codes. These codes and legal education must change to value ADR and case management: see generally Bobette Wolski, ‘Reform of the Civil Justice System 25 Years Past: (In)adequate Responses from Law Schools and Professional Associations? (And How Best to Change the Behaviour of Lawyers)’ (2011) 40 \textit{Common Law Review} 40.

to the costs of proceedings.\textsuperscript{86}

Other provisions of the legislation dealing with ADR have been retained.\textsuperscript{87} The legislation imposes various obligations under Chapter 2, relating to the ‘overarching purpose’ and ‘overarching obligations’ that affect the ways that judges, lawyers and clients behave in the civil justice system, and require all participants to be responsible for the just, efficient, timely and cost-effective resolution of issues in dispute. As part of the widened use of ADR and case management provisions under the legislation, lawyers and parties are obligated to engage in all opportunities for settlement of a dispute. For example, under s 22 lawyers and parties must use reasonable endeavours to resolve disputes and these endeavours may include the use of ADR. Under s 23 ADR can also be used to, at least, narrow issues in dispute, even if resolution is not possible through ADR. Under ss 66-68 the Act explicitly promotes ADR, and includes the option of mandatory mediation and other non-binding ADR processes. In Queensland case management, early settlement of disputes is encouraged through the \textit{Uniform Civil Procedure Rules 1999} (Qld). Under rule 5(1) the general objective of the rules, similar to those of the new Victorian provisions, is to facilitate the just and expeditious resolution of disputes at minimal expense.\textsuperscript{88} ADR, including mediation, is also routinely used in the Queensland courts as part of case management to facilitate the early resolution of disputes.\textsuperscript{89}

At a Federal level in Australia, government policy has also increasingly supported ADR. For example, the report, \textit{A Strategic Framework to Justice in the Federal Civil Justice System}, recommends increased use of ADR and case management and the

\textsuperscript{86} Civil and Legal Profession Amendment Bill 2011, Explanatory Memorandum; see also Michael Brett Young, ‘New Broom Sweeps Cleanly’ (2011) 85 \textit{Law Institute Journal} 6. The repealed Chapter 3 of the Civil Procedure Act 2010 (Vic), ‘…required disputants to use alternative dispute resolution (ADR) processes, [that] were burdensome and unworkable and had the potential to undermine the overall intention of the civil procedure reforms.’: 6

\textsuperscript{87} For an analysis of these provisions: Mary-Anne MacCallum and Richard Vinciullo, ‘Smother Sailing with ADR’ (2011) 85 \textit{Law Institute Journal} 36.

\textsuperscript{88} Wolski, above n 84, 49.

\textsuperscript{89} Ibid 53.
better education of lawyers in non-adversarial processes. Subsequent legislation, the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth), amends the *Federal Court Act 1976* (Cth) and imposes an overarching purpose that the just resolution of disputes according to law should proceed as quickly, inexpensively and efficiently as possible. The provisions of the legislation encourage ADR and are similar to the Victorian legislation. Additionally, there is a recent report by NADRAC about the possible increase in the use of ADR in civil litigation in the federal sphere. This report recommended the inclusion of pre-action litigation requirements. This resulted in the *Civil Dispute Resolution Act 2011* (Cth) that introduces pre-litigation procedures in federal civil litigation. These provisions are similar to those repealed by the Victorian government. Under ss 6-7 applicants must file ‘genuine steps’ statements prior to litigating. These ‘genuine steps’ statements must include initiatives to engage with the dispute or there may be later cost penalties in subsequent litigation. Under s 4(1A) the ways to resolve a dispute are suggested by the legislation in a non-exhaustive list and are notably broad in nature, ranging from the exchange of information to the use of ADR.

Some of the most comprehensive pre-litigation ADR requirements in Australia are evident in family law. Since 2006, pre-litigation requirements for parenting matters under s 60I require ‘genuine’ engagement in a family dispute resolution process prior to filing to litigate regarding parenting disputes, although exceptions do apply. The 2006 changes to the Act introduced a wide definition of the kinds of processes that

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must be undertaken. Under s 10F ‘family dispute resolution’ (FDR) encompasses processes (other than a judicial process) where an independent third party helps separated or divorced parents to resolve disputes. FDR in practice is most often family mediation.\textsuperscript{96} The changes to family law also included initiatives to support the use of less adversarial trials (LATS) that provide significant innovations to family court litigation with a focus on party engagement and a move away from traditional adversarial trials.\textsuperscript{97} Such changes to civil procedure and family law are evidence of the commitment of governments to encourage settlement prior to litigation through the use of ADR,\textsuperscript{98} although these initiatives have met some resistance largely traceable to the continued adversarial frame of practice of many Australian lawyers.

1.4 FIRST GENERATION PRACTICE: NEGOTIATION AND MEDIATION

Overall, the two most commonly used ADR processes in Australia, particularly in the court-connected context, are negotiation and mediation.\textsuperscript{99} Precise definitions in the discipline area of ADR are difficult due to debates over what each process encompasses.\textsuperscript{100} The practices that have been adopted in Western countries in relation to negotiation and mediation are often centred on the ‘Harvard’ integrative bargaining approach.\textsuperscript{101} This model of negotiation has been adopted in the facilitative model of

\textsuperscript{96} Donna Cooper and Rachael Field, ‘The Family Dispute Resolution of Parenting Matters Australia: An Analysis of the Notion of an “Independent” Practitioner’ (2008) 8 Queensland University of Technology Law and Justice Journal 158, 159.

\textsuperscript{97} For a detailed discussion of these innovations: Diana Bryant and John Faulks, ‘The Helping Courts Come Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia’ (2007) 17 Journal of Judicial Administration 93.


\textsuperscript{99} David Bamford, Principles of Civil Litigation (LBC Thomson Reuters, 2010) 197. According to Bamford, ‘The primary means by which the courts explicitly promote settlement of litigation is by encouraging, sometimes to the point of compelling, parties to engage in ADR processes, especially mediation’: 199.

\textsuperscript{100} NADRAC prefers to use a ‘description’ of a dispute resolution term in recognition of the diverse meanings given to ADR terms: NADRAC, above n 4, 1-2.

\textsuperscript{101} Michelle LeBaron and Mario Patera, ‘Reflective Practice in the New Millennium’ in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), Rethinking Negotiation Teaching: Innovations for Context and Culture (DRI Press, 2009) 48.
mediation. The integrative model of negotiation and the facilitative model of mediation can be categorised as first generation practice because, amongst a number of characteristics, these approaches have an instrumental focus on the gaining of agreement and frame bargaining around individualistic interests. That is in these approaches there is a focus on gaining settlement and the frame of practice is on individuals gaining a preferred outcome, rather than wider concerns of relationships or community. While relationships and emotions may not be completely ignored in facilitative mediation, the main emphasis is often on achieving outcomes. First generation practice is a common approach in both the practice and teaching of negotiation, but has recently received significant criticism, although many continue to value this approach and seek to build on it rather than entirely replace it. I now discuss the evolution of first generation practice and pedagogy in negotiation.

1.4.1 NEGOTIATION

Negotiation is used in a number of ways in society. For instance direct negotiation is where parties in conflict discuss their issues and concerns in person, and this communication may lead to some form of agreement. In a legal context, lawyers will often represent parties in conflict negotiations and this can be categorised as ‘indirect’ negotiation. NADRAC describes indirect negotiation as:

> a process in which the parties to a dispute use representatives (for example, lawyers or agents) to identify issues to be negotiated, develop options, consider alternatives and endeavour to negotiate an agreement. The representatives act on behalf of the participants, and may have

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102 Bush has traced the history and ultimate dominance of the Harvard approach to negotiation in mediation practice. The Harvard integrative bargaining concepts of ‘…mutual problem solving to meet needs and interests’ became part and parcel of standard mediation texts, training guides, competency tests, and ethical standards-at least, within the mainstream of what has come to be called “facilitative” mediation practice’: Bush, above n 25, 723.

103 LeBaron and Patera, above n 101, 46-47.


105 Astor and Chinkin, above n 1, 82-83.
authority to reach agreements on their own behalf. In some cases the process may involve the assistance of a dispute resolution practitioner (the facilitator) but the facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.\textsuperscript{106}

In indirect negotiation, the lawyer’s role is to negotiate on behalf of a client.\textsuperscript{107} There are a variety of theories of negotiation ranging from the adversarial bargaining approach of distributive or zero-sum negotiation to the more collaborative approach of integrative or interest-based/problem-solving negotiation, or as it is sometimes known ‘principled negotiation’.\textsuperscript{108} These approaches are based largely on Western notions of negotiation and some writers have emphasised the need to consider negotiation from other cultural perspectives.\textsuperscript{109} A range of practices exist in legal negotiation, but many argue that the distributive approach, coupled with an adversarial approach to bargaining is the most common legal orientation to conflict due to its similarity to the philosophical underpinnings of traditional legal practice advocacy.\textsuperscript{110} Some academics and practitioners argue for a shift in the legal culture to encourage lawyers to adopt non-adversarial approaches to negotiation that focus on a problem-solving approach to client’s legal and personal issues.\textsuperscript{111} Carrie Menkel-Meadow argues for an engagement with underlying interests, as opposed to positions, in thinking about settlement options and asks legal negotiators to consider, amongst other issues, whether the solution was fair and just for the parties:

Adversarial assumptions affect not only the quality of solutions to negotiated problems but also the process by which these solutions are

\textsuperscript{106} NADRAC, above n 4, 8.
\textsuperscript{107} There are ethical tensions inherent in the choices lawyers make regarding pursuing a collaborative problem solving approach as arguably on occasion an adversarial approach may provide the ‘best’ outcome for a client: Scott Peppet, ‘ADR Ethics’ (2004) 54 Journal of Legal Education 72.
\textsuperscript{108} Astor and Chinkin, above n 1, 107; Sourdin, above n 5, 33-36.
\textsuperscript{109} LeBaron and Patera, above n 101, 48-40.
\textsuperscript{110} Sourdin, above n 5, 46-47.
reached. This is especially important because the type and quality of solutions may depend a great deal on the process used. The adversarial conception of negotiation produces a particular mindset concerning the possible solutions which then tend to produce a competitive process. This in turn may cause the parties to miss opportunities for expanding the range of solutions.\textsuperscript{112}

The narrow mind-set of some lawyers, identified by Menkel-Meadow as constraining the creative possibilities of negotiation, has been criticised by other writers,\textsuperscript{113} particularly in the context of court processes. In court-connected contexts negotiation can occur both prior to litigation and at any time before the final determination of a matter. Too often though, the shadow of the law\textsuperscript{114} falls not only on the substance of the issue to be negotiated in the legal context, but also on the way that the issue is negotiated, leading to highly adversarial negotiation practices. While some writers\textsuperscript{115} argue that an adversarial approach to negotiation is sometimes necessary, many theorists point to the range of ADR processes that are now available and the need for lawyers to more widely adopt collaborative approaches in legal negotiations.\textsuperscript{116} In particular, problem-solving approaches are advocated to assist clients to deal holistically with the myriad issues associated with legal conflicts.\textsuperscript{117}

Problem-solving negotiation draws from the work of Roger Fisher and William Ury and the principled approach to negotiation, often described as the Harvard approach.
as it was developed as part of the Harvard Negotiation Project.\textsuperscript{118} This approach attempts to explore options in such a way that parties are able to settle their dispute using a win/win approach. In contrast to the adversarial/distributive approach which is the other main form of negotiating technique, principled negotiation avoids a highly competitive mindset; one party does not lose everything nor does the other party win everything. Whereas the adversarial/distributive approach is characterised by positional bargaining and a focus upon finite resources, the integrative (principled) approach looks at options in a creative manner to allow the parties to seek mutually beneficial solutions.

Fisher and Ury advocated the following four concepts in their original model of negotiation. They provide a framework for the strategies and techniques of integrative bargaining:

(i) Separate the people from the problem. In this approach the emotional dimensions of a dispute are separated from the substance of the conflict.\textsuperscript{119}

(ii) Focus on interests rather than positions. This approach asks a negotiator to ask for the reasons behind stated positions.\textsuperscript{120}

(iii) Invent options for mutual gain. This approach asks for creative option generation and problem-solving to explore mutual gains for the parties involved in conflict. Parties look for ‘win/win’ solutions.\textsuperscript{121}

(iv) Use objective criteria. This approach asks negotiators to research objective information to provide a benchmark for the issues reached in agreement.\textsuperscript{122}

Together with other theorists, Fisher and Ury have further developed this model to include preparation for negotiation, exploration of relationships and to incorporate the


\textsuperscript{119} Ibid 17.

\textsuperscript{120} Ibid 41-57.

\textsuperscript{121} Ibid 58-83.

\textsuperscript{122} Ibid 84-98.
emotional dimensions of conflict. Despite ongoing development, critics of contemporary negotiation theory point to the lack of engagement with many issues of identity in negotiation models. Many of the prominent theories, such as the Harvard approach, fail to adequately deal with the impact of culture and power both in negotiation and in the allied process of mediation, and they can also be assessed as addressing emotional concerns too simplistically. The dominant conception of negotiation as an instrumental process focussing on reaching agreement can sideline other concerns in the process, such as relationships and the potential for negotiation to be transformative. Linda Putman states that concerns about instrumentality lead to negotiation being depicted as a way of achieving agreement over substantive issues to the exclusion of other concerns in a negotiation. This focus on gaining an agreement, coupled with a frame of practice skewed towards individual rather than relational needs can constrain the opportunities to explore and develop relationship that negotiation offers. Also, the dominance of a rational frame to decision-making results in agreements that fail to address all the dimensions of conflict, including emotional concerns. She argues that there is a neglected potential for a negotiation to be transformative and contribute to fundamental change between the parties:

Fundamental changes might entail transforming the way individuals conceive of the other person, their relationship, the conflict dilemma, or the social-political situation. Negotiations can produce fundamental

123 Roger Fisher, William Ury and Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In (Penguin Group, 1991). The facilitative model of mediation is based upon this approach: Boulle, above n 37, 46. See also a recent work on understanding emotion in negotiation: Roger Fisher and Daniel Shapiro, Beyond Reason: Using Emotions as You Negotiate (Penguin Group, 2005).
125 LeBaron and Patera, above n 101, 49.
127 Ibid 338-341.
128 Ibid 341-342.
129 Ibid 342-343.
changes in conflicts at the actor level, issue level, rules, structures and context of the dispute, however normative and descriptive models overlook these changes and center on the settlement itself.\textsuperscript{130}

In recent years a series of conferences have been devoted to reconsidering negotiation practice and pedagogy.\textsuperscript{131} In the writings resulting from these conferences Putman’s criticisms of negotiation have been echoed by other academics, targeting the Harvard model and other pragmatic influences in negotiation such as game theory.\textsuperscript{132} For instance, Michelle LeBaron and Mario Patera have analysed the elements of traditional approaches to negotiation that include many of the concepts of the integrative approach in order to critique the reification of this method. Drawing directly from their work the elements they see that threaten a more relational approach to negotiation are:

Explicit communication and direct confrontation
Individualist perspectives on agency and autonomy;
Competitive assumptions that people will act to maximise individual gains, and can be assisted to extend this behaviour to maximizing joint gains if their own interests are not compromised;
Action-orientation at the expense of a focus on “being” or inaction;
Analytic problem-solving;
Sequential orientation to time;
Universalist ideas about the international applicability of interest-based

\textsuperscript{130} Ibid 339.


negotiation

Agreement as a central measure of success.\textsuperscript{133} For LeBaron and Patera the focus on analytical, rational problem-solving and individualistic perspectives incorporated in the Harvard model, is largely holding back the potential of negotiation to contribute to improved ways for people to interact in society. They argue that second generation practice should re-examine the theory, practice and education in the negotiation field.\textsuperscript{134} I discuss the emergent ideas of second generation practice in section 1.4.3, but first consider the ADR process of mediation, as first generation negotiation practice has been the formative influence in the development of mediation.

1.4.2 MEDIATION

Traditionally, mediation has been praised for its informality, flexibility and low cost in comparison to litigation. It is a private process, the outcomes of which are generally not recorded (except in some legislative contexts) and no-one but the parties and the mediator themselves are privy to the conduct of the mediation.\textsuperscript{135} As noted previously in this chapter it is valued for enhancing party self-determination in dealing with conflict and offers potential for empowering parties. There are a number of difficulties in providing a definition of mediation as this process has been given a range of meanings and there is no uniformity in approaches to this process.\textsuperscript{136} Practice is highly varied due to the particular professional background, training and personal

\begin{footnotesize}

\textsuperscript{133} LeBaron and Patera, above n 101, 48.

\textsuperscript{134} Ibid 49-50.

\textsuperscript{135} Astor and Chinkin, above n 1, 9-10.

\textsuperscript{136} One well known Australian description of mediation is as follows, ‘Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement’: NADRAC, above n 4, 9. Gregory Tillett, ‘Terminology in Dispute Resolution: A Review of Issues and Literature’ (2004) 15 Australasian Dispute Resolution Journal 178.

\end{footnotesize}
philosophy of the mediator. However, the two most practiced approaches in Australia are the facilitative and evaluative models. The Australian voluntary national mediation accreditation standards provide a definition of mediation that is open enough to include a range of models:

A mediation process is a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.

In Australia the facilitative model is privileged in most legislative and court contexts.

Bush notes that mediation practice has been influenced by the Harvard integrative bargaining approach. Bush argues that this approach gave mediators a frame of practice that:

… became the basis for the view that mediation should also be seen as a process for addressing conflicts through creative, mutual problem-solving, not just a process of settling cases in the shadow of the expected court outcomes.

The facilitative model, drawing from the Harvard integrative approach, can be categorised as first generation practice. In contrast, I would argue that evaluative mediation is not eligible to be considered first generation practice as it does not encourage creative, mutual problem-solving, but uses mediator influence to reach settlement and compromises party self-determination. It can be seen as an evolution

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138 Sourdin, above n 5, 53.
140 Sourdin, above n 5, 53.
141 For example, in relation to power: Astor and Chinkin, above n 1, 9-10.
142 Bush, above n 25, 721.
of practice that has more in common with arbitration and litigation. In the Australian standards, known as the *National Mediation Accreditation Scheme and Standards* (NMAS), evaluative mediation is not recognised as a mediation model but is as seen as a ‘blended’ approach. Sourdin states that a blended approach is ‘not defined as mediation but as an amalgam of processes where the consent of disputants is required.’ 143 Notably, in practice many mediators do not adhere to a set model, but will move through models during the mediation. This indicates a lack of theoretical consciousness from the mediator and a pragmatic ‘doing whatever it takes to settle’ approach. For example, Boulle notes that in mediation a mediator might begin with a facilitative approach but in parts of the process the mediator may adopt an evaluative frame of practice. 144

In the beginning of this chapter, in section 1.2, I canvassed critiques of private ordering, evaluative mediation and the lack of procedural justice in much of court-connected mediation practice. Added to these concerns expressed by critics, there are vexed questions relating to facilitative practice. For example, Bush highlights research into family mediation that indicates that a focus on problem-solving and settlement can undermine the fairness of the mediation process. 145 Family mediation, although attempting to promote party self-determination in separating couples, often involves a mediator influencing parties to settle. 146 Mediators selectively facilitate and prioritise issues so that settlement is reached and this approach may silence exploration of some the parties’ concerns. 147 Research over the years shows disadvantage through power imbalances for some women and other vulnerable groups in family mediation. 148

143 Sourdin, above n 5, 53.
144 Boulle, above n 37, 43.
145 Bush, above n 25, 711-717.
146 Ibid 717-720.
Power imbalances due to family violence are a major and ongoing concern that has been explored and critiqued by researchers in the field. In Australia, under s 60I of the Family Law Act 1975 (Cth) as amended by Family Law Amendment (Shared Responsibility Act) 2006 (Cth), family dispute resolution (which includes mediation) is now compulsory prior to litigation in matters where children are involved. Under the legislation, victims of domestic violence are exempt from attending mediation, although screening processes may fail to identify all those who have experienced violence. These women may not notify the system that they are victims of violence because of feelings of shame or due to fear of the high cost of litigation. Thus there are a number of matters being mediated where parties have experienced violence and strategies need to put in place to ensure that women who experience violence are screened out of mediation or are better protected during the process. This will require education, legislative reform and prioritising family violence in family law. It also requires changes in family mediation practice that better deal with power concerns in the process. These concerns about mediation have also been voiced in research into community mediation.

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150 Astor and Chinkin, n 1, 345.


Culture is another neglected issue in the family jurisdiction, and more widely in other areas of mediation practice. Negotiators and mediators from Western societies tend to adopt Western approaches to conflict. Arguably these approaches fail to consider diverse cultural approaches to conflict. Too often culture may be conceptualised in simplistic terms, with little reflection regarding differences from the dominant norms of Western societies. Cultural constructs can affect the unfolding story of conflict, leading at times to one dominant story whilst other stories told around the mediation table may be colonised. Reflexive exploration of mediators’ own personal and political history, may address cultural concerns in the mediation process. Mediators need to begin to perceive any cultural biases in their own practices and consider the cultural identity concerns of parties more deeply.

However, in order to improve mediation practice there must be institutional support for a more relational, culturally aware approach to mediation that recognises and deals with power imbalances. According to Bush, contemporary mediation practice is failing parties due to the influence of courts and the focus on settlement. The courts do not support the evolution of mediation practice, but instead foster a climate of settlement at the cost of relational concerns. In his view, mediation will only thrive if it can operate and evolve away from courts. Bush argues that new models of mediation have developed in reaction to concerns about mediation practice. These

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160 Armstrong, above n 155, 34.
161 Bush, above n 25, 739.
162 Ibid 732-738.
163 Ibid 739-743.
models resist the settlement focus of much of mediation and articulate new ways of approaching practice. These models of mediation hold out the promise of the kind of conflict transformation articulated by Putnam. I now canvass the evolution of second generation practice and discuss the ways that these conceptions of practice better meet parties’ needs in conflict engagement.

1.5 SECOND GENERATION NEGOTIATION AND MEDIATION

New approaches to negotiation and mediation are not uniform in their practice innovations and many have divergent philosophies and interventions. However, these emergent approaches have in common both a critique of dominant models of negotiation and mediation, as well as strategies for improvement. For some writers, second generation practice is a rejection of many of the premises of first generation practice, such as the focus on settlement, an individualistic frame of practice and the privileging of rationality.164 For others it is a re-working of the integrative/facilitative approaches to address selected criticisms.165 Various initiatives introduced below and discussed in detail in chapter three, attempt to improve practices in response to a range of concerns such as the issue of emotion in conflict engagement, cultural frames of practice and power imbalances. Some writers see second generation practice as an approach where there is a shift from an instrumental focus and individualistic frames to a more open-ended, relational world-view that can assist in conflict transformation. Negotiators and mediators can improve interventions in relation to emotion, culture and power by adopting the philosophy of a relational world-view informed by critical

164 For example for negotiation: Fox, above n 132; Docherty, above n 132; Putman, above n 126; Linda Putman, ‘Negotiation and Discourse Analysis’ (2010) 26 Negotiation Journal 145. In regards to mediation such an approach is evident in transformative mediation: Bush and Folger above n 64; and also narrative mediation: Sara Cobb, ‘Empowerment and Mediation: A Narrative Perspective,’ (1993) 9 Negotiation Journal 245; John Winslade and Gerald Monk, Narrative Mediation (Jossey-Bass, 2000).
165 For example, using first generation approach but emphasising the need for curiosity: Chris Guthrie, ‘I’m Curious: Can We Teach Curiosity’ in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), Rethinking Negotiation Teaching: Innovations for Context and Culture (DRI Press, 2009) 63. In mediation the new ‘understanding’ model builds on facilitative mediation and adds to this approach by focusing on understanding and emotion and by including legal concerns through ‘looping’ communication strategies: Gary Friedman and Jack Himmelstein, Challenging Conflict: Mediation through Understanding (American Bar Association, 2008), xxii.
theory. I now introduce some of these approaches.

1.5.1 NEGOTIATION

In an effort to chart the evolution of second generation practice in negotiation there have been a number of conferences bringing together negotiation practitioners and teachers from around the world. Writings from this conference, including two books, have raised many issues relating to the content and pedagogy of negotiation and articulated a range of ways to define second generation practice. Practitioners and teachers contributing to second generation practice are drawn from a variety of fields and are not confined to law. Of interest in this thesis are those writers who critique first generation negotiation scholarship from the perspective of critical theory as this approach has synergies with developments in mediation. As noted previously, Putman has criticised negotiation for its instrumental focus, individualistic frame of practice and the adherence to the rational in negotiation discourse. Putnam advocates a nuanced approach to negotiation practice informed by critical theory, particularly using discourse analysis in negotiation. She argues that opportunities can occur in turning points in negotiation; specific critical moments that can assist with conflict transformation through ‘changes in meaning that the two sides constructed for the issues’.

Kenneth Fox endorses Putman’s work and argues that the field of

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166 Second Generation Global Negotiation Education, above n 130.

167 The two books are Christopher Honeyman, James Coben and Giuseppe De Palo (eds), Rethinking Negotiation Teaching: Innovations for Context and Culture (DRI Press, 2009); Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) http://law.hamline.edu/dri/projects/press.html at 30 November 2011. There was also a special edition of the Negotiation Journal in 2009.


negotiation should evolve from the assumptions of first generation practice. Together with LeBaron and Patera and Julie Ann Gold, he emphasises that stereotypical conceptions of culture predominate in first generation practice. He advocates for a construction of culture that recognises it to be fluid and only one aspect of identity. Fox also highlights the benefits of postmodernist and social constructionist perspectives to negotiation. Fox states that adopting critical theory has benefits for practice:

This post-modern view re-orient how we examine negotiation. Instead of assuming we can plan, “game” and develop strategic road-maps for successful negotiation, this new view shifts our focus to examining the language, interactions and meaning that emerge organically as the negotiation process unfolds.

Emergent theories of negotiation such as these represent a valuable re-examination of the field that may promote conflict transformation. This re-examination is not confined to negotiation theory and practice but also includes review of negotiation pedagogy. First generation practice has developed a particular approach to pedagogy that is dominated by the Western-centric frames. First generation pedagogy relies on description and practice of role-plays and many teachers will adopt case studies, scenarios and debriefing exercises embedding Western constructs of conflict engagement and culture. Many of the writers engaging with second generation practice query the basis of first generation pedagogy and suggest improvements. Writers argue that when using first generation pedagogy, lecturers and trainers unquestioningly teach students’ individualist, rational approaches to negotiation. These approaches reinforce the first generation frame. Again, as noted in regards to

171 Fox, above n 132, 13-14.
172 LeBaron and Patera, above n 101.
173 Gold, above n 132, 281-287.
174 Fox, above n 132, 20-23.
175 Ibid 22.
176 LeBaron and Patera, above n 101, 48-50.
177 Fox, above n 132, 13-14.
negotiation practice, some of these critiques of learning and teaching do not reject first generation efforts but see change as building on previous pedagogy. Others argue that Western-centric constructs in negotiation pedagogy fail to engage with cultural diversity and thus may be alienating to some students. They argue for a more radical re-examination of negotiation pedagogy. I will discuss issues of pedagogy in detail in chapter three, but now consider second generation practice in mediation.

1.5.2 MEDIATION
In response to the perceived failures of dominant problem-solving practice in mediation, particularly in regards to the widespread use of evaluative mediation and the lack of procedural justice in court-connected practice, a number of models have developed. Many of these models focus on conflict transformation in a manner according with Putman’s view of the potential of negotiation to be transformative. Bush identifies these new models as the transformative, narrative, insight and understanding models and argues that these models focus on goals beyond settlement. Although, these models are not uniform in their approaches, they have some similarities, in that they are not myopically focused on the transactional dimensions of disputes and the gaining of agreement. Rather they value interactional concerns and the relationship dimensions of conflict, as a priority in the mediation. Also, these models largely focus on mediator interventions that are not directive. These models of mediation might be described as second generation

178 Noam Ebner and Kimberlee Kovach ‘Simulation 2.0: The Resurrection’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 245.
179 Nadja Alexander and Michelle LeBaron, ‘Death of the Role-play’ in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), Rethinking Negotiation Teaching: Innovations for Context and Culture (DRI Press, 2009) 179.
180 Bush, above n 25, 739.
181 Ibid 740-746.
182 Ibid 743.
183 Ibid 746-748.
practice. Most aim for some form of conflict transformation in parties to a dispute. For example, the transformative mediation model challenges settlement orientated approaches to conflict and instead focuses on relationships and opportunities for conflict transformation through recognition and empathy. Narrative mediation achieves conflict transformation through helping parties to ‘re-story’ the conflict to one where parties are in greater harmony. Writers about these approaches adopt postmodernist and social constructionist perspectives on mediation practice. Along with new mediation practice models there have also been changes in mediation pedagogy. Recent initiatives in mediation learning and teaching have been canvassed in the United States as part of conference on mediation pedagogy. I discuss these initiatives in detail in chapter four.

Emergent areas of practice and pedagogy in ADR are important to consider because they give legal practitioners the opportunity to reconsider practice, and address concerns such as the rise of evaluative mediation and the lack of procedural justice in court-connected contexts. These different paradigms are of value when considering the ways lawyers should practice in the future. Critique of first generation models may not only assist with improved practice, but also shed light on dominant premises about ADR content and pedagogy in legal education. Increasingly writers argue for

185 Joseph Folger and Robert A Baruch Bush, ‘Ideology, Orientations to Conflict, and Mediation Discourse’ in Joseph Folger and Tricia Jones (eds), New Directions in Mediation: Communication Research and Perspectives (Sage, 1994) 3.
186 Cobb, above n 184; Cobb, above n 164.
187 Winslade and Monk, above n 164.
the inclusion of ADR in legal education to prepare law students for practice. A central concern of this thesis is what is being taught in a course on ADR (or similar subject name) and this area of learning and teaching can be improved. One of the issues it addresses is the kind of practice that is being taught in law schools and whether course content includes emergent theory and practice. Other issues concern the place of ADR in legal education and the pedagogy adopted by ADR teachers. I will now introduce some key issues relating to ADR and legal education.

1.6 ADR AND LEGAL EDUCATION: KEY ISSUES
The need to include ADR in the legal curriculum has long been argued for and many commentators have advocated that law schools systematically include the range of non-curial options, particularly negotiation, in the education of law students. In initial debates about ADR and legal education, as early as 1984, Riskin argued that both negotiation and arbitration fitted well with traditional legal culture, and that law schools should value the transformative potential of mediation in the legal curriculum. Similarly, Beryl Blaustone noted that mediation education provides an


190 For instance Marc Galanter, ‘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 ‘litigationation’. He states ‘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’: 270.

opportunity for students to engage with issues relating to party empowerment.\textsuperscript{192} Many writers have linked an understanding of ADR to the wider endeavour of assisting law students to develop their skills as holistic problem solvers,\textsuperscript{193} modifying the traditional adversarial construct of the legal identity as a successful advocate. Thus learning about ADR is not simply an end in itself, but is positioned in the wider discourse of changing the professional identity and skillset of lawyers.

Extensive growth in the use of ADR in our legal and justice system would seemingly dictate the widespread inclusion of the discipline of ADR as an essential element in law school education. Despite this evident need, ADR is not included as a compulsory course for admission to practice in Australia. Legislation in each state of Australia governs the admission criteria to practice as a lawyer, adopting a nationally unified set of requirements that prescribe eleven areas of knowledge, known as the ‘Priestley 11’.\textsuperscript{194} ADR is not included in these requirements. Areas of ADR, such as


\textsuperscript{194} The Priestley 11 are the core knowledge areas that are required for students to successfully study at university in order to practice. They are named after Mr Justice Priestley who chaired the 1992 committee that articulated the eleven knowledge areas: Richard Johnstone and Sumitra Vignaendra, \textit{Learning Outcomes and Curriculum Development in Law: A Report Commissioned by Australian Universities Teaching Committee (AUTC)} (2003), 4. The knowledge areas are: ‘contract, tort, real and personal property, equity (including trusts), criminal law and procedure, civil procedure, evidence, professional conduct (including basic trust accounting) administrative law, federal and state constitutional law and company law’: 4-5.
negotiation and mediation are however mandated in practical legal training as part of a post-university qualification required for legal practice.\textsuperscript{195}

In the United States a report by the Carnegie Foundation into legal education in 2007 emphasised the importance of legal skills and advocated for a return to an ‘apprenticeship’ style of legal education.\textsuperscript{196} Deborah Jones Merritt argues that the renewed focus of legal education on this ‘apprenticeship’ style education and professional identity, gives ADR increased importance in the legal curriculum due to the vocational nature of this discipline area.\textsuperscript{197} Douglas Adams traces the teaching of ADR in the United States, beginning with the introduction of an upper-level elective subject by interested academics leading to the integration of ADR, especially negotiation and mediation, into substantive first year offerings.\textsuperscript{198} He argues that ADR teaching has reached a plateau.\textsuperscript{199} More recent research, through the synthesis of data from professional associations, confirms that the teaching of ADR in United States law schools continues, but that there are only slight increases in the number of ADR subjects offered in law schools.\textsuperscript{200} The need to integrate ADR across all relevant subjects in the legal curriculum has been proposed by well-known practitioners and theorists in ADR. For instance, Menkel-Meadow points to the importance of the inclusion of ADR in the legal curriculum not merely as an ‘add on’ but as an integration of a range of dispute resolution theory and skills in order to combat the

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\begin{itemize}
\item \textsuperscript{195}See generally: \textit{Australian Professional Legal Education Council, Competency Standards for Entry Level Lawyers} (2000).
\item \textsuperscript{197}Deborah Jones Merritt, ‘Pedagogy, Progress and Portfolios’ (2010) 25 \textit{Ohio St Journal on Dispute Resolution} 7, 8.
\item \textsuperscript{199}Ibid.
\item \textsuperscript{200}Michael Moffitt, ‘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 \textit{Ohio St Journal on Dispute Resolution} 25.
\end{itemize}
adversarial culture of much of law teaching.\textsuperscript{201} Leonard Riskin and James Westbrook argue for integration in the first year of the law curriculum\textsuperscript{202} and specifically suggest that ADR options are taught as part of substantive law subjects. In the United States, six universities were funded to trial the integration of ADR into various law courses by the incorporation of ADR into substantive law courses or the teaching of ADR as a stand-alone course. Subsequent evaluation of these initiatives found improved understanding of ADR in law students.\textsuperscript{203} Advocates for the integrated approach still argue strongly that first year law programs need to integrate ADR into their teaching or risk marginalizing these options and privileging litigation.\textsuperscript{204}

As will be shown in chapters two and five of this thesis, many Australian universities include specific subjects, parts of subjects, or skills programs that deal with ADR and focus on areas such as negotiation and mediation. These ADR courses include compulsory or elective subjects, or may be considered as part of a core subject for legal practice such as civil procedure. They may also be part of an integrated skills program along with other practical legal skills such as advocacy. ADR education is also frequently provided in postgraduate programs, as an element of pre-admission


\textsuperscript{204} John Lande and Jean Sternlight, ‘The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering’ (2010) 25 \textit{Ohio St Journal on Dispute Resolution} 247. There is some detail regarding the offerings of ADR in Australian universities. This data provides a snapshot of subjects and degrees offered in studies in Australia in ADR, but with a focus upon mainly postgraduate offerings in ADR: National Alternative Dispute Resolution Advisory Council, \textit{The Development of Standards for ADR: Discussion Paper} (2000) 125. The data does not show the degree ADR is integrated into substantive law courses or give detail of the undergraduate or Juris Doctor academic courses in this area. Jeff Giddings argues for a systematic approach to integrating legal skills, amongst other graduate attributes, into the law curriculum: Jeff Giddings, ‘Why No Clinic Is an Island: The Merits and Challenges of Integrating Clinical Insights Across the Law Curriculum’ (2010) 34 \textit{Washington University Journal of Law and Policy} 261.
training in practical legal skills, and as part of continuing professional development of lawyers.\textsuperscript{205}

Macfarlane advocates for change to legal practice and argues that legal education is pivotal for re-imagining conflict resolution.\textsuperscript{206} In Australia a recent report dealing with ADR and restorative justice by the Victorian Law Reform Committee notes the need to change lawyers’ orientation to conflict through changes to legal education.\textsuperscript{207} Significantly, the National Alternative Dispute Resolution Advisory Council (NADRAC) calls for teaching ADR to law students in their report entitled \textit{Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction}.\textsuperscript{208} A similar call also comes from the Attorney-General in the state of New South Wales.\textsuperscript{209} Such proposals for changes in legal education are discussed in detail later in this thesis.

\textbf{1.7 THE NEED FOR RESEARCH INTO ADR AND LEGAL EDUCATION}

The foregoing discussion emphasises that many court and government initiatives seek to promote ADR in Australia. ADR skills and processes and, in particular, negotiation and mediation, are beginning to be considered as important aspects of lawyers’ practice and viewed by some as a pivotal focus in the education of lawyers. Although the use of ADR in Australia continues to increase, as evidenced in Victoria and Queensland, there are also some criticisms of its use. Some of these criticisms relate to the nature of ADR and suggest that it may lead to less access to the courts and inferior experience of justice than a court hearing. Some criticisms relate to the use of ADR in the civil justice system, particularly regarding mandatory ADR provisions in legislation. For example, the repealed provisions in relation to pre-litigation requirements in Victoria demonstrate a continuing resistance to ADR initiatives by sections of the legal profession. A better understanding of ADR would assist lawyers

\textsuperscript{205} See generally Charles Brabazon and Susan Frisby, ‘Teaching Alternative Dispute Resolution Skills’ in Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), \textit{Educating Lawyers for a Less Adversarial System} (Federation Press, 1999) 156.

\textsuperscript{206} Macfarlane, above n 18, 223-4.

\textsuperscript{207} Law Reform Committee, Parliament of Victoria, above n 82, Recommendation 38: 161.


\textsuperscript{209} Letter from NSW Attorney General, John Hatzistergos to Australian Universities, (17 May 2010).
to achieve greater understanding and receptivity to ADR reforms in civil justice. Further education of lawyers about ADR is thus critical to the continued use and growth of ADR in our civil justice system. Legal education at universities is one of the most important sites for shaping future lawyers to fit the evolving legal culture.

Exploration of the content and pedagogy of ADR subjects in legal education is the focus of this thesis. Mapping ADR in legal education in two states in Australia, Victoria and Queensland, will clarify its place in legal education. A key issue in this research is the range of theories and models of negotiation and mediation being taught in ADR legal education. In particular, the teaching of first and second generation practice and pedagogy is assessed as this gives an indication of the willingness to incorporate the emergent ADR theory and practice into law teaching. Teaching these areas may contribute to improved practice in ADR as second generation models offer the possibility of conflict transformation. Moving away from a focus on instrumental practice that emphasises individualistic, rational approaches to negotiation and mediation allows practitioners to focus on relationship concerns in conflict. Also, adopting negotiation and mediation practice that incorporates postmodernist and social constructionist perspectives assists with interventions regarding emotion, culture and power in these processes. Another key concern is the extent to which other paradigms of practice, such as non-adversarial practices, are represented in ADR teaching because of the evolutionary change in the concept of the lawyer’s role in ADR.

Lawyers can significantly affect the experience of ADR for clients. The way they frame their practice, and the theoretical and philosophical lens through which they view ADR impacts upon their client and can affect outcomes, particularly in the court-connected sphere. Lawyers without sufficient skills and education in ADR may be unable to relinquish their customary adversarial framework when engaging in these processes. Thus teachers of ADR have significant influence on the potential for law students to develop skills, understanding and theoretical flexibility in their relationship to ADR in legal practice. Tracing the stories of ADR teachers in legal education and identification of emerging themes, trends and concerns is an important area of research in order to encourage ongoing curriculum renewal. This thesis explores these stories and gathers data with a particular focus on negotiation and
mediation, and the content and pedagogy used to teach these ADR options in legal education.

1.8 CONCLUSIONS
This chapter has mapped the rise of ADR in the legal and justice system with a particular focus on Australia. I have canvassed many of the significant criticisms of ADR and argued that processes such as mediation in the courts, are failing to meet party needs due to the rise of evaluative mediation and the consequent lack of procedural justice experienced by parties. Although there have been many initiatives in ADR at both state and Federal levels in Australia, the adversarial culture of many lawyers persists and undermines the evolution of legal practice to include non-adversarial practice. Further, I have outlined dominant and emergent practices in negotiation and mediation arguing that there is value in second generation practice in our legal and justice system. Emergent theory and practice in negotiation and mediation, although not uniform in approach, increasingly questions the underpinnings of dominant norms in these approaches to conflict. Critically, second generation practice queries the instrumental focus of much of practice, the construct of individualistic needs and rational decision-making that sidelines emotional concerns. First generation approaches are Western-centric drawn from the Harvard model and other influences such as game theory. Second generation practice offers the opportunity to re-imagine negotiation and mediation practice to be focussed on more than settlement, include a relational world-view, and critique the primacy of rational decision-making in conflict engagement. Second generation approaches have as central concerns practice interventions that engage with issues of emotion, culture and power in mediation and negotiation. Although ADR in legal education has grown in importance it is unclear what theory and practice is taught in law schools and thus this area requires research. The next chapter considers existing research on ADR and legal education and outlines the methodology of my study to address outstanding questions relating to ADR and legal education.
CHAPTER 2
METHODODOLOGY

2.1 INTRODUCTION
In chapter one I described and discussed the rise of ADR options in our legal and justice system in Australia, focusing on negotiation and mediation, first and second generation practice and pedagogy, and a summary of the debates surrounding legal education and ADR. My reading in this area highlighted the scarcity of research on ADR and legal education in Australia and the need for further exploration of this topic. The empirical component of this project explores the content and pedagogy of the teaching of ADR in selected law programs in Australia. This chapter discusses the research approach and methodology I adopted for this empirical work. The purpose of my study was to explore how law teachers of ADR understand teaching in this discipline area. I explored the content and pedagogy used by ADR legal academics and gathered the stories of their experiences teaching ADR in law schools and more widely at universities.

This chapter firstly describes existing research into legal education, and more particularly ADR education in law schools. This review highlights the research gap that this study seeks to address. The methodologies used by some of these existing studies are examined in order to inform choices for this study. The chapter then identifies the scope and aims of the study and the central and associated research questions. I next discuss the choice of research perspective, or epistemology, that guided my research and methodological choices. I then discuss the mixed method approach adopted in this study with a focus on a constructivist approach using primarily qualitative data, and including some quantitative data such as surveys, and a content analysis of ADR course guides. Next, I discuss the use of a grounded theory based approach in this study. I then provide detail of the organisation and analysis of the data for this study. Lastly I discuss the limitations of the study.

2.2 RESEARCH INTO ADR AND LEGAL EDUCATION
There have been a number of significant recent research studies in the United States and Australia regarding legal education, both in relation to program-wide concerns and specific issues relating to ADR. Selected research studies below canvass the
range of research agendas and methodologies adopted in these areas.¹

The influential United States report on legal education, the MacCrate Report,² identifies ten fundamental lawyering skills and significantly for the concerns of this thesis includes negotiation and dispute resolution options. A more recent but equally influential United States report on legal education, the Carnegie report,³ published in 2007, also recognised the importance of ADR. This report provides insights into the content and pedagogy of law programs in the United States and is important in terms of the comprehensive methodology adopted. In this study the authors visited sixteen law schools and explored case studies of law school pedagogy,⁴ integrated with analysis and argument, to assist in developing a new framework for legal education. As part of the research, legal professional groups were consulted (including the Association of American Law Schools),⁵ and law school staff (deans, academic and administrative staff), and students were also interviewed.⁶ The research teams engaged in participant observation of law school classes at the chosen institutions. The teams also consulted with legal educators in Canada, and the United Kingdom.⁷ Their research critiques the teaching of ADR in United States law schools, arguing that this discipline area has particular benefits for law students as it builds theory and practice in collaborative problem-solving. The report also focuses on the benefits of the commonly used strategy of experiential learning through role-plays in ADR; exploring the ways that such practices can help build professional identity.⁸ The authors review of ADR courses in law draws mainly from the literature. This research

¹ See for more detail regarding these reports chapter four of this thesis.


⁴ Ibid 16.

⁵ Ibid 15.

⁶ Ibid 16.

⁷ Ibid 16-17.

⁸ Ibid 111-114.
was supplemented by a report, published in 2007, focused on best practices in legal pedagogy, the Stuckey report. This report, through an investigation of educational literature and a continuing dialogue with a committee of legal scholars, suggests specific learning and teaching approaches, including experiential learning. Neither report, however, provides details regarding the content and pedagogies of ADR courses in law schools in a systematic way, drawn from empirical data. Nor do these reports engage with the experiences of ADR teachers about teaching ADR in a law school setting.

In an innovative research approach to understanding legal education, focused on first year pedagogy, Elizabeth Mertz analysed teaching practices of law lecturers in Contract Law courses in eight United States universities. Through examining transcripts of recordings of law classes together with observational notes, she charts the practices that create an intellectual approach of ‘thinking like a lawyer’ in law students and the impact this has on lawyers’ professional identity. Mertz argues that the traditional Socratic method, or variations of that approach to pedagogy, leads to a framing of the law that is largely divorced from questions of morality and she notes that emotion is frequently sidelined in the work of lawyers. Mertz’s work does not research all the courses that make up the legal curriculum and so does not specifically explore how learning about ADR may contribute to a law student’s development of professional identity, or their engagement with emotional dimensions of conflict.

In Australia there have been a number of reports into legal education and some of these note the importance of legal skills such as ADR, but none provides detail

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9 Roy Stuckey and Others, Best Practices for Legal Education: A Vision and a Road Map (Clinical Legal Education Association, 2007).
10 Ibid viii.
11 Elizabeth Mertz, The Language of Law School: Learning to Think Like a Lawyer (Oxford University Press, 2007).
13 Ibid 120.
regarding the content and pedagogy adopted by ADR law teachers. For example the Pearce report,\textsuperscript{15} published in 1987, highlights the focus on doctrine in legal education and calls for an increase in legal skills teaching, including ADR, in law schools in Australia. Echoing this view, the \textit{Managing Justice: A Review of the Federal Civil Justice System}\textsuperscript{16} report, published in 2000, considered the federal litigation system and the place of legal education in shaping the culture of the legal profession. This report recommends greater attention to legal skills, including negotiation and dispute resolution options, in law programs.\textsuperscript{17} Neither report maps the teaching of ADR in law schools, nor did the reports provide detail of the subject area of ADR.

One of the most significant reports in Australia, published in 2003, the Johnstone and Vignaendra\textsuperscript{18} report captured the learning and teaching practices in law schools, providing a 'stock-take' of legal education.\textsuperscript{19} This report was particularly useful in describing law school educational practices as the authors adopted a mixed method research approach that captured the views of many stakeholders. This approach included firstly, law school visits to interview deans/heads of school and key staff, and run focus groups with law staff.\textsuperscript{20} Secondly, students in their penultimate year of law school were surveyed and student focus groups followed up on themes that arose from the survey data.\textsuperscript{21} Thirdly, legal employers were interviewed by telephone to


\textsuperscript{16} Australian Law Reform Commission, \textit{Managing Justice: A Review of the Federal Civil Justice System}, Report No 89 (2000). The authors of this report conducted consultations and sought submissions from the legal community and analysed case files and case cost information as the basis of the reports wide ranging recommendations: 8.

\textsuperscript{17} Ibid ch 2.


\textsuperscript{19} Ibid 2-5.

\textsuperscript{20} Ibid 17.

\textsuperscript{21} Ibid.
determine preferred graduate attributes.\textsuperscript{22} The data in this study shows an increase in the teaching of generic and legal skills in law schools including ADR (particularly negotiation and mediation).\textsuperscript{23} Again, this study does not provide detail of the content and pedagogy of ADR courses.

Prominent Australian academic Margaret Thornton conducted research, funded by the Australian Research Council, into Australian legal education and the experiences of law academics.\textsuperscript{24} Thornton’s research considered the wider political and sociological questions surrounding legal education. This study included qualitative data from interviews with up to six legal academics in each university in Australia offering law programs.\textsuperscript{25} In this work Thornton explored the practices of law teachers and the effects of recent neo-liberal government policies upon law schools.\textsuperscript{26} She does not consider in detail particular courses in the legal curriculum, such as ADR, rather she critiques the effects of corporatist constructs and the retreat from the theoretical in legal education.

In 2009 the Australian Learning and Teaching Council (ALTC) and the Council of Australian Law Deans (CALD) conducted a joint research project into legal pedagogy.\textsuperscript{27} This research included a mapping of graduate attributes and pedagogy in legal education in Australia.\textsuperscript{28} This scoping study mapped recent changes in content and pedagogy in law schools, such as the increased use of online learning. Data for the research was gathered from each law school in Australia through focus groups and

\textsuperscript{22} Ibid.

\textsuperscript{23} Ibid 133-166. Law schools were categorised as providing legal skills education in a number of ways; that is (i) minimalist, (ii) more explicit, (iii) integrated and (iv) as part of professional legal training program: 134.


\textsuperscript{25} The exception was La Trobe University in Victoria where Thornton worked at the time of the study.

\textsuperscript{26} Ibid 16-18.


\textsuperscript{28} Ibid 12-17.
later from working groups dealing with specific pedagogical practices such as ethics or role-play.\textsuperscript{29} This study provides limited information relating to ADR and although role-plays were discussed as an important learning and teaching initiative, the focus of discussion was not ADR.\textsuperscript{30}

In March 2008, CALD\textsuperscript{31} adopted voluntary standards for law programs in order to improve the provision of legal education in Australia. These standards are the result of an international investigation of legal education standards. This initiative was complemented by a 2010 Federal government project to identify discipline standards in law.\textsuperscript{32} The approach to developing these standards involved two discipline leaders in law consulting with the various law schools in Australia and the legal profession, judiciary and admitting authorities.\textsuperscript{33} These standards include required education in knowledge, skills and values and general graduate attributes as minimum standards in the teaching of law.\textsuperscript{34} Like the CALD standards, this work was based on a consultative process, and it also drew on similar reports and standards worldwide.\textsuperscript{35} Significantly, the report identified the importance of ADR as a legal skill, including negotiation, and the range of alternative options to litigation,\textsuperscript{36} but did not provide specific details about the content and pedagogy of ADR academic courses.

However, some studies have researched concerns relating to the teaching of ADR. For instance, in the United States Ronald Pipkin undertook research into ADR learning

\begin{itemize}
\item \textsuperscript{29} Ibid.
\item \textsuperscript{30} Ibid B23.
\item \textsuperscript{32} Australian Learning and Teaching Council, \textit{Learning and Teaching Academic Standards Project: Bachelor of Laws: Academic Standards Statement} (December, 2010). These standards are progressively being developed in all discipline areas in universities in Australia, with law being one of the first areas to be addressed: 3
\item \textsuperscript{33} Ibid 5-6.
\item \textsuperscript{34} Ibid 9.
\item \textsuperscript{35} Ibid 12-13.
\item \textsuperscript{36} Ibid 10; 19.
\end{itemize}
and teaching in law in the United States in the period between 1990-1991.\textsuperscript{37} He compared the integration of ADR into first year law courses at the University of Missouri-Columbia with a control university at Indiana University-Bloomington where the first year curriculum did not include an integrated approach to the teaching of ADR. This study tested students’ learning in respect of ADR, where ADR was studied as a module in a substantive law course. Additionally, Pipkin investigated ADR teaching as a stand-alone subject at a third university, Willamette University.\textsuperscript{38} Students responded to questionnaires before undertaking the experience of the relevant subjects at the three law schools. The questionnaires used a series of statements to test orientations to legal practice with responses recorded on a Likert scale. Students were again surveyed after completion of the course using the same instrument, to test the effectiveness of their learning of non-adversarial orientations to practice, and the use of ADR.\textsuperscript{39} This research was funded from various grants that promoted the dissemination of an integrated approach to the teaching of ADR in law schools in selected universities in the United States and showed the benefits of studying ADR, particularly in developing an understanding of ADR options and collaborative problem-solving.\textsuperscript{40}

The most recent research in the United States into ADR and legal education charts the numbers of law teachers who self-identify as providing learning in ADR.\textsuperscript{41} This research by Michael Moffitt used the Association of American Law Schools directory of law teachers investigates three periods, 1997-1998, 2002-2003 and 2007-2008 to

\textsuperscript{37} Ronald Pipkin, ‘Teaching Dispute Resolution in the First Year of Law School; an Evaluation of the Program at the University of Missouri-Columbia’ (1998) 50 Florida Law Review 610.

\textsuperscript{38} Ibid 612.


\textsuperscript{40} Ibid 610. See also Leonard Riskin and James Westbrook, ‘Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan’ (1989) 39 Journal of Legal Education 509. The integrated approach was briefly discussed in chapter one of this thesis.

assess the number of ADR teachers in United States law schools.\footnote{Ibid 28.} Data used for this task also included the online database of the American Bar Association Section on Dispute Resolution, and the University of Oregon, Appropriate Dispute Resolution Centre. Some data from the \textit{U.S. News and World Report} annual rankings of law schools was also used. As this research sought only to track the number of teachers, and some teaching preferences, the material gathered was limited to quantitative data.\footnote{Ibid 76-78.} This research project established that ADR teaching continues to be present in the majority of law schools, although the growth rate seen in the 1980’s has plateaued.

In contrast, research undertaken in the United States and Canada by Julie Macfarlane and Bernie Mayer adopted a qualitative approach to study teachers and trainers who provided short course training in the area of ADR. The authors investigated the teaching of theory by a cohort who taught collaborative problem solving short courses.\footnote{Julie Macfarlane and Bernie Mayer, \textit{What Is the Use of Theory? How Trainer Practitioners Understand and Use Theory} (2005).} In this research, the authors used a qualitative approach and gathered the stories of the community of teachers. They gathered data through the use of semi-structured interviews with twenty-five participants to determine the content and pedagogy of courses in collaborative problem solving. Macfarlane and Mayer chose a small sample of well-regarded trainer/practitioners and trainer/researchers. They encouraged the participants to be both creative and reflective in their responses regarding their roles as teachers, some of whom were university lecturers.\footnote{Ibid 13-15.} A major finding of this research was that the majority of teachers in this study failed to prioritise the teaching of theory.\footnote{Julie Macfarlane and Bernard Mayer, ‘What Theory? How Collaborative Problem-Solving Trainers Use Theory and Research in Training and Teaching’ (2005) 23 \textit{Conflict Resolution Quarterly} 259’}

In Australia there is limited research about the teaching of ADR in law schools. In 1988, as ADR was emerging as a new course in law programs, law schools were surveyed to establish the extent of ADR teaching. The finding was that few schools
offered an ADR course. In 2005, with ADR teaching expanding in law schools, Tom Fisher, Judy Gutman and Erika Martens conducted a study at La Trobe University, Victoria, Australia. The study tested the effectiveness of teaching ADR (or Dispute Resolution as it is known at La Trobe University) in legal education. In particular, the study investigated whether the attitudes of law students regarding the use of ADR in legal practice shifted after experiencing a semester length stand-alone course dealing with ADR. There were five main areas in the survey: (i) importance of ADR; (ii) lawyer client interaction; (iii) focus of approach; (iv) negotiating behaviour; and (v) lawyer’s responsibility. In the research, similar to the earlier study by Pipkin, students responded to a series of statements using a Likert scale. Students were later re-tested to assess changes in their attitudes in the five nominated areas. The study showed that students experienced attitude changes to the ways that they framed legal practice. Students moved from a more adversarial approach to legal dispute resolution to one that privileged collaborative problem-solving. The research did not attempt to determine which parts of the course or learning and teaching strategies brought about the attitudinal changes. Thus it is not clear if the experience of lectures, role-playing, debriefing or other learning and teaching strategies brought about the changes in attitudes in the students or whether the changes were the result of experiencing the course content and pedagogy collectively. The data gathered for this study was limited to quantitative data and did not explore learning and teaching strategies from the perspective of ADR teachers. Nor did the authors gather and analyse any stories from ADR law staff.

47 JE Effron, ‘Breaking Adjudication’s Monopoly: Alternatives to Litigation Come to Law School’ (1991) 2 Australian Dispute Resolution Journal 21. A survey was sent to each law school in Australia and ten schools responded. Notably, at the time of the survey there were significantly fewer law schools than the thirty-two presently offering law programs. Out of the ten law programs that responded to the survey two schools offered elective stand-alone ADR courses. The article describing this research did not provide detail regarding methodology, particularly the survey instrument and there was also limited analysis of the results.

48 Fisher et al, above n 39.

49 Ibid 72-74.

50 Ibid 76.

51 Ibid 75-79.
Jeff Giddings of Griffith University in Queensland recently researched the teaching of ADR in law schools as part of an integrated skills approach.\(^52\) Through the analysis of four case studies concerned with clinical programs at four Australian law schools, Giddings provides insights into the use of clinical pedagogy in order to integrate legal skills (including ADR) as well as other graduate attributes such as ethics, into the legal curriculum.\(^53\) He argues that a sequence of integrated simulation experiences aimed to develop graduate attributes in the legal curriculum should culminate in clinical placements for law students.\(^54\) The research focus in this study is primarily around clinical legal education. This study provides valuable insights into teaching ADR in an integrated manner. It also identifies obstacles to be addressed for the success of an integrated approach,\(^55\) although it does not map the academic courses devoted to ADR, nor gather the stories of practice of ADR teachers.

The research for this thesis addresses the teaching of ADR by Australian university law lecturers and considers the content and pedagogy of ADR subjects. It is an in-depth study of the area of ADR, providing detail of this discipline area that previous legal education reports have failed to deliver due to the more general nature of their inquiries into the legal curriculum. The study resembles the approach of Macfarlane and Mayer in that it attempts to gather the stories of a community of practice.\(^56\) However, its focus is on Australian law teachers and the teaching of ADR in the legal curriculum and thus differs in focus and context from the work of Macfarlane and Mayer in the United States that specifically researched trainers in short course training. The Australian context of my research into ADR in law programs is an important addition to the literature as the majority of the research projects, such as Pipkin’s and Moffitt’s work, are located in the United States.

\(^{53}\) Ibid 262.
\(^{54}\) Ibid 268.
\(^{55}\) Ibid 287-288.
\(^{56}\) Jean Lave and Etienne Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press, 1991); Etienne Wenger, *Communities of Practice: Learning, Meaning and Identity* (Cambridge University Press, 1998). This concept is discussed in detail in chapter four of this thesis.
The study complements and extends the work of Fisher et al and their evaluation of Australian law students’ learning in an ADR course. It considers the experience of teaching ADR in law schools in the Australian context, from the perspective of teachers rather than law students and considers the content and pedagogy of ADR courses. It offers a wider investigation of law schools than the Fisher et al study as it reaches beyond consideration of one law school in Victoria to twelve law schools in two states: Victoria and Queensland and one law school in New South Wales. My study is primarily constructivist and utilises mainly qualitative data, with some quantitative data largely in the form of a content analysis of ADR course guides, whereas the study of Fisher et al, and the United States studies focused on ADR in law programs used a positivist approach and utilised quantitative data.

2.3 AIMS AND SCOPE OF THE STUDY AND RESEARCH QUESTIONS
The aim of this study is to gain information about and understandings of the ways in which ADR and, in particular, negotiation and mediation are taught in selected Australian law schools. This research may assist with curriculum review in relation to legal education in individual law schools. The research also may assist with a consideration of the legal curriculum areas that should be compulsory when studying law as a preparation for contemporary legal practice in Australia. As noted in chapter one, these compulsory knowledge areas are colloquially known as the ‘Priestley 11’.

Additionally, the findings of this study may assist policy-makers to develop suitable ADR initiatives. Lawyers have a significant impact on the conduct of ADR processes, particularly in court-connected contexts and they also work as ADR practitioners. The approach to educating lawyers about ADR will affect their practice, influencing the ways that they approach conflict and assess dispute resolution options. The involvement of a lawyer, their ‘ownership’ of ADR processes, will affect the success of ADR programs as lawyers influence client’s perceptions of dispute resolution processes such as mediation.\footnote{Jean Poitras, Arnaud Stimec and Jean-Francois Roberg, ‘The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?’ (2010) 26 Negotiation Journal 9, 12-14.}

Ensuring that the education of lawyers will enable them to effectively represent clients in ADR is a concern for government and court administrators seeking to broaden the adoption of ADR. Also, the findings of this study may facilitate teaching of second generation practice models, described in
chapter one, and this awareness may encourage lawyers of the future to place more value on relationships and relational world-views in conflict.

Legal education is only one site for the construction of lawyers’ practice in ADR, but it is recognised as a primary formative site.\textsuperscript{58} In Australia, no previous research exists investigating teachers’ perceptions of the teaching of ADR in law schools. Thus there is a gap in the research on ADR and legal education and my study provides empirical data and analysis specifically addressing this neglected area. The focus of this research is Australian law lecturers teaching ADR as an academic course, as either a stand-alone course or in combination with another subject area such as civil procedure. The research does not investigate skills modules in ADR (for example where negotiation is taught as a module in another academic course, such as contract law). Nor does the research consider the subject area of civil procedure where the title of the civil procedure unit does not specifically include ADR or Dispute Resolution. The study only considers ADR stand-alone courses or combination courses such as the course at Deakin University that combines the discipline areas of Civil Procedure and ADR in a course entitled \textit{Civil Procedure and Alternative Dispute Resolution}.\textsuperscript{59}

The extent to which Civil Procedure teachers address ADR is an important research area but it is not the subject of this thesis. A fruitful avenue for future research would be to investigate the teaching of Civil Procedure and the content of ADR in that subject area where there is no specific reference to ADR. Civil procedure is a discipline area that should include substantial attention to ADR due to the significant rise of court-connected ADR programs.\textsuperscript{60} However, the attention given to ADR in these courses may be minimal as traditionally these subjects are framed around litigation. Where ADR in some form is included in the title of a Civil Procedure course it signifies the intention to devote a considerable part of the course to this area.

\textsuperscript{58} Julie Macfarlane, \textit{The New Lawyer: How Settlement is Transforming the Practice of Law} (University of British Columbia Press, 2008) 33.

\textsuperscript{59} \textit{Civil Procedure and Alternative Dispute Resolution} http://www.deakin.edu.au/current-students/courses/unit.php?unit=MLL391&year=2012&return_to=%2Fcurrent-students%2Fcourses%2Fcours e.php%3Fcours e%3DM312%26version%3D1%26year%3D2012%26key words%3Dm312%26print_friendly%3Dtrue&print_friend ly=true at 3 January 2012.

\textsuperscript{60} David Bamford, \textit{Principles of Civil Litigation} (LBC Thomson Reuters, 2010) 197.
and these courses are included in this study.

The key research question was: what are the content and pedagogies used by law teachers in teaching the discipline area of ADR?

Questions included in the interviews and surveys used in this research attempt to understand the content and pedagogy of ADR, whether non-adversarial practice in law is promoted through the teaching of ADR, and detail about the teaching of first and second generation practice in negotiation and mediation. In particular I chart whether second generation approaches are being taken up in Australian law schools, by considering emotion, culture and power in ADR. These concerns are often evident in emergent, diverse models in negotiation and mediation., although the theoretical basis informing these areas may differ. As outlined in chapter one these concerns are central to evolving trends in ADR and they inform recent learning and teaching approaches. An important additional question in the research was the place of ADR, from the perspectives of academics teaching in this discipline area, in legal education. Therefore these issues were subsidiary questions in the research. The associated research questions are as follows:

• Do law teachers teach about lawyers’ non-adversarial practices in ADR?
• From the perspective of the law teachers of ADR what is the place of ADR in the legal curriculum?
• What are the learning and teaching strategies adopted by law teachers of ADR?
• Do law teachers teach about emotion in ADR?
• Do law teachers teach about culture in ADR?
• Do law teachers teach about power in ADR?
• Do law teachers teach a range of diverse models of negotiation and mediation, second generation practice, informed by theory from the social sciences?

In order to explore these questions a mixture of qualitative and quantitative research methods were employed. Ethics approval was granted for this study on the 17th November 2006 by RMIT University; Register Number HRESC A-895-09//06. Ethics approval is discussed in detail later in this chapter.

Qualitative data about the experience of teaching ADR was gathered through
interviews with twenty-four teachers in Victoria and Queensland who taught ADR or a combination ADR course—that is where ADR was combined with another discipline area such as civil procedure. Further data was gathered from five ADR teachers in Queensland through a survey, as time and budget constraints did not permit these teachers to be interviewed.\textsuperscript{61} This survey instrument used a Likert scale and the survey mirrored the questions posed in the interviews with the opportunity for open-ended responses. Additionally, I gathered quantitative data by conducting a content analysis of thirteen ADR law course guides for the ‘main’ ADR subjects identified by the teachers in this study. I obtained these course guides from the teachers in this study or analysed course guide information accessed from the worldwide-web pages of the relevant universities. For some courses I obtained information from both sources. Three other additional advanced elective ADR course guides and two social science ADR guides were also examined. These course guides were provided to me by the teachers. Methodological detail is provided later in this chapter.

\section*{2.4 EPISTEMOLOGY AND METHODOLOGY}

There are a variety of epistemological stances in research. The positivist approach is a perspective used in traditional scientific studies which relies upon the testing of a hypothesis through gathering quantitative data. In this approach there is an assumption that there is a ‘true’ state of affairs that can be determined by the researcher and ‘only phenomena and hence knowledge confirmed by the senses can genuinely be warranted as knowledge (the principle of phenomenalism).’\textsuperscript{62} From this perspective, the researcher is seen to be independent and capable of investigating and verifying data without influencing the research.\textsuperscript{63} Positivist research designs can include control groups and matched samples. Statistical significance is a concern in the use of results.\textsuperscript{64} Quantitative research does not necessarily entail a causal hypothesis and instead a research question may address a set of concerns that

\textsuperscript{61} Each of the interviewed and surveyed teachers was asked for background information relating to socio-demographic characteristics and these are collated in tables 2.3 and 2.4 below.


\textsuperscript{63} Egon Guba and Yvonna Lincoln, ‘Competing Paradigms in Qualitative Research’ in Norman Denzin and Yvonna Lincoln (eds), \textit{Handbook of Qualitative Research} (Sage, 1994) 109-110.

\textsuperscript{64} Bryman, above n 62, 62-69.
underlie the data gathered. Experimental researchers use a hypothesis more often than social science researchers. A post-positivist approach similarly assumes that reality exists and that the reality is ‘only imperfectly apprehendable because of basically flawed human intellectual mechanism and the fundamentally intractable nature of phenomena.’ The National Alternative Dispute Resolution Advisory Council (NADRAC), the Federal government organisation that monitors research into ADR in Australia, identifies the positivist approach as commonly used in evaluations of ADR programs in Australia. These evaluations generally consider the efficiency of ADR in settling cases and conduct surveys of parties’ levels of satisfaction.

Unlike the positivist stance to research, the interpretivist stance rejects the view that researchers can be objective in their endeavours, and that the study of the social world can be approached in the same manner as the natural sciences. The interpretivist stance ‘subsumes the views of writers who have been critical of the application of the scientific model to the study of the social world…’ The constructivist approach also rejects the objectivism of the positivist stance. This approach does not subscribe to the idea of an objective reality that is ascertainable through research. According to a constructivist perspective:

Realities are apprehendable in the form of multiple, intangible mental constructions, socially and experientially based, local and specific in nature (although elements are often shared among many individuals and even across cultures), and dependent for their form and content on the individual persons or groups holding the constructions.

This approach can be used to explore the lived experience of research participants where social phenomena and meanings are produced and revised by social actors.

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65 Ibid 63.
66 Guba and Lincoln, above n 63, 110.
68 Bryman, above n 62, 13. There are a number of theoretical perspectives on research. A full discussion is beyond the scope of this thesis: see generally Bryman’s discussion: ch 1.
69 Guba and Yvonna Lincoln, above n 63, 111.
70 Bryman, above n 62, 17
The aim is to gather data about subjective human experiences and to assess how individuals construct social reality. The researchers understand that they are not ‘objective’ in their approach to the research but are aware that their own ‘world view’ affects all aspects of the research question, including the initial framing of the research. There is a requirement that the researcher examines his/her own experience and history as they impact upon the research. The researchers’ own reflections, intuitions and insights can thus be part of the evidence in the research in a reflexive manner. It is important however to be aware of the danger of becoming preoccupied with one’s own experience and neglecting the stories of the participants.

Epistemological stances are associated with methodological approaches. As noted, quantitative data is generally associated with the positivist and objective stance. The use of quantitative data has a number of benefits depending on the research question. It can be described as:

Entailing the collection of numerical data and as exhibiting a view of the relationship between theory and research as deductive, a predilection for a natural science approach (and of positivism in particular), and as having an objectivist conception of social reality.

Data may be gathered through surveys, structured interviews and content analysis of documents. The limitations of quantitative data lie in the method of collection and analysis with a focus generally upon statistical information and the use of charts to

71 Ibid 18.
72 Ibid 19.
73 Ibid.
75 Ibid.
76 Bryman, above n 62, 19.
77 Ibid 62.
78 Ibid ch 3-10.
provide interpretation and analysis. The focus of data collection is on statistical information and causality, rather than constructions of meaning. This approach does not seek to uncover the meaning human beings attach to their individual and social worlds rather it is used to determine more generalizable information.

An interpretive and constructivist approach is most often associated with gathering qualitative data. A qualitative approach may take many forms. Norman Denzin and Yvonne Lincoln note that: ‘A complex interconnected family of terms, concepts and assumptions surround the term qualitative research.’ There is also a variety of ways to approach it. Drawing from the literature, Catherine Marshall and Gretchen Rossman argue that qualitative research:

(a) is naturalistic, (b) draws on multiple methods that respect the humanity of participants in the study, (c) focuses on context (d) is emergent and evolving and (e) is fundamentally interpretive.

A core characteristic of a qualitative approach is commitment to seeing the topic or issue from the perspective of those studied. The benefits of qualitative data lie in the deep and rich exploration of small samples through in-depth interviews and ‘thick’ descriptions of lived experience. Qualitative research can give detailed insights into practice, where the stories of participants can be explored and analysed through an inductive approach. This approach provides unique insights for researchers to reflect
upon: insights that generally cannot be obtained from quantitative data alone.\textsuperscript{86} In qualitative data respondents and researchers have the opportunity to move beyond yes/no answers or Likert scales. The aim in qualitative data is often to identify emergent themes. Although this approach may use some forms of quantification, through the use of terms such as ‘many’ and ‘some’, it is not generally concerned with frequency in the manner of quantitative data analysis.\textsuperscript{87}

Alan Bryman asserts that qualitative and quantitative methodology should not be seen as divided as ‘research methods are much more “free floating” in terms of epistemology and ontology than is often supposed.’\textsuperscript{88} Similarly, Martyn Hammersley argues that the conventional distinction between these two methods should not be seen as a binary dichotomy, but that researchers should choose either approach depending upon the purposes and circumstances of the research. In some circumstances researchers combine the approaches.\textsuperscript{89} Quantitative data can be combined with qualitative data where there are gaps in the qualitative data due to the ‘inaccessibility either of particular people or particular situations.’\textsuperscript{90} The combination of these two methods can add richness to a data collection and the use of mixed methods is commonly accepted in the research literature.\textsuperscript{91} A mixed method methodology was adopted in this study and is described in the next section.

\textbf{2.5 ADOPTION OF A MIXED METHOD APPROACH IN THIS STUDY}

My initial approach to this research was to conduct a quantitative study involving a survey of ADR teachers. The survey was to be administered to all ADR teachers in Australia and some of the teachers would then be invited to discuss their responses in follow up interviews. I also planned to conduct an analysis of course guides provided by those teachers who were a part of the study. On reflection, I decided instead to adopt a primarily qualitative approach, as this method would allow me to gather the

\textsuperscript{86} Bryman, above n 62, 128-130.

\textsuperscript{87} Ibid 445.

\textsuperscript{88} Ibid 443.

\textsuperscript{89} Martyn Hammersely, ‘Deconstructing the Qualitative-Quantitative Divide’ in Julia Brannen (ed), \textit{Mixing Methods: Qualitative and Quantitative Research}, (Avebury, 1992) 39, 51.

\textsuperscript{90} Alan Bryman, \textit{Quantity and Quality in Social Research} (Routledge, 1988) 137.

\textsuperscript{91} See generally: Bryman, above n 62, ch 22.
rich stories of the community of practice of ADR teachers. Although survey data can be valuable and was used in this study, trialling the survey in 2007 with two ADR teachers from La Trobe University helped me to realise that I needed to adjust my research methodology in order to obtain richer data. The aim of the trial was to gain feedback about the questions and the order of the questions. However, the survey results and feedback from the teachers from the trial showed me that responses would be likely to be too concise and would not provide me with the reflective discussion that I was seeking in order to investigate my research questions. Thus the methodology I chose for this study was a mixed method approach including gathering qualitative data through interviews; gaining quantitative data, including the compilation of a survey for use with participants that I could not interview due to time and budgetary constraints; and the content analysis of ADR course guides.

My research is primarily constructivist and hence relies on qualitative data to explore the stories of ADR law teachers. The analysis of the emergent themes from the interviews is supported by the analysis of quantitative data, including the responses to surveys sent to a number of research participants who could not be interviewed, and particularly the content analysis of course guides. As I have noted the qualitative data is useful to understand the experiences of individuals or a group. In this study I have assessed the interview data to unpack the experiences of the ADR law teachers’ professional and personal endeavours. The content and pedagogy of ADR is affected not only by the stories of the individual law teachers, but by the law schools which employ them, by the wider stories of university education, by ADR in our legal and justice system, and by the legal profession in those states, and nationally. The aim of this research was to trace the intersection of these stories and explore the experiences of ADR teachers in selected law schools. My interest in this research area arose out of my own experiences as an ADR practitioner and teacher, the kind of situated approach that is common in qualitative research.92

Quantitative data can also be valuable in this kind of study. In this study each of the participants were asked for the course guide for the ADR course under discussion and most participants provided this guide. Where participants did not provide a guide, course details were obtained through the university website. I chose content analysis

as the methodology to investigate the course guides provided by the various ADR teachers and/or accessed through university websites. Bryman defines content analysis as, ‘an approach to the analysis of documents and texts that seeks to quantify content in terms of predetermined categories in a systematic and replicable manner.’ This approach provided data relating to course objectives, topics, models of ADR taught, learning and teaching strategies, and assessment and resources used such as textbooks. The content analysis of the course guides allowed me to confirm the reliability of the qualitative data and provided a context for the interviews. Insights and themes from the interviews were matched with information gained from the course guides relating to the content and pedagogy of the ADR subjects. The guides assisted me to understand the courses discussed by the teachers. This data was also used to support insights from the interviews and surveys.

For example, one of the secondary research questions for this study related to power. By analysing the course guides I could establish whether the study of power was a learning objective in the course. I could also assess whether the topics listed in the course guides included power and I could identify whether power was part of any assessment task. I was able to draw conclusions about the extent to which the topic of power was addressed in ADR by comparing the quantitative data from course guides with interview responses where participants reflected on their teaching regarding power in ADR. The data from interviews and surveys also resulted in a mapping of ADR stand-alone courses in the two states (see Appendix H) and this is discussed in chapters five, six and seven.

Insights from the data, including the interviews, survey and content analysis of the guides were integrated with emerging literature relating to non-adversarial practice in law, and the new approaches to negotiation and mediation described as second generation practice and pedagogy. This emerging literature is discussed in detail in chapters three and four. It is integrated with the analysis of the data in chapters five, six and seven. This literature informs and supports my insights and conclusions relating to the teaching of ADR in law schools. This cycle of analysis from initial literature review, data collection and analysis and review of results in the context of a further literature search is consistent with the form of theory generation produced by a

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93 Bryman above n 62, 183.
grounded theory approach, although my approach was not a strict use of this theory.

2.6 GROUNDED THEORY
Consistent with my epistemological approach in the analysis of data for this study, I adopted grounded theory in this research. My intention was not to prove or disprove a hypothesis, but to explore in depth the stories of ADR teachers in Victoria and Queensland. Grounded theory provides a framework for qualitative analysis to facilitate ‘the discovery of theory from data systematically obtained from social research.’ Barney Glaser and Anselm Strauss first articulated grounded theory in response to the emphasis on verification of established ‘grand’ narratives in sociology. In their view theory should not be deductive but rather inductively developed from the data. This approach has been widely adopted although a strict approach to grounded theory is rarely used. Bryman argues that:

…two central features of grounded theory are that it is concerned with the development of theory out of data and the approach is iterative, or recursive, as it is sometimes called, meaning that data collection and analysis proceed in tandem, repeatedly referring back to each other.

There are a number of tools of grounded theory including, theoretical sampling, coding, theoretical saturation and constant comparison. Theoretical sampling is a progressive approach to data collection where there is a cycle of data selection, collection and analysis. Theory emerges from comparison of data with theory, leading to further choices for data collection and continued analysis. Coding occurs as part
of data analysis and involves breaking down and labelling the data into component parts.\textsuperscript{102} The cycle of data collection can continue until the aims of the research are met through theoretical saturation. The concept of saturation is contested, but generally refers to the point in the data collection where no substantial new insights emerge from interviews or other data collection methods.\textsuperscript{103} Constant comparison is the particular approach used. This tool requires the researcher to make continual connections between data and emergent concepts, ensuring the link between the two is not severed so a ‘theoretical elaboration of that category can begin to emerge.’\textsuperscript{104}

Bryman states that there are various products of the phases of grounded theory including concepts, categories, properties, hypotheses and theory.\textsuperscript{105} First concepts arise from analysis of the data using open coding. From this, categories are identified and the researcher may select some ‘core’ categories.\textsuperscript{106} When considering a category a researcher may focus on an attribute or aspect of a category known as a property.\textsuperscript{107} The use of a memo is one way to assist the generation of concepts and categories. A memo serves to remind the researcher of the concepts and categories already identified and assists in reflection and theory generation.\textsuperscript{108} A researcher may develop initial intuitions about the data and the relationship between concepts, known as a hypothesis.\textsuperscript{109} From these various products of data analysis, a researcher develops a theory that may be substantive or formal. Bryman distinguishes these two types:

The former [substantive theory] relates to theory in a certain empirical instance or substantive area, such as occupational socialization. A formal theory is at a higher level of abstraction and has a wider range of applicability to several substantive areas, such as socialization in a

\textsuperscript{102}\textsuperscript{Bryman, above n 62, 401-402.}
\textsuperscript{103}\textsuperscript{Glenn Bowen, ‘Naturalistic Inquiry and the Saturation Concept: A Research Note’ (2008) 8 Qualitative Research 137.}
\textsuperscript{104}\textsuperscript{Bryman, above n 62, 403.}
\textsuperscript{105}\textsuperscript{Ibid 403-404.}
\textsuperscript{106}\textsuperscript{Ibid 403.}
\textsuperscript{107}\textsuperscript{Ibid 404.}
\textsuperscript{108}\textsuperscript{Ibid 405.}
\textsuperscript{109}\textsuperscript{Ibid 403.}
number of spheres, suggesting that higher-level processes are at work. The generation of formal theory requires data collection in contrasting settings.\textsuperscript{110}

Consistent with my epistemological approach, I grounded my findings firmly in the data. Like many researchers who use grounded theory the overall approach was adopted, but I focused less on the ‘constant interplay of data collection and conceptualisation’\textsuperscript{111} than some researchers. It is accepted that there are many variations of this method.\textsuperscript{112} My approach in this study is generally consistent with a small ‘g’ grounded theory approach. Participants were sampled as the analysis proceeded until theoretical saturation, regarding ADR teachers in each university, was reached. In my study I gathered data in two states, in Queensland and Victoria, in order to provide a comparison with the themes initially identified in Victoria and to aid theory generation. Glaser and Strauss described a comparative approach to theory generation:

Thus, generation of theory through comparative analysis both subsumes and assumes verifications and accurate descriptions, but only to the extent that the latter are in the service of generation.\textsuperscript{113}

From the interview data, I elicited themes that assisted me to analyse the content and pedagogy of ADR teaching in the various law schools that were a part of this study. I also included further survey data from participants I could not reach. My analysis was then supported by data gained through the process of examining and coding course guides collected from participants or accessed from university websites. I used memos to aid my research.

\textbf{2.7 ORGANISATION OF STUDY}

\textbf{2.7.1 SAMPLE}

The data for my study was collected from ADR teachers in Victoria and Queensland.

\textsuperscript{110} Ibid.

\textsuperscript{111} Ibid 407.

\textsuperscript{112} Ibid.

\textsuperscript{113} Glaser and Strauss, above n 94, 28.
I chose Victoria as one of the states where I would conduct this research partly due to the significant contribution to teaching of ADR in legal education from one university law school in that state: La Trobe University. This university introduced the first compulsory stand-alone ADR course in 2005. Additionally, important considerations of budget and accessibility of participants made Victoria a logical starting point. As a resident of Victoria, teaching in a Victorian university I had relatively straightforward access to participants in each of the Victorian universities. I chose the state of Queensland as a second state in my study as Bond University law school is considered a leader in ADR practice and education. Bond law school was an early adopter of research and teaching in ADR and established its Centre for Dispute Resolution in 1989. This centre undertakes research, and provides training to the legal profession in ADR. The staff of the Centre teach ADR to Bond law students. Another consideration was that each of the two states had six law programs. Thus both states included in this research had universities renowned for their contribution to ADR legal education and also an equal number of other law programs that might offer differing approaches to the teaching of ADR. Data from the two States enabled a comparison of responses across states as well as within states. Victorian participants in interviews discussed the work of interstate teachers of ADR that they considered pertinent to the study. Based on this, a participant from New South Wales, identified by other participants as a significant contributor, also agreed to be interviewed.

I began initial data collection by interviewing ADR teachers in Victoria. I started with the general research question and identified relevant participants from Victorian universities. I undertook semi-structured interviews with these participants and gathered course guides for the relevant subjects. Most law schools included in this study had more than one ADR teacher on staff or contributing to the program as a sessional (i.e. not on staff) teacher and some of these teachers were interviewed. After each interview I reviewed the details of the interview and considered how many other ADR teachers from that university should be included in the sample in order to achieve theoretical saturation, whereby I was satisfied that the themes in the data

114 Fisher et al, above n 39, 68.
collection were sufficiently explored. I then contacted and interviewed other participants, in each law school, until in my view saturation was reached.

After examination of university websites to locate course names and content relating to ADR, and following collection and analysis of the data from the semi-structured interviews with early participants, the primary sample was expanded to include civil procedure teachers where there was significant attention to ADR in their subjects. In some circumstances, the title of the course indicated that these subjects dealt with the area of ADR in depth. They were often the ‘main’ ADR course offered by the law school in that university, and in each case these courses were compulsory for students in that law program.

Every university in Victoria and Queensland had at least one representative interviewed (either face to face or by telephone) or a survey was sent to an ADR teacher identified from the relevant university website. In total twenty-four participants were interviewed and five participants surveyed in this study. The subject I teach at RMIT is included in the data, and my observations of teaching in this area inform the research. In addition I interviewed my co-teacher (with whom I taught an ADR course in 2008) as part of the data collection to gather further insights to extend my experiences in teaching this subject area at RMIT. The characteristics of each person interviewed or surveyed, such as age and gender, were gathered as part of this study and tabulated. Each of the ADR teachers interviewed was asked to provide a course guide, or if a participant was surveyed, questions relating to the course guide were included in the survey. If no guide was provided, or if the information was incomplete, additional material was sourced from the university website. I performed a content analysis of these guides, discussed below. Overall in this study, sampling was extended in a manner consistent with the need to investigate appropriate sources as these became evident during the research process. Appendix A provides detail of the number of academics from each university who were interviewed or responded to surveys. The appendix indicates whether a course guide was provided or information was accessed from the university website or whether both approaches were used.

2.7.2 ETHICS
As indicated previously in this chapter, ethics approval was granted by RMIT University for the research in September 2007. RMIT research ethics policy has three
categories of risk and is in alignment with the national statement on ethical conduct in human research. The project was assigned a ‘low risk’ level. Before each interview we discussed the information and consent form. This form was then signed by each participant. There was also an opportunity to discuss the consent form prior to interviews by email and telephone. Two participants raised queries about the research by email, querying whether they were appropriate participants and asking about the nature of the research. One participant inquired about an aspect of the consent form at the interview prior to signing the form. All queries were dealt with satisfactorily and consent forms signed. Two participants did not wish to be named in the research and all others agreed to be named. However, due to the nature of the research, where participants might be seen to be critical of their employer, I made the decision not to name any participant. In my research there were no other ethical concerns identified.

2.7.3 RECRUITMENT
Participants were contacted by email and invited to be part of the research. A plain language letter and consent forms were attached to the email. If there was no response, a follow up email was sent. If the response was positive, a time and date was set for the interview or a survey was forwarded to the participant. The participants I interviewed were asked to nominate a venue or a time to be telephoned. The venues included cafes, restaurants and offices. On one occasion I conducted an interview in my home and on two occasions in the participant’s home.

2.7.4 INTERVIEWING
In this study I adopted a reflexive approach when gathering the data in the interviews with ADR teachers. Reflexive practice in research aids the researcher to reflect on any preconceptions formed regarding the research topic. In researching the literature prior to interviewing I realised the importance of power relationships in my methodology. Those teachers who agreed to be part of the research, many of whom

117 Finlay, above n 74.
agreed to be named, could potentially be criticised for their pedagogical choices about the teaching of ADR in a law school. As well as a peer and a researcher, it was important for me to reflect upon my own power in the research project. My reflections upon power in the context of researching teachers’ experiences in a law school highlighted for me the importance of being reflexive as a researcher. I considered the potential for my critique of the data to reflect badly on a law school and expose participants to criticism from their employer. A reflexive approach can help in adopting particular research stances, such as remaining ‘curious’ and ‘open’ to the stories gathered in the research process. For example, in this research a core concern was to discuss the models of negotiation and mediation taught in each course. In order to ensure that I explored with participants the stories of why certain models of negotiation and mediation were included in their courses, I asked questions about the rationales for content and pedagogy choices by teachers. I sought to maintain an open and curious stance, delving deeper into questions of ideology and pedagogy associated with the teachers’ choice of models.

An interview schedule helped direct the conversations with participants including open-ended questions within the schedule designed to elicit rich responses. In order to provide contextual information, I gathered demographic details of the participants in initial questions about age, sex, qualifications, status and tenure of position. The survey schedule also included some detailed questions and these matched the research questions. These questions related to the content and pedagogy of the ADR course taught by the participant. Additionally, I asked participants to comment on institutional issues relating to the teaching of ADR in law schools. This issue also emerged in responses to other questions in the interview schedule. I include the schedule in Appendix B.

In order to trial the interview schedule for the semi-structured interviews I conducted a pilot interview with a trial participant teaching in the ADR course known as ‘Dispute Resolution’ at La Trobe University. In 2007 in an hour-long interview we

118 These types of skills, such as active listening, are commonly used in mediations: Patricia Marshall and Rosalind Hursworth, ‘Mediation and Qualitative Research Interviewing’ (2009) 7 Alternative Dispute Resolution Bulletin 141. As a practicing mediator I have had experience in using these approaches.
discussed ADR content and pedagogy at La Trobe University using my initial interview schedule and also then debriefed about the interview approach. After this interview I adapted the interview schedule, combining some questions and deleting others. After reflections on my approach to the interview, I decided to adopt a more ‘curious’ stance and I reframed and summarised participants’ answers to improve my ability to listen to the stories of participants. The material from the interview with this trial participant is not used in this study due to its provisional nature.

The questions included the collection of participants’ characteristics. These were followed by prompt questions on topics relating to the research questions (see Appendix B). Prior to commencement of the interviews participants were asked if they agreed to have the interview recorded. All participants in the study agreed. I also took notes during the interviews of key points. Before the interview began, I explained the method of interviewing in detail. I emphasised the reflexive nature of my approach to interviewing and the participants were advised that I would interact with them to provide input and insight. I used summarising to ensure accuracy of understanding at key points in the interview. At times the interviewee amended or extended these summaries. I also used reframing at intervals during the discussion, rewording the interviewee’s response to check understanding. Reframing occurred when I was confused by the interviewee’s statements or sought more information, while summarising occurred at key moments in the interview.

2.7.5 SURVEY

A survey form of the interview questions was sent to selected teachers of ADR in Queensland. As noted earlier in this chapter an initial survey was trialled with two ADR teachers from La Trobe University and the feedback from these teachers informed the subsequent design of the survey questions. The survey was designed to ask questions to ADR teachers similar to those that were posed in the interviews. The initial survey document was further refined after my analysis of the data gained from the Victorian interviews. The survey was adjusted after insights from the interviews. That is, some parts of the survey were altered to better reflect the questions, a section was shortened and some examples removed. Parts of the surveys provided the opportunity for open-ended responses. The survey was sent to Queensland ADR

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119 In one interview the recorder malfunctioned and I relied on my hand written notes for coding.
teachers who could not be interviewed due to time and resource constraints. For this research, twelve surveys were sent out by email and five participants responded.

There were thirty questions in the survey (see Appendix C). The majority of questions were closed questions with four open-ended questions included at the end of the survey. Questions dealt with:

- the characteristics of the participant including age, gender and teaching experience in ADR (1-10).
- the placement of ADR in the law program (11-12).
- the objectives and content of the ADR teaching in the course (13-23).
- pedagogy including the use of role-plays in the teaching of ADR (24-26).

The last four questions were open-ended, and sought information about teaching ADR in the law school environment, the teaching of different models of mediation, as well as any general comments and details about the books and literature used to inform the participant’s teaching. Survey data was used in this study to support the analysis of the interview data. The survey provided additional information as a comparison to the Victorian experience and also, where course guides or information were provided, contributed to the mapping of ADR offerings in the two states.

2.7.6 CONTENT ANALYSIS

I asked each of the participants to provide the course guide for the main ADR course that they taught. These guides were collected in 2007 and 2008 and therefore pertain to these two teaching periods. Courses could be elective or compulsory, stand-alone ADR courses or combined ADR with another discipline area. If a participant was surveyed, the survey asked specific questions relating to the course guide, such as the objectives of the course, the topics and the assessment.

I gathered information about thirteen ADR law courses. I categorised these as the ‘main’ ADR courses in the sample as participants identified these courses as the most important ADR courses within their school’s law program. There were also two non-law courses that were part of the sample. These were social science courses at Victorian universities, which some law students regularly chose as electives. There were also a number of courses that the interviewees identified as ADR courses
available in their law programs apart from the ‘main’ ADR course. There were two such courses in Victoria and one in Queensland and these were included in the sample. The aim was to gather data relating to the research questions articulated in section 2.3 of this chapter. I undertook a content analysis of the guides and this data provided support for the themes elicited from the interviews and survey information.

2.8 ANALYSIS
2.8.1 ANALYSIS OF THE INTERVIEWS
Interviews lasted approximately thirty to sixty minutes and were conducted face-to-face or by telephone. Interviews were taped, transcribed and coded manually. Detailed questions relating to curriculum were included to ascertain baseline information regarding the content and pedagogy of the teaching of ADR. Open-ended questions such as one relating to the role of ADR in legal education encouraged participants to comment freely upon this and other issues. The semi-structured interviews allowed participants to comment upon a particular issue relating to the research and also allowed for creative thinking and brainstorming around that issue.

Transcriptions were organised through a transcription service, Outscribe. The identity of the participants was separated from the data. A numbered coding system was adopted to identify individual participant responses and each participant was given the code of either ‘V’ for Victoria, ‘Q’ for Queensland and N for the NSW participant. Each of the participants was assigned a number, indicating their university. Where more than one participant came from the same university, this was indicated by using a letter of the alphabet eg V 1 (a). After initial open coding of the data using a numbering system I derived a number of concepts and categories. These were checked and adapted on a second reading of the transcripts. I progressively wrote memos summarizing categories and concepts and as a result of the issues I identified, I decided to extend my data collection to Queensland in order to see if similar themes would emerge in another location and context of ADR teaching.

In the study, themes were conceived progressively through a form of constant comparison with emerging ideas and the data. My research focus meant that I was alert to material about the content and pedagogy of ADR courses and particularly the teaching of diverse models of negotiation and mediation. Models formed an early concept in the data analysis and this topic was later changed to a category of ‘first and
second generation practice/models’. As indicated previously in this thesis this categorization is a heuristic device adopted to frame my discussion of emergent theory and practice. In this thesis I do not seek to privilege one model of practice over others, but rather to identify trends. I acknowledge that many participants in negotiation and mediation and mediators do not have as a goal conflict transformation’ when taking part in these ADR processes. Throughout data collection and analysis I engaged with relevant ADR literature and allowed my reading to inform my analysis. I also explored whether teachers engaged with power and cultural concerns. I coded responses to these questions under the category of ‘power/culture’. I specifically asked about engagement with emotion as part of the teaching of ADR and responses to this question were coded as a category. The learning and teaching strategies of ADR were the focus of another question and formed a category in the data analysis.

As I reviewed the data, I became conscious of the importance of framing ADR as contributing to lawyers’ professional identity and the promotion of non-adversarial practice by the law teachers. I was aware that ADR teachers may frame their learning and teaching strategies in contrast with adversarialism, and indeed the data revealed the extent to which teachers focused on the importance of students adopting a non-adversarial approach. I therefore coded the transcripts with the category ‘adversarialism’, but also added the emergent category of non-adversarial practice as this was a consistent frame of content and pedagogy in the sample. This concern linked with another theme that emerged from the data: the role of ADR in lawyers’ vocational skills. I became conscious of this theme as participants commented on the dual role of an ADR course to engage students with substantive course content, as well as to assess students’ abilities in ADR, particularly in negotiation and mediation. I therefore coded this theme separately from the previous two categories. These issues are linked to another emergent category: the place of ADR in the legal curriculum. This theme emerged as a separate category as the issue of whether ADR should be a compulsory knowledge area for admission to practice as an Australian lawyer was identified as an important concern by nearly all the teachers of stand-alone ADR courses, especially as this issue affected the status and funding of the discipline area. Table 2.1 below provides the list of the categories that developed from my analysis.
Table 2.1 Numbering of Categories for Interviews

<table>
<thead>
<tr>
<th>Numbering</th>
<th>Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Cost</td>
</tr>
<tr>
<td>2</td>
<td>Lawyer’s skills</td>
</tr>
<tr>
<td>3</td>
<td>Adversarialism</td>
</tr>
<tr>
<td>4</td>
<td>Pedagogy</td>
</tr>
<tr>
<td>5</td>
<td>First/second generation practice</td>
</tr>
<tr>
<td>6</td>
<td>Non-adversarial practice</td>
</tr>
<tr>
<td>7</td>
<td>Marginalised/resistance</td>
</tr>
<tr>
<td>8</td>
<td>Emotion</td>
</tr>
<tr>
<td>9</td>
<td>Place of ADR in the legal curriculum</td>
</tr>
<tr>
<td>10</td>
<td>Power/culture</td>
</tr>
</tbody>
</table>

The data is integrated with the emergent literature in ADR and legal education and is discussed in detail in chapters five, six and seven.

2.8.2 ANALYSIS OF THE SURVEYS
The surveys were analysed using a simple counting approach. The surveys are coded in the same manner as the interviews. As only five out of twelve surveys were returned, and the research was conducted primarily through semi-structured interviewing, the survey data was a comparatively small part of the study. The survey results are used in the collation of the data about characteristics of participants (see Appendix D, E and F). These results are included in the content analysis of the reading guides (see Appendix G) and the mapping of the ADR course offerings (see Appendix H). Open-ended responses from the survey are analysed and discussed in chapters five, six and seven.

2.8.3 CONTENT ANALYSIS
Content analysis is a quantitative approach that identifies and prioritisises categories. Bryman notes that:
Frequently in a content analysis the researcher will want to code text in terms of certain subjects and themes. Essentially, what is being sought is a categorisation of the phenomenon or phenomena of interest.\(^\text{120}\)

A coding schedule needs to be designed and if more than one person is involved with the analysis a coding manual ensures a degree of consistency.\(^\text{121}\) In this study I analysed the content of the guides and information from university websites after the ongoing analysis of the interviews and surveys. The coding schedule was developed from the themes that emerged from the interviews. Some categories were also included that specifically dealt with the nature of course, that is, I included categories about course objectives and assessment on the basis that courses in universities generally include this information in guides. I devised twelve categories in the coding schedule as shown in Table 2.2 below. The results were tabulated and are provided in Appendix G. The table details the name of the university in Victoria and Queensland, the name of the course and the year of the course guide. The content analysis categories based on the research questions are provided below.

Table 2.2 Categories for Content Analysis of Course Guides

<table>
<thead>
<tr>
<th>Numbering</th>
<th>Categories</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Objectives: conflict/range of ADR processes</td>
</tr>
<tr>
<td>2</td>
<td>Objectives: non-adversarial practice/lawyer ethics</td>
</tr>
<tr>
<td>3</td>
<td>Generic graduate attributes: critical thinking, communication, reflection and team work</td>
</tr>
<tr>
<td>4</td>
<td>Power</td>
</tr>
<tr>
<td>5</td>
<td>Culture</td>
</tr>
<tr>
<td>6</td>
<td>Emotion</td>
</tr>
<tr>
<td>7</td>
<td>Doctrine/case Law</td>
</tr>
<tr>
<td>8</td>
<td>First generation practice: integrative/facilitative model</td>
</tr>
<tr>
<td>9</td>
<td>Second generation practice: diverse models</td>
</tr>
<tr>
<td>10</td>
<td>Learning and teaching strategies</td>
</tr>
<tr>
<td>11</td>
<td>Assessment</td>
</tr>
<tr>
<td>12</td>
<td>Prescribed text</td>
</tr>
</tbody>
</table>

\(^{120}\) Bryman, above n 62, 188.

\(^{121}\) Ibid 190-191.
There were thirteen stand-alone ADR courses or ADR combined courses that were identified as the main ADR course in each of the six universities in the Victoria and Queensland and the single university from New South Wales. The guides to these courses were the primary source of the content analysis. Additionally, there were two guides from the social science faculty in one university that provided ADR courses as electives to the law students. Participants also provided guides for ADR or ADR combined law electives, which were additional to the main ADR course in the law program. There were three of these guides: two from Victoria and one from Queensland. This data also contributed to the mapping of ADR courses in the two states.

2.8.4 MAPPING
The mapping of ADR courses shows that this subject area is well represented in law programs in the two states (see Appendix H). In Victoria five out of the six law programs have ADR as a compulsory stand-alone course (two) and ADR was combined with civil procedure as a compulsory course (three). In terms of whether ADR was a first year offering one of the Victorian universities offered ADR as a compulsory first year course and one had ADR combined with civil procedure as a compulsory first year course. In Queensland ADR was not compulsory as an academic course. However in some law programs it was offered through the integration of an ADR module in a substantive law course and then offered as a later year elective (three out of six). In other law programs in Queensland ADR was offered as an elective only (two out of six). Importantly, only one Queensland law program offered ADR as a compulsory stand-alone course, and this offering was not in first year but was located in third year.

A variety of names were used in the ADR courses or ADR combined courses that were the subject of this study. There were three courses in Victoria with Dispute Resolution as the title of the course or included in its name (i.e. RMIT: Negotiation and Dispute Resolution). It appears that the term Dispute Resolution without the word ‘Alternative’ has been adopted in Australia to indicate that the area should be seen not as an alternative to litigation but as one of a number of choices including litigation,
when engaging with legal disputes. This was the most popular choice of course name in the sample.

The primary course at Monash University resembled the title of the RMIT course as it was called *Negotiation and Mediation*. There were two courses that included ADR in combination with civil procedure. These were entitled *Civil Procedure and Alternative Dispute Resolution* at Deakin University and *Dispute Resolution and Civil Procedure* at Victoria University. Of the six main courses analysed in Queensland only one had *Dispute Resolution* in the title. Three courses had ADR in their title. One core Queensland course had the name *Legal Conflict Resolution*. Another Queensland course was called *Dispute Systems Design* and was offered as an elective. The results of the content analysis and the mapping of ADR course offerings are further discussed in chapters five, six and seven.

### 2.9 DESCRIPTION OF PARTICIPANTS

There were twenty-nine participants in this study. Demographic characteristics were gathered from each of the participants and are tabulated in Appendix D. Selected data is analysed and included in table form (see Appendix E and F). The data covered participants’ gender, age, work status, qualifications, period teaching ADR, research interest in ADR (expressed as a percentage) and level of academic appointment. Below I discuss these characteristics, providing some details in table form, and draw some conclusions that will be discussed and analysed in more detail in chapters five, six and seven. General data in relation to law school academic demographics have not been gathered in recent major reports into legal education. The 2003 Johnstone and Vignaendra report and the Owen and Davis report, both discussed in section 2.2, offer data relating to student characteristics but do not provide data relating to law academics. However, some data is available relating to academics in Australia more

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123 This elective course was provided by one of the participants in this study. It was the only course provided to me by lecturers at Bond and may not be the ‘main’ ADR elective at this university, however I chose to include it in the study as it was the best data available to me. Also, Victoria University has a course entitled *Interviewing and Negotiation Skills*. I did not include it as the ‘main’ ADR course as it had primarily a skills focus.
generally and some studies in the United States have included data on the characteristics of ADR law teachers. I discuss the following findings by drawing on this selected literature. The first issue is the gender and age of participants and a table summarising this data is provided below.

Table 2.3 Gender and Age of Participants

<table>
<thead>
<tr>
<th>Age Band</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>% of sample</td>
</tr>
<tr>
<td>50+</td>
<td>9</td>
<td>31</td>
</tr>
<tr>
<td>40-49</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>30-39</td>
<td>1</td>
<td>3</td>
</tr>
</tbody>
</table>

Of the twenty-nine participants in this study twelve participants were male (41%) and seventeen participants were female (59%). There were eleven males and thirteen females interviewed and, in addition, one male and four females surveyed. Women predominate in ADR learning and teaching in the sample of ADR teachers in this study. This figure is in contrast to United States research into ADR teachers through the analysis of the listings in the AALS Directory of Law Teachers that establishes that women make up ‘approximately one-third of the faculty who teach ADR...’

Although the number of women teaching in law schools in the United States is growing, it is notable that they can still be segregated to less prestigious and secure positions.

Marjorie Kornhauser argues that:

…although the number of women law professors has greatly increased over the past three decades, women are still underrepresented on faculties and disproportionatelly hold less prestigious and non-tenured

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124 Moffitt, above n 41, 35.
positions such as librarians, clinicians and legal research and writing instructors.  

Similarly, Thornton argues that women in Australian academia are similarly marginalised in an institution that has retreated from gains made by first, second and third wave feminists. With the advent of neo-liberal policies in higher education, feminist concerns have lost much of the ground that was gained previously as the humanities and social sciences are devalued in favour of business paradigms. This has led to a re-masculinisation of universities that has negatively impacted on feminist academics and their concerns, causing them to be marginalised and devalued. In Australian law schools, ADR may be perceived as a ‘soft’ area of study due to its lack of focus on doctrine and the interdisciplinary nature of the study drawn from the humanities and the social sciences. There has been considerable debate as to whether negotiation and mediation represent a challenge to traditional masculinist, adversarial constructs in law and represent a ‘feminine’ approach to conflict resolution that incorporates an ‘ethic of care’. Whilst not necessarily subscribing to this view, it would appear from the data gathered in this study that women are increasingly drawn to the teaching of ADR. Combined with age (discussed below) there would appear to be an important change in the gender of ADR teachers as younger teachers establishing themselves in the field are mainly female. This is in contrast to the study by Kornhauser in the United States that found that men were increasingly teaching in


126 Ibid 294.


128 Ibid 381-385.

129 Ibid 387-390.

130 Brendan French, ‘Dispute Resolution in Australia- The Movement from Litigation to Mediation’ (2007) 18 Australasian Dispute Resolution Journal 213, 217. See also Macfarlane above n 58, 52-54.

the ADR field in that country. She posited that as ADR becomes more acceptable in the legal academy, more men are drawn to teaching in this field.132

Participants were asked to define their age category: 30-39; 40-49; 50 and over. There were fifteen participants aged 50 years and over at the time of the study. General data on Australian academics shows that in many discipline areas including law, a high percentage of academics are aged over 50 with the highest percentages in education, welfare studies, humanities and nursing, some sciences.133 However in law the percentage in 2006 according to data drawn from government figures was 37.7% and thus has one of the smallest proportions of staff over 50 years of age.134 Overall in Australia all professions have a significant percentage of academics teaching in their discipline area over 50 years of age but for some areas, such as law, this is not a pressing concern.135 The percentage of ADR teachers in this study who were over 50 years of age was 52%. Thus this figure is higher than the average in the wider legal academic community.

Within the over 50 group in this sample, nine male ADR teachers (60% of that age group) outnumber six females (40%). Meanwhile, five of the six participants in the 30-39 year age group in this study were female (83% of that age group). As no attempt was made to choose participants based on sex, this spread of age and sex suggests (but is not a large enough statistical sample to demonstrate) increasing interest, and professional involvement in ADR among younger women lawyers. The figures are suggestive of a generational change in ADR learning and teaching with males in the sample predominately in the over 50 category and few younger males coming through to take up positions in the university. As indicated, the younger participants in this study were female and show a trend to an increasing predominance of women in ADR. The next issue assessed was work tenure and this issue concerned

132 Kornhauser, above n 125, 311.

133 The National Centre for Social Applications of Geographic Information Systems, Investigating the Aging Academic Workforce: Stocktake (2010). These discipline areas show academics over 50 to be in the range of 51% to 62% of the workforce.

134 Ibid 8.

135 Ibid 9. The Council of Law Deans has not articulated concerns regarding an ageing academic population in the manner of some other disciplines, such as nursing: 14
whether participants were continuing in their employment, on a fixed contract, or were casual (paid an hourly sessional rate). I also asked if participants were full or part time. This is summarised below in Table 2.4.

Table 2.4 Participants’ Contract and Working Time Status

<table>
<thead>
<tr>
<th>Work Tenure</th>
<th>Number</th>
<th>Percentage of Sample n=29</th>
<th>Full-time</th>
<th>Percentage of Sample n=29</th>
<th>Part-time</th>
<th>Percentage of Sample n=29</th>
</tr>
</thead>
<tbody>
<tr>
<td>Continuing</td>
<td>19</td>
<td>65</td>
<td>19</td>
<td>83</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Fixed</td>
<td>5</td>
<td>17</td>
<td>4</td>
<td>17</td>
<td>1</td>
<td>17</td>
</tr>
<tr>
<td>Casual</td>
<td>5</td>
<td>17</td>
<td>0</td>
<td>0</td>
<td>5</td>
<td>83</td>
</tr>
</tbody>
</table>

Most of the academics in this study worked full-time, (twenty-three were full-time and six were part-time). All casual employees worked part-time and one fixed term employee also worked part-time. This demonstrates a largely stable workforce in the teaching of ADR in the two states. Appendix E has details of participants’ qualifications showing most have a Masters level qualification and 34% have a PhD. I also asked participants to nominate the number of years they have been teaching ADR and these are tabulated (see Appendix F). Most teachers of ADR in this study had extensive experience in this area, with a total of 76% teaching in the area for more than 5 years and 48% having more than 10 years’ experience. This represents substantial expertise in the teaching of ADR in this sample. This wealth of experience assists the findings in this study as participants could draw on significant experience when describing their teaching of ADR. Conversely, the data indicates that the number of new entrants to the field in this study, who have less than 5 years of experience, is relatively small. This may indicate some succession difficulties in the future for the teaching of ADR as the present population of teachers progressively reaches retirement age.
2.10 LIMITATIONS OF THE STUDY

The research design focused on the benefits derived from gathering stories of ADR teachers and the thick, rich descriptions that they provided regarding ADR content and pedagogy. This was the first time this approach has been used in Australia to investigate this topic and provides a useful mapping of this discipline area at a time when ADR teaching is growing in importance due to the rise of ADR options and philosophy in our legal and justice systems. The role of ADR in helping law students to adopt non-adversarial practice as a frame for their future legal work has also gained currency in the literature and in government policy over recent years. Additionally, capturing the ‘lived experience’ of teaching this subject area in the particular context of Australian law schools and including deep reflections from participants provides insight into the challenges and benefits of teaching in university law schools in the new millennium. In the interviews participants described the ADR content taught and learning and teaching strategies, providing examples of ways that they taught topics such as negotiation and mediation. The data from the content analysis of the course guides provides more limited information about content and pedagogy, providing information about topics taught but not the ways that the topics are taught.

One limitation of the study is that data collection was largely restricted to two states in Australia. However, the study explores a community of practice and the findings are generalizable to ADR teachers in other states. Another limitation is that the research did not attempt to establish whether a stand-alone ADR course or an integrated approach to including ADR in substantive courses was the ‘best’ way to teach this discipline area. Teachers in this study did occasionally comment on these issues but the primary aim of the research was to gather the stories of ADR teachers, their lived experience, and to describe and discuss a number of themes that arose from the data.

One possible limitation is that the relevance of some of the data may be limited to the period when participants contributed to the study. The teaching practices of the law teachers who participated in this study may have changed since the data was gathered between late 2007 and 2009. In addition, no Deans of Law or heads of school were included in the study. Therefore, the study does not include information or reflections from those who have been able to make broader changes to the place of ADR in legal
education through, for example championing the inclusion of ADR in first year introductory courses in the law curriculum. Similarly, the study does not include government decision makers such as Attorneys-General of the various Australian states and territories, who have considerable influence on universities and law schools, due to their role in the accreditation of law programs and regulation of the legal profession. The Deans of Law schools and Attorneys-General were not included as part of this study due to the chosen parameters of the research. This study was conceived as an exploration of the stories of ADR teachers in law schools and as such is confined to teachers. Future research might usefully include a wider group of participants. However, the data gathered does provide the basis for a detailed analysis and discussion of the content and pedagogy of ADR subjects in two states and the rich stories of the ADR law teachers. The themes elicited from participants’ responses, when placed in the context of an extended literature review, reveal ideologies and discourses that underpin teaching practices, as to both content and pedagogy that might shape the culture of ADR teaching in law schools into the future. My study thus provides unique insights into the lived experience of ADR law teachers in Australia and makes a significant contribution to the field. In chapters five, six and seven the themes elicited as a result of the data analysis are reported in the context of that extended literature, which is discussed in chapters three and four.
CHAPTER 3
THEORETICAL PARADIGMS OF ADR PRACTICE

3.1 INTRODUCTION
Recognition of the influence of lawyers in court-connected ADR is growing. 1 Many of the original aims of the introduction of ADR into courts such as increasing party self-determination and maximising collaboration have been undermined by the legal culture that has first adopted and then changed the practice of alternatives to litigation. 2 The courts’ objective for efficiency and case management has meant that some of the relationship dimensions of conflict of negotiation and mediation have been subjugated to the need to achieve settlement. 3 The presence of lawyers as agents and mediators in negotiation and mediation relating to legal disputes, 4 the prevailing adversarial culture of lawyers in both courts and legal firms, 5 lawyers’ expectations about the process and their understandings of mediation 6 have a profound impact

1 The impact of lawyers approach to ADR affects their clients’ view of mediation and the clients’ opportunity to improve the relationship with the other party(s): Jean Poitras, Arnaud Stimec and Jean-François Roberg, ‘The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?’ (2010) 26 Negotiation Journal 9, 12-14. Lawyers can be a positive force in a mediation, but it is dependent on the approach that they take, which may shift according to a client’s needs: Olivia Rundle, ‘A Spectrum of Contributions that Lawyers can Make to Mediation’ (2009) 20 Australasian Dispute Resolution Journal 220. The involvement of lawyers can mean an evaluative, rights-based approach dominates in the court connected context: Tania Sourdin and Nikola Balvin, ‘Mediation Styles and their Impact: Lessons from the Supreme and County Courts of Victoria Research Project’ (2009) 20 Australasian Dispute Resolution Journal 142.


upon the practice of court-connected negotiation and mediation. Importantly, court-connected negotiation and mediation occurs in the shadow of the law, that is these processes are influenced by the probable court outcomes relating to a dispute. Therefore it is likely that court-connected ADR practice differs from other areas of ADR that are more remote from the courts, such as community mediation. Yet courts may still be capable of adopting more wide-ranging relational aims in their ADR processes and a more relational approach may benefit court users.

While there is a range of factors influencing legal culture, the importance of legal education and the content and pedagogy of ADR is paramount in lawyers’ learning during law school significantly shapes their practice. I argue that if lawyers learn about first and second generation practice during their legal education this learning may legitimise shifts in ADR practice. As noted in chapter one, first generation practice has the benefits of promoting non-adversarial paradigms and collaborative problem-solving. This approach moves away from traditional adversarial constructs in law, and models of ADR that privilege evaluation, such as evaluative mediation. Second generation practice could potentially shift lawyers’ practice even further to include a relational world-view, that may better deal with issues of emotion, culture and power in negotiation and mediation. In time, learning about first and second generation practice in legal education may contribute to re-shaping lawyers’ professional identities. This new shaping may have an impact on the way that lawyers approach their role in negotiation and mediation (as either negotiating agent or

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10 Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Columbia, 2008) 223-224. Notably, Macfarlane argues that a change to lawyers’ culture does not require a paradigm change but is rather an evolution of practice: 96. Law school adoption of ADR as a course in law programs has grown significantly in Australia, but there is a lingering perception that this is a ‘soft option’ in the legal curriculum: Brendan French, ‘Dispute Resolution in Australia- The Movement from Litigation to Mediation’ (2007) 18 *Australasian Dispute Resolution Journal* 213, 217.
mediator) and the range of models practised in the court-connected contexts.

In this chapter I discuss the theoretical paradigms of a number of prominent negotiation and mediation models. I do not attempt to canvass all the possible models of practice\(^1\) available to negotiators and mediators, but instead explore a number of contrasting approaches that might inform the evolution of court-connected ADR practice. The chapter firstly explores in detail the dominant first generation model of practice: the integrative/facilitative model and the lawyer influenced derivation of that model the evaluative approach to mediation. I discuss the process of collaborative law that generally adopts integrative bargaining techniques drawn from first generation practice.

As discussed in chapter one first generation practice focuses on the instrumental aim of agreement, is individualistic in nature and adopts a rational frame of decision-making. Use of integrative bargaining promotes a non-adversarial approach to negotiation and mediation that includes collaborative problem-solving. This chapter considers the contrasting approaches of first and second generation practice. In particular I focus on two approaches, the narrative and transformative models of mediation, to illustrate the differences in emergent frames of practice.\(^2\) This chapter gives particular attention to mediation models of practice. Mediation has arguably led the way in developing theory for practice in ADR. Second generation mediation models have begun to proliferate, although as yet these models are not widely practiced in Australia. Additionally, I will describe victim offender/restorative justice conferencing.\(^3\) These restorative processes have synergies with mediation practice,

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\(^3\) This approach is widely practiced in Australia, particularly in the juvenile context to deal with criminal matters: Kelly Richards, ‘Police-referred Restorative Justice for Juveniles in Australia’ Trends and Issues in Crime and Criminal Justice, No. 398, (Australian Institute of Criminology, 2010).
especially transformative practice. I also canvass the philosophy of therapeutic jurisprudence, a framework for change in the law and legal education.

3.2 OVERVIEW OF THE DEVELOPMENT OF THEORY IN NEGOTIATION AND MEDIATION

As stated in chapter one, the release of *Getting to Yes*, by Roger Fisher and William Ury reinvigorated negotiation theory. This book served to provide an engagement with negotiation theory that rejected adversarial approaches and positional bargaining stances in favour of creative problem-solving approaches to negotiation that have been described as ‘win-win’. The ideas in the book draw upon a range of academic disciplines and summarised approaches to negotiation that can be linked to labour management, education and the social sciences. Recently, Carrie Menkel-Meadow observed that:

The authors of *Getting to Yes* also drew on the many constituent disciplines of negotiation theory and practice, including economics, game theory, psychology, anthropology political science, sociology, decision sciences, communication and planning, to name some, but not all, of the bodies of knowledge that have contributed ideas or “memes” (cultural genes) about negotiation.

Although drawing on a range of disciplines, this understanding of conflict is grounded in a modernist paradigm. That is the construct of the ‘win-win’ solution advocated by Fisher and Ury, and later further explored by a variety of co-authors, sees negotiation as an individualistic endeavour, reliant on consideration of actors whose needs,

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interests and concerns are largely divorced from the wider society. The problem-solving approach to negotiation was adopted in the facilitative model of mediation that uses an ‘interest based, problem-solving, rational analytic approach [to] mediation’.

Although, it is likely that the facilitative model of mediation evolved under a number of influences that are not clearly articulated in the literature, at its heart this model has an instrumental focus that encourages settlement through the use of the integrative approach to negotiation. This emphasis on settlement and cooperation for individualistic gain are the focus of first generation practice. However, such a focus doesn’t necessarily mean that practitioners do not deal with key concerns such as emotion. Often practitioner efforts are based on intuition and experience rather than engagement with theory. Progressively issues such as emotion are part of the discourse of first generation practice but efforts to include emotion are piecemeal.

Kenneth Fox argues that with most training and education, including legal education, based on this approach ‘students are currently taught that the negotiator’s central challenge is learning how to develop and enact rational strategies to claim and/or create maximum value that satisfy the negotiator’s (or her principal’s) self-interest.’

According to research conducted with short course trainers, for many first generation practitioners, some of whom also taught in legal education, theory is frequently ignored in their practice and teaching. This is because the focus of practice is seen to

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19 Boulle above n 5, 44.
20 Ibid 45.
be the gaining of agreement and this aim may be stymied by attention to theoretical concerns, forestalling a ‘quick fix’ solution to the dispute. However, even a belief that there is no theory underlying practice is itself a theory of practice and seeking to investigate and understand theory may lead to improved party experiences in conflict. Importantly, Michael Lang and Alison Taylor posit that reflection on practice and theory is critical to gaining ‘artistry’ in practice, that is, the capacity to develop beyond the constraints of a model whilst attuned to both the theoretical constructs that underpin a model and the particular conflict environment where a mediator practices. In contrast to this ‘theory-free’ first generation pragmatism, second generation models of negotiation and mediation draw on theory from the social sciences. These models do not focus on settlement to the exclusion of other concerns, are relational in their philosophy and have clearly thought out strategies to engage with emotional concerns in negotiation and mediation. These strategies will be discussed in detail below. Mediators are reflexive about the role of the mediator, understand the influence of the mediator on both process and content of the conflict, and promote party empowerment. These second generation approaches arguably better meet parties’ need for self-determination, as they are not pressured to settle disputes. Also, parties are encouraged to directly tell the story of the conflict that brought them to the mediation, assisting with the experience of procedural justice. I also argue that articulation and engagement with theory, with or without adhering to a set model, will enable practitioners to better reflect on practice issues in negotiation and mediation including strategies for dealing with emotion, culture and power. I

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25 Ibid.
27 Fox, above n 22.
now discuss each of these practice issues in turn, beginning with emotion.

3.2.1 EMOTION IN NEGOTIATION AND MEDIATION

In the court-connected context, in civil matters lawyers acting on behalf of their clients can influence the way that the mediator will practice and in particular influence the discussion of emotional concerns in legal disputes. Lawyers can sideline the issue of emotion and emphasise their preference for a focus on settlement. They can potentially narrow the issues to those related to the likely outcome of a case, and whether it should be litigated. They will also generally focus on quantitative questions of ‘how much the defendant is prepared to pay and the plaintiff willing to accept to avoid the delay, risks and costs of trial?’ This approach can limit the emotional dialogue as it privileges rational, rights-based concerns in conflict. Emotional issues, including issues such as the offer of an apology, are generally marginalised, although for some practitioners it is possible to combine both rights-based talk and emotional dialogue. When emotional issues are sidelined this may result in clients who are disappointed with the experience of mediation. Emotion is a key concern in conflict and allowing its expression can influence the transformation of the relationship.
of parties’ views and orientations in disputes. Commentators increasingly argue that parties in court-connected mediation should be allowed to engage with the process more fully and have the opportunity to directly discuss their concerns, issues and emotions. Generally, both first and second generation practitioners acknowledge the presence of emotion in conflict but importantly, second generation practitioners address emotional concerns through strategies informed by critical theory.

In the negotiation and mediation literature there is a growing recognition of the impact of emotion upon negotiation and mediation. Carrie Menkel-Meadow has noted that the original concept of ‘separating the people from the problem’, as articulated in Getting to Yes, has been revised in recent writings related to principled negotiation. For example, Roger Fisher and Daniel Shapiro acknowledge the role of emotion in negotiation, but state that emotion cannot be adequately dealt with in the process and advocate strategies where emotion is ‘put to one side’ during attempts at conflict resolution. In contrast Trish Jones argues that practitioners must recognise the role of emotion in conflict and identify the various ways that models of practice


39 Jones and Bodtker, above n 29.


deal with emotion. Lawyers who lack an appreciation of the effect of emotion on their work can seek to suppress it when they represent their clients at ADR processes such as negotiation and mediation. Due to a lack of awareness of the role of emotion in conflict, lawyers can underestimate its significance and fail to see the psychological costs of neglecting emotion both for their clients and themselves. Generally, lawyers do not perceive that emotional responses are relevant to a legal problem. The legal worldview largely assumes that emotion is untrustworthy. As the legal culture values the realm of the rational so highly, lawyers cannot be seen to succumb to the ‘whimsical and arbitrary’ emotional reactions that their clients exhibit. Disputants usually feel negative and blaming towards the other party and the depth of their despair and anger about the conflict may feel threatening. Lawyers unused to acknowledging emotion may fear exploring the clients’ emotional experiences and may be apprehensive about being drawn into the negative spiral of conflict thus distorting their capacity to advise their clients. Julie Macfarlane states that:

Along with the other major professions, law has come to increasingly promote a culture of competence centred on technical rationality, in which specialist knowledge—the ability to predict legal outcomes—is prized above all other skills and aptitudes. In another element of the bargain, the lawyer will be unemotional and objective in reaching decisions about appropriate actions, and in exchange, the client will

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43 Deana Foong argues that, ‘The legal culture is suspicious about emotion, as cognition and emotion have traditionally been seen as competing elements in the mental landscape. Lawyers and negotiators prefer to see themselves as keenly rational thinkers with hard skills and identifiable principles’: Deana Foong, ‘Emotions in Negotiation’ (2007) 18 Australasian Dispute Resolution Journal 186, 186.
grant him complete or relative autonomy in the management of this case. 48

Michael King has posited that Australian lawyers need to understand and engage with emotion in legal practice. 49 He argues that lawyers need to feel a degree of empathy for their clients in order to effectively engage with all the dimensions of the legal problem that the client brings to the lawyer. However, there is resistance in the profession to such an approach, as many lawyers are focused upon intellectual, analytical concerns in an adversarial framework. 50 Presently legal education rarely addresses in depth the emotional dimensions of conflict in the legal curriculum. 51 Emotion figures in aspects of law teaching, such as criminal law where offences such as rape give rise to emotional reactions in students, 52 but in pedagogy relating to the civil jurisdiction, emotion is often neglected due to a focus on rational decision-making in appellate courts.

All the parties in the room can engage with emotional issues, including lawyers and mediators however, mediators frequently have little to guide them in this important area. 54 Most often the focus of discussion in relation to emotion has centred on anger

48 Macfarlane above n 10, 101.
50 Ibid 1100.
53 For example in criminal law about rape: Mary Heath, ‘Encounters with the Volcano: Strategies for Emotional Management in Teaching the Law of Rape’ (2005) 39 Law Teacher 129.
54 Jones and Bodtke above n 29, 219.
and the potential negative repercussions of this kind of reaction to conflict.\(^{55}\) Generally the aim in mediation is to manage emotion in such a way that it does not interfere with problem-solving and settlement.\(^{56}\) The emotional responses of parties in mediation are framed by the value system to which they subscribe and this in turn is affected by societal discourses.\(^{57}\) Perceptions of right and wrong, influenced by societal norms, will affect parties’ emotional response to conflict. Threats to identity also invoke shame-based cycles that may spiral into unresolved shame and anger combinations.\(^{58}\) Rather than witnessing emotion and encouraging ‘venting’ or ‘getting rid’ of emotion so that parties can deal with the issues rationally, mediators may explore the benefits of allowing emotional expression as a way to uncover the deepest concerns, interests and motivations at stake in the dispute.\(^{59}\) If emotions such as anger are not acknowledged appropriately, mediators risk frustrating parties and exacerbating the dispute. Suzanne Retzinger and Thomas Scheff state that:

> Just venting anger is not only simplistic “there we’ve done anger,” but it is also potentially damaging as expression of anger can be humiliating for the other party and may escalate conflict.\(^{60}\)

The mediation profession now more widely understands the need to engage with

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\(^{55}\) Jones and Bodtker argue that ‘to gain a full understanding of the nature of the conflict (or the relational tensions, interests in the dispute, underlying concerns, opposing positions, etc arising from them), mediators must attend to the emotional triggers that influenced how the disputants recognised and defined the conflict, and which emotion scripts they invoked’: Ibid, 223.

\(^{56}\) Ibid 221.

\(^{57}\) Ibid 222.

\(^{58}\) Ibid 223.


emotion, including both positive and negative emotions.\textsuperscript{61} Arguably, however there needs to be more progress in the kinds of interventions mediators use. Some lawyers recognise the need to address emotion in conflict (see the discussion below relating to therapeutic jurisprudence) but more consensus is needed about the best ways for lawyers to deal with emotion. One option is to respond to emotion by practicing such strategies as mindfulness, an Eastern meditation approach that is being adopted in a number of professions that allows for the detachment from and observation of, emotion, deepening the practitioner’s reflective and reflexive capacities and their ability to acknowledge emotion without fear.\textsuperscript{62} Another option is for a lawyer to be aware of ‘psycholegal soft spots’ in conflict, in order to assess the emotional toll of the legal problem on their client and counsel them in ways to minimise client distress; an approach articulated by the therapeutic jurisprudence movement.\textsuperscript{63} In terms of mediation various models offer different approaches to emotion. The mediation models that deal more productively with emotion will be considered in more detail later in this chapter.

3.2.2 CULTURE AND POWER IN NEGOTIATION AND MEDIATION

As discussed in chapter one first generation practice in negotiation and mediation can

\textsuperscript{61} Archie Zariski, ‘A Theory Matrix for Mediators’ (2010) 26 Negotiation Journal 203, 211-212. One suggested strategy is a pre-meeting before a mediation that provides the opportunity to engage with emotion in an environment separate to negotiation: Daniel Shapiro, ‘Pre-empting Disaster: Pre-mediation Strategies to Deal with Strong Emotions’ in Margaret Herrman (ed), The Blackwell Handbook of Mediation (Blackwell Publishing, 2006) ch 14. Some writers in second generation practice and pedagogy see emotional concerns as crucial to address in conflict. For example: Linda Putman, ‘Negotiation and Discourse Analysis’ (2010) 26 Negotiation Journal 145, 147; Mario Patera and Ulrike Gamm, ‘Emotions-A Blind Spot in Negotiation Training’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 335; Melissa Nelken, Andrea Kupfer Schneider and Jamil Mahuad, ‘If I’d Wanted To Teach About Feelings I Wouldn’t Have Become a Law Professor’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 357.


be described as ‘Western-centric’.

The focus on individual needs through problem solving denies the collectivist approach of many other cultures. Relationships can be a central concern in many cultures and the assumption of individual needs can alienate some parties. Differing values and religious beliefs can impact on negotiations that are transnational and parties need to adopt strategies to deal with differing cultural norms. For example, generally the Chinese culture does not construct conflict as individualistic, but sees conflict as part of a breakdown in the web of relationships in community. One of the central concerns of second generation negotiation practice is to consider diverse cultural understandings in negotiation and mediation. Also, second generation pedagogy includes an examination of the ways that the teaching of negotiation and mediation has reinforced and privileged Western constructs, and reified integrative bargaining as the process of choice. The materials and activities of the Harvard program that promote integrative bargaining have rapidly expanded in Western countries such as Canada, Britain and Australia, and have now spread to many Asian countries. But not all recipients of the Harvard approach see this frame of practice as appropriate to use in their countries.

Many writers in this area have criticised the export of Western approaches in the

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64 Fox, above n 22, 20.
66 Fox, above n 22; Michelle LeBaron and Mario Patera, ‘Reflective Practice in the New Millennium’ in Christopher Honeyman, James Cohen and Giuseppe De Palo (eds), Rethinking Negotiation Teaching: Innovations for Context and Culture (DRI Press, 2009) 46.
content and pedagogy arising from the United States. In spite of these concerns, some second generation advocates still value a construction of practice that prioritises problem-solving; a key tenet of first generation practice.\textsuperscript{70} For example, some academics lobby for the retention of this approach to negotiation in their pedagogy, but argue that practitioners and teachers need to situate the approach and be aware that ‘what we currently teach in our trainings and basic courses is only one form of negotiation that was developed in a particular historical and cultural location for specific purposes’.\textsuperscript{71} An increasing number of writers seek to cultivate awareness of the socially constructed nature of culture and encourage exploration of the wider societal discourses that impact upon cultural concerns in negotiation.\textsuperscript{72} In second generation negotiation practice the approach of understanding differing world-views is emphasised. In this approach there is an acknowledgement that world-views shape and inform cultural identities.\textsuperscript{73}

Similar to the concern of culture, power is an area that academics have increasingly seen as important to debate in negotiation and mediation. In first generation practice power is frequently seen to be a commodity that parties in negotiation and mediation possess, and may choose to exercise.\textsuperscript{74} Bernard Mayer, framing power in modernist terms, has argued that power is drawn from a variety of sources such as superior monetary reserves for litigation, social standing and personal charisma.\textsuperscript{75} Arguably,

\begin{itemize}
\item \textsuperscript{70} Jayne Docherty, ‘“Adaptive” Negotiation: Practice and Teaching’ in Christopher Honeyman and James Coben (eds), \textit{Venturing Beyond the Classroom} (DRI Press, 2010) 481.
\item \textsuperscript{71} Ibid 493.
\item \textsuperscript{72} Fox, above n 22; Julie Anne Gold, ‘Cultural Baggage When You “Win As Much As You Can”’ in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), \textit{Rethinking Negotiation Teaching: Innovations for Context and Culture} (DRI Press, 2009) 281; Docherty, above n 70; Putman, above n 61.
\item \textsuperscript{73} Kenneth Fox, Manon Schonewille and Esra Cuhadar-Gurkaynak, ‘Lessons from the Field: First Impressions from Second Generation Teaching,’ in Christopher Honeyman and James Coben (eds), \textit{Venturing Beyond the Classroom} (DRI Press, 2010) 18.
\item \textsuperscript{74} Dale Bagshaw, ‘Three M’s of Mediation; Mediation, Postmodernism and the New Millennium’ (2001) \textit{18 Mediation Quarterly} 205.
\item \textsuperscript{75} Bernard Mayer, ‘The Dynamics of Power in Mediation and Conflict Resolution’ (1987) \textit{16 Mediation Quarterly} 75.
\end{itemize}
these understandings of power in negotiation and mediation accord with the dominant discourses in the law. The concept of liberalism and various ideas from legal science inform much of court-connected practice in mediation. \(^{76}\) Indeed, as indicated in chapter one, mediators in the court-connected context may unconsciously retreat to the norms of litigation through the use of evaluative mediation where mediators intervene more strongly and offer advice to parties about likely court outcomes.

The underlying philosophy is that the law is a coherent body of rules akin to a legal science. \(^{77}\) This approach to law was first postulated by legal philosophers generally referred to as the school of legal positivism. \(^{78}\) A positivist scientific approach was shaped by the Victorian desire for modernist stories to explain and categorise phenomena. \(^{79}\) This approach framed the law as a science where the judge was a neutral observer/scientist who sought to discover the truth. Fairness was inherent in these notions founded on the value-based approach of neutrality \(^{80}\) and upholding the need to guard against bias in the law. This approach to legal philosophy influenced the framing of ADR processes that were adopted in court-connected conflict. \(^{81}\) The idea of the legal actor ‘based on the Enlightenment model of a rational and autonomous person’ \(^{82}\) underlies modernist legal philosophy and dominates the way law is perceived in present day legal and justice policy. However, not all lawyers subscribe to these philosophies. In an influential work, United States academic Susan Daicoff advocates for changes to legal practice to a paradigm that deals with conflict holistically based on a relational focus derived from postmodernist discourse. \(^{83}\) In ADR Carrie Menkel-Meadow argues that postmodernist theory allows lawyers to

\(^{76}\) Folger and Bush, above n 65, 13-14.


\(^{78}\) Ibid 99-101.

\(^{79}\) Folger and Bush, above n 65, 3.


\(^{81}\) Mulcahy, above n 28, 506.

\(^{82}\) Davies, above n 77, 330.

recognise the fluidity of ‘truths’ in legal disputes.\textsuperscript{84}

Another policy influence on ADR is liberalism. Liberalism underpins our democratic values and legal system. Specific notions of fairness that stem from a belief in a construction of equality, drawn from the liberal tradition, affect the organisation of our legal system, the legal culture of lawyers, justice agencies and litigants.\textsuperscript{85} The problem-solving approach to mediation draws from liberalism and the frame of individualistic need that is part of this philosophy.\textsuperscript{86} There has been much critique of liberalism in the context of the law and in particular specific groups, such as women\textsuperscript{87} and minority groups,\textsuperscript{88} have criticised the liberal concept of equality for denying them substantive equality in court. This is because the law is primarily framed around the norms of white, middle class males, and the experiences of women and minorities are often marginalised in legal doctrine.\textsuperscript{89} This critique of the law can also be directed at mediation, as it is a third party process that operates in the shadow of the law.\textsuperscript{90} Mediation can reinforce power imbalances in the process, negatively impacting on the disadvantaged in society.\textsuperscript{91} Mediators often will not intervene to address power imbalances due to the philosophy that the third party should be neutral in the


\textsuperscript{85} Davies, above n 77.


\textsuperscript{87} Davies above n 77, ch 6.

\textsuperscript{88} Ibid ch 7.

\textsuperscript{89} See generally Regina Graycar and Jenny Morgan, Hidden Gender of Law (Federation Press, 2nd ed, 2002).


\textsuperscript{91} Bush and Folger, above n 12, 15-18.
process. Power imbalances in mediation can mean that parties are unable to negotiate a fair agreement. Mediators generally see power as a larger power possessed by one party over another, rather than fluid in the mediation process. According to Leah Wing:

Thus allegiance to positivist thinking along with its attending value of neutrality are central to the hegemonic paradigm in the Western mediation world.

Neutrality is commonly described as the mediator’s capacity to deal with the dispute in an impartial, detached and disinterested manner. Yet, neutrality is also an issue in a mediators understanding of their own practice and the ways that mediators frame conflict. Framing refers to the values and assumptions that underlie approaches, actions and interventions in the mediation process. The ways that participants and mediators construct their worldview and the impact these views have on the unfolding story of the mediation are critical professional practice concerns for the mediation

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95 Wing above n 93, 391.


If mediators are unaware of the impact of their worldview on the mediation then the parties may not have the opportunity to discuss all the issues that are relevant to them. Mediators may silence concerns or fail to give priority to issues that are important to the parties. According to Michel Foucault, power is not fixed and is not a commodity that is possessed by an individual or group. Rather power circulates in society. In the context of mediation Luis Pinzon, basing his analysis upon the work of Foucault, argues that:

…power should not be conceived of as a property or possession of two isolated individuals who resort to the negotiating table. Speaking of power in a dispute necessarily requires reference to the entire set of relations between the individuals.

In his writings Foucault explores how discourse shapes power relations. Discourse is the term used by Foucault to identify the ways that language constructs the world in which we live. Discourse analysis can assist negotiators and mediators to deconstruct the wider societal stories that impact on the mediation. Through discourse analysis mediators can assist parties to have agency to address imbalances of power. In this approach mediators are active in their interventions to assist parties to re-story conflict. This approach is not generally adopted by mediators due to the philosophy of

99 Gerami, above n 94, 427.
101 Gavin Kendall and Gary Wickham, Using Foucault’s Methods (Sage, 1999) 47.
104 Foucault, above n 102, 78; 83.
mediator neutrality in the mediation process. It is thus necessary to reconceptualise the concept of neutrality in mediation so that parties can be assisted to reach fair agreements, aided by the efforts of the mediator. Some of the mediation models discussed in this chapter adopt postmodern and social constructionist perspectives. As noted these approaches can be termed second generation practice and are also evident in the negotiation literature. In the next section of this chapter, I discuss the theoretical concerns in a variety of selected models of negotiation and mediation.

3.3 EVOLVING MODELS
I now discuss particular models of practice, beginning with problem-solving models.

3.3.1 PROBLEM-SOLVING MODELS
Problem-solving models of negotiation and mediation generally construct conflict resolution using what I have described as first generation practice paradigms. That is, the frame of practice tends to be individualistic, where parties try to satisfy interests and needs, divorced from community, and focus on maximizing satisfaction of their own self-interest. Generally, in mediation models that primarily aim to solve the problem of a dispute the mediator is categorised as a neutral third party who facilitates agreement, controlling the process but not the content of the mediation. In this approach the mediator refrains from interventions to address issues of fairness and equality. Consensus is emphasised in this model and mediation is not seen to empower a mediator to make a decision in relation to the dispute. Mostly, parties engage in a bargaining process where options are canvassed and agreement is

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108 Della Noce et al, above n 18, 45.
109 Astor, above n 106, 221-225.
sometimes reached and the role of the mediator is to encourage agreement, but not to intervene to address issues of fairness. However, this means that some parties can suffer disadvantage in the mediation process.\textsuperscript{111}

As noted in chapter one, facilitative mediation is based upon integrative bargaining techniques as part of first generation practice. The aim of this model is for the mediator to facilitate discussion and attempt to encourage the parties to meet each other’s needs and interests, rather than negotiate on the positions articulated by parties.\textsuperscript{112} Mediators and parties attempt to achieve ‘win-win’ solutions in the mediation process. Emotional issues are considered in this model, but how they are expressed will depend upon the skill of the mediator. The voices and concerns of parties may be suppressed by the mediator’s focus upon gaining agreement as this approach has a transactional rather than an interactional focus.\textsuperscript{113} The problem highlighted by researchers in this area is that the mediator may selectively facilitate issues that move parties towards settlement and omit issues that might be more difficult to deal with, such as relationship concerns from the discussion.\textsuperscript{114} The facilitative model is widely seen as the preferred model of mediation and is routinely taught in Australian short course programs,\textsuperscript{115} particularly for accreditation under the voluntary national mediation scheme. A derivation of this model is the Understanding Model of mediation that attempts to move away from merely focusing on settlement to address parties’ deeper concerns, including emotion, and has a specific approach to the lawyer’s role in mediation where lawyers are involved in a secondary conversation about legal issues and risk.\textsuperscript{116} Through the approach of ‘looping’ back

\begin{itemize}
  \item[111] How to address this concern is a matter for mediator ethics: Rachael Field, ‘Rethinking Mediation Ethics: A Contextual Method to Support Party Self-determination’ (2011) 22 Australasian Dispute Resolution Journal 8.
  \item[112] Boulle above n 5, 46.
  \item[113] Della Noce et al, above n 18, 49.
  \item[115] Boulle above n 5, 43.
\end{itemize}
lawyers are involved in the mediation as a communication enhancer whereby they summarise and reframe legal issues into the conflict conversation to enhance understanding.117

The influential United States academic and lawyer Leonard Riskin118 has argued that most mediation practice can be understood as occurring on a continuum between the facilitative and evaluative approaches.119 Riskin’s aim in providing such a grid was to assist parties and their lawyers, to understand and make choices about mediation models. Riskin recently renamed the facilitative model as ‘elicitive’ and the evaluative model as ‘directive’.120 This approach allows for a wider range of models to be recognised. The grid demonstrates the ways that mediation is evolving in philosophy and practice. However, many new approaches still have the problem-solving philosophy at their heart. One such process, collaborative law, is increasingly popular in some areas of legal practice.

The collaborative law movement builds on problem-solving models in negotiation.121 This approach to negotiation constructs a new role for lawyers where all lawyers involved agree to eschew litigation and promote a ‘four-way’ negotiation where clients and lawyers collaborate to solve the dilemma of the legal problem. In the collaborative family law model the parties in dispute,122 with assistance from their

117 Ibid ch 4.
119 The grid caused debate about the legitimacy of the evaluative model due to its directive nature: Bush, above n 21, 740.
lawyers, draw up a written contract setting down the ground rules to be followed in the process. Clients and lawyers work together to decide upon processes to assist in the ‘four-way’ negotiation. A central feature of the contract is a statement that the lawyers involved in the collaborative family law process are retained for the sole purpose of assisting in the negotiation of a mutually acceptable agreement. Significantly, lawyers are disqualified from representing the parties further if either party decides to go to court. The contract between the lawyers and parties determines the processes to be followed and includes a term disqualifying the lawyers from representing the parties in further litigation. Lawyers provide legal advice and information about possible outcomes of litigation, as well as likely costs involved, and they advocate for the best interests of their clients.

The contract provides for full disclosure by each party of all their needs, interests and concerns. A key component of the agreement is that it is developed and enacted in good faith. Some lawyers have questioned the competing ethics of full disclosure as this approach might impact negatively on a client in later litigation. Collaborative law may also include a wider group of professionals to provide advice in non-legal areas of the dispute and to ensure agreements are tailored to the specific needs and circumstances of the participants. For example, at times counsellors are brought in through agreement in the ‘four-way’ negotiation to assist clients to better address emotional concerns. The organisation of collaborative law places lawyers at the centre of the process. In contrast, the practice of ADR is multi-disciplinary and may include lawyers, but is generally run by the mediator who may or may not have a legal background. In collaborative law, lawyers make the process decisions in conjunction with the clients, rather than an independent third party as is usual in other

123 Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law: A Qualitative Study of CFL Cases* (Family, Children and Youth Section, Department of Justice, Canada, 2005).
124 Sourdin, above n 5.
126 Ibid.
dispute resolution process. This role requires lawyers to adopt non-adversarial, more collaborative approaches. Collaborative law began in arguably the most relationship focussed area of law, the family law jurisdiction and as such emotional concerns are commonly dealt with in this model. It is gradually growing more widely in civil law, although family law remains the prime area of practice.128

The focus on problem-solving evident in the above approaches has created orientations to practice that prioritise solutions to conflict. However, as indicated in chapter one, some emergent models of mediation are more interactional in focus. There are similarities in the transformative, narrative and insight models of mediation as these models include goals beyond settlement.129 The underlying philosophy of these models is a relational world-view where humans are constructed as both individual and social actors. In this approach, relationships are valued as they contribute to meaning-making and identity.130 Further, a relational approach means that these models of practice reject the primacy of individualistic needs in conflict.131 There has been criticism of these models because relationship repair may not be enough to meet institutional and individuals’ expectations of mediation.132 However, such is the impact of these emerging models that interactional approaches have begun to influence practice, including facilitative mediation, to focus more on relationships

129 Bush above n 21, 740-746. Bush also includes the Understanding Model. This model prioritises relationships and understanding between parties, but I would argue does not have a philosophy of a relational world-view at its base.
130 The insight approach also views conflict as relational and includes postmodernist and social constructionist perspectives: Cheryl Picard and Kenneth Melchin, ‘Insight Mediation: A Learner Centred Mediation Model’ (2007) 23 Negotiation Journal 35. However, discussing all the various models of mediation in detail is beyond the scope of this thesis.
and party self-determination even where the specific model has not been adopted. I will now discuss two of these models, the transformative and narrative models in detail as these two models are well established in the literature of mediation. I describe these two models as second generation practice, although I acknowledge that this term is merely an organizational category. These two models should not be privileged in mediation practice but provide examples of evolving theory and practice that react to some of the perceived shortcomings of first generation practice.

3.3.2 TRANSFORMATIVE MEDIATION

The transformative model of mediation offers an alternative both to litigation and to negotiation and mediation models that are premised on individualistic world-views and a problem-solving approach to conflict. Robert Baruch Bush and Joseph Folger argue that one of the premises of their approach is a relational world-view, drawing on wider developments in social science that move from an individualistic ethos to a relational social order. The authors state that: ‘Mediation, with its capacity for transforming conflict interaction, represents an opportunity to express [a] relational vision in concrete form.’

This approach can transform the interpersonal crisis that parties can experience in conflict. The aim is to achieve the twin objectives of shifts in empowerment and recognition contributing to changing the dynamics of the interaction. The mediator supports parties in conflict with the aim of achieving empowerment. This is achieved by amplifying opportunities for them to decide for themselves how to address the conflict. Mediator interventions also invite the parties to see the conflict from the other party’s point of view, with the aim of achieving a degree of empathy, defined as recognition. Overcoming the crisis in human interaction is the priority in conflict transformation, and exploring and deciding on options for problem-solving are often achieved in addition to this normative aim. The mediator in the transformative

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133 Bush above n 21, 762-764.
134 Bush and Folger, n 12, 37.
136 See Della Noce et al, n 18, 57.
137 Bush and Folger, n 12, 60.
model is not considered a neutral third party, but instead acknowledges the impact of mediator interventions on the mediation story with the normative aim of conflict transformation. The transformative dimensions can benefit the specific dispute being mediated as well as the community more generally as participants may become more adept at dealing with conflict.\(^{138}\) Thus the experience of transforming their conflict interaction for participants affects not only the disputing parties, but also potentially the wider community.\(^{139}\)

This approach relies upon postmodern and social constructionist literature as part of its philosophical basis, but also draws on the fields of communication, cognitive psychology and social psychology.\(^{140}\) Developing a conflict psychology based on a relational world-view, Bush and Folger analyse conflict as causing an individual a ‘kind of crisis’. When parties experience the conflict that leads them to seek mediation they will often feel a sense of disempowerment and displacement. Importantly, the authors describe conflict as affecting an individual’s sense of self and their relationships with others. Parties react with a sense of weakness; becoming self-absorbed and self-centred. Bush and Folger describe this process as a negative spiral of conflict that the transformative model attempts to reverse. Mediators intervene in the conflict with the normative aim of transforming the conflict through empowerment and recognition shifts.\(^{141}\) Practice interventions of this model aim to encourage storytelling of past events so that underlying issues can be discussed. Confusions between parties can be identified through a close listening to the parties’ concerns.\(^{142}\) Whilst not rejecting entirely other models of mediation the authors critique a focus upon rights at the expense of relationships. Bush and Folger argue that:

In general, research like this suggests that conflict as a social phenomenon is not only, or primarily, about rights, interests, or power.

\(^{138}\) Ibid 37.

\(^{139}\) Ibid 78.

\(^{140}\) Della Noce et al, n 18, 48.

\(^{141}\) Ibid 45-53.

Although it implicates all of those things, conflict is also, and most importantly, about peoples’ interaction with one another as human beings.143

Some law academics acknowledge transformative mediation as a model of mediation practice that is an important new paradigm.144 In the United States the transformative model has been used with considerable success in employment dispute resolution and has been touted as the most effective model of mediation in that context.145 It has also been used successfully as a model to deal with conflict within families.146 There have, however, been significant criticisms of this model. Menkel-Meadow argues that many of the interventions are not unique to transformative mediation and reflect generic communication strategies commonly used in other models of mediation such as facilitative mediation.147 Transformative mediation has also been criticised for the assertions relating to moral growth. For instance, Mayer rejects the value-based approach of this model.148 Many regard the experience of a mediation session, often lasting only a few hours, as an unlikely forum for lasting moral changes to occur.149 Others have criticised transformative mediation for its focus upon relationships at the expense of problems. Mediation, it is claimed, can accommodate both aims and other

143 Della Noce et al, above n 18, 49.
models espouse practices to achieve both aims.150 There has been criticism of transformative mediation for its failure to engage with psychological theories and the unacknowledged influence of Gestalt theory on the model.151

In terms of practice interventions, emotion is a key concern of the transformative model. The mediator does not ‘shut down’ emotion in the manner of many problem-solving mediators, but instead allows parties to determine the degree of emotion that is present in the dialogue.152 For example, where there are emotional outbursts from parties, instead of acting to control the dialogue the mediator will support party choice and let the parties themselves choose how they wish to interact, including the level of expression of strongly held feelings. The mediator ensures that their own demeanour is calm through any fraught conversations between parties, thus being careful not to ‘implicitly discourage emotional expression.’153 Mediators also use generic communication skills of reflection and summarising to assist parties in their choices, being careful in any interventions not to quell emotional dialogue.154 There has been criticism of this kind of approach for allowing parties such a degree of control over potentially inflammatory dialogue. Emotion can ‘flood’ parties and cause residual resentment. Jones argues that the ways that transformative mediation approach emotion is simplistic as parties can be suffused with negative emotion during the mediation.155

Culture is another concern in relation to the transformative model. There is an argument that transformative mediation is Western-centric in the same manner as problem-solving models, as it does not acknowledge the culture-bound origins of its approach.156 It does not articulate specific interventions in relation to culture and due

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150 Picard and Melchin, above n 130.
152 Bush and Folger above n 12, 153.
153 Ibid 154.
155 Jones, above n 42, 284.
156 Milner, above n 86, 744-745.
to the philosophy of party empowerment regarding both process and content can allow cultural stereotypes to dominate. If cultural disadvantage is not to operate in mediation there is a need for active interventions by the mediator to ensure fairness.\textsuperscript{157} This kind of sitting back and optimizing party control of process can mean that power concerns are also not sufficiently addressed by the mediator. The transformative approach to power is largely static, arguing that general empowerment interventions assist all parties equally.\textsuperscript{158} This model does not sanction mediator interventions to support a party experiencing power imbalances. Thus it might be said to fail to address the needs of women and other vulnerable groups in mediation. A more active approach in terms of culture and power is evident in the narrative model that is discussed next.

3.3.3 NARRATIVE MEDIATION

Narrative mediation is a relatively new model of mediation that has its origins in narrative therapy and is predicated on a storytelling approach to conflict.\textsuperscript{159} Like the transformative approach this model critiques the assumptions of problem-solving, most notably the view ‘that individuals are driven primarily by internally generated needs which are expressed in mediation as their interests.’\textsuperscript{160} Rather than framing conflict around individual needs narrative mediation, based on postmodern and social constructionist perspectives, sees conflict as “…the inevitable product of the operation of power in the modern world”.\textsuperscript{161} This approach endorses a relational world-view and includes the aim of conflict transformation for parties in dispute.\textsuperscript{162}

\begin{itemize}
\item \textsuperscript{157} Isabelle Gunning, ‘Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations’ (2004) 5 Cardozo Journal of Conflict Resolution 87, 94.
\item \textsuperscript{158} Bush and Folger above n 12, 54-74.
\item \textsuperscript{160} Winslade and Monk, n 12, 30.
\item \textsuperscript{161} Ibid 41.
\item \textsuperscript{162} Ibid ch 5.
\end{itemize}
The authors of this model reject the liberal ideology that supports notions of neutrality and mediators are seen as active participants in re-storying conflict and framing more harmonious stories between parties.\(^{163}\) This approach looks beyond the facts and interests that are the subject of problem-solving mediations and seeks to deconstruct the cultural and historical processes by which these facts and interests came to be.\(^{164}\) Through various techniques mediators assist parties to reconsider the conflict stories that brought them into dispute, opening space in the conflict narrative for new perspectives and understanding.

One such mediator strategy is developing a rapport with parties so that they trust the mediator and the process, in order to encourage storytelling and provide respectful listening to conflict narratives and their impact.\(^{165}\) Another mediator strategy is adopting the approach of an ‘externalizing conversation’ where mediators speak about a problem as if it was ‘an external object or person exerting an influence on the parties but they do not identify it closely with one party or the other.’\(^{166}\) Mediators also map the history of a dispute in order to gain clarity about the ebb and flow of the conflict. Such an approach contributes to the construction of solution-bound narratives where allegations of mutual blame between parties can be re-storied to include more positive dialogue focused on improving relations.\(^{167}\) The written word is used to assist in the development of a new more harmonious story, which may address the concerns that brought the parties to the process. For instance, documenting changes in the conflict stories that were engaged with in the mediation, through letters to parties from the mediator, can encourage further progress in subsequent sessions.\(^{168}\) Another key strategy is the deconstruction of larger societal stories that will impact on the mediation story as it unfolds during the mediation. Dominant stories about issues such as class, gender and race will affect the conversation in the mediation. Mediators need to recognise that there are ‘systemic patterns of marginalisation and legitimation that

\(^{163}\) Ibid 38-41.
\(^{164}\) Ibid 38.
\(^{165}\) Ibid 5.
\(^{166}\) Ibid 6.
\(^{167}\) Ibid 8-14. See also ch 6.
\(^{168}\) Ibid 228.
are featured within a conflicted interaction.¹⁶⁹ The mediator, as a non-neutral co-author, can make clear the discursive background to the re-storying of the mediation. The mediator can talk with parties about the wider societal stories that frame the mediation conversation; such as commonly held views of what a ‘good’ mother would do regarding parenting arrangements in a family law mediation.

Also, Winslade suggests that positioning theory may assist in understanding the discursive positions of participants in mediation.¹⁷⁰ This theory posits that positions are taken up through conversations. Conversational acts create positions informed by societal discourses in relation to the speaker and addressee at a given moment in a conversation. Winslade explains this theory in the following terms:

For example, a speaker may take up a position of deference and call the other person into a position of superior knowledge and expertise, such that his utterances will have greater material effect. Or she may take up a position of exaggerated entitlement and call the other into a position of marginalization such that his utterances will be of little account.¹⁷¹

In much of mediation practice, parties make opening statements drawing on larger societal stories that reinforce their positions, often constructing their statements in a way that the other party is blamed for the conflict. Parties can call on societal discourses to legitimise their position and utterances, sometimes silencing the voices of other parties in mediation. Analysing discourse in mediation can help mediators to

¹⁶⁹ Ibid 100. Some parties in mediation may have a sense of ‘excessive entitlement’ in the conflict: ‘People often find themselves believing that others should treat them well and look after their needs’: 95. This frame may mean that in mediation a party has a view of excessive entitlement, often drawn from larger societal stories, such as between a male manager and female secretary, where there are unreasonable demands regarding work. See ch 4 for detail about discourses of entitlement in mediation, including the impact of gender on working relations.


¹⁷¹ Ibid 65.
understand the larger societal stories operating in the process. Such analysis can assist mediators to understand and make visible the operation of power and dominant discourses in conversations that occur in mediation. During the course of the mediation the mediator can act to make clear to the parties the operation of societal discourses in the parties’ interaction and can call into question the basis of societal discourses. Positioning theory is useful in mediation because:

…it affords people the opportunity to address the particularity of localised experiences without losing touch with the powerful social discourses within which subjective experience is built.

It also alerts a mediator to positioning dialogue in the mediation conversation that resists power through human agency. Winslade and Monk argue that the mediator can assist parties to reposition through simple interventions:

The role of the mediator…is to open up the possibilities for such repositioning to occur. It is achieved by hearing a piece of positioning and stopping to be curious about it.

This curious questioning of parties is an important strategy in this model to help parties reconsider conflict and the larger societal discourses surrounding the conflict. Ultimately the aim of a mediator in this model is to develop in the parties shared meanings in relation to the issues raised in the mediation and to develop ideas for possible solutions, without overly focusing on settlement. In terms of emotion, a key concern in second generation practice, the narrative model acknowledges the impact of emotion on conflict and mediation. The authors of the narrative approach do not see emotion as an essential element of an individual. Instead, the narrative model links emotion with discourses of power in mediation that positions the various participants. The participants’ understandings and expectations of emotional reactions

174 Ibid 60.
175 Winslade and Monk, above n 12, 22-29.
are created through societal discourses. When parties and the mediator feel emotion they are reacting to positioning discourses that create emotional reactions. By talking about these discourses the mediator can help parties understand the basis of their emotional reaction. This understanding allows the disruption of stories of mutual blame and the reconstruction of more harmonious stories amongst parties to conflict. Recently, Winslade and Monk stated that:

This approach to emotional experience does not make a person’s feelings any the less real or any the less painful, but it might alter how others conceptualize their responses. Rather than assuming that a person’s feelings or thoughts are essential to *who he or she is*, one might think of them as essential to *a narrative in which the person is situated* and, therefore, when the story shifts, or the person’s position within the story shifts, the emotions will follow (italics in the original).\(^{176}\)

Cultural identity in such an approach is regarded as fluid rather than an essentialist attribute of an individual.\(^{177}\) Such an approach moves away from stereotypical constructions of culture in a similar manner to second generation negotiation practice. In terms of power imbalances, due to the postmodernist underpinnings of narrative mediation, it is explicit in intervening on behalf of the more vulnerable in the mediation.\(^{178}\) Narrative mediation is one of the most powerful emergent paradigms in mediation due to its critical theory philosophy. However, Winslade himself has argued that the importance of models may be overemphasised, with their focus on specific practice interventions and that instead reflexive, theory informed, practice may be the important frame for future mediation practice.\(^{179}\) Mediation is not the only process that attempts to deal with conflict. There are other practices that are of relevance to this thesis as they may also be part of content in ADR teaching. One such approach is victim offender mediation/restorative justice conferencing.

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\(^{176}\) Winslade and Monk, above n 173, 7.

\(^{177}\) Winslade and Monk, above n 12, 38.

\(^{178}\) Ibid 120.

3.4. VICTIM OFFENDER MEDIATION/RESTORATIVE JUSTICE CONFERENCING

A model of practice dealing with conflict that has evolved in the criminal rather than the civil jurisdiction is victim offender mediation or restorative justice conferencing. Restorative justice, like transformative mediation, attempts more than just conflict resolution. This method of dealing with conflict attempts to restore relationships between parties and affect the wider community through its process. It has a history of being closely aligned with court processes as many programs in this area began as a diversion from court or as part of sentencing options and this relationship with the institutions of justice has assisted its success. Restorative justice has evolved into a worldwide movement that has many applications. Although initially seen to be solely a criminal justice option, this conflict resolution process is now utilised in workplaces, schools and communities. In relation to criminal matters conferencing has been used to “deal with a spectrum of crimes up to and including homicide and sexual offences, but the majority deal with less serious offences (property offences, minor assaults, and public order offences).” These kinds of processes can be described as efforts to heal the aftermath of conflict.

Kathleen Daly argues that restorative justice has a ‘mythic’ quality associated with claims of Indigenous origins and that these claims are far from the truth. Whatever its origins the use of restorative justice to deal with the aftermath of selected criminal actions and other conflict has grown significantly in Australia since the 1990s. For instance Juvenile Justice Conferencing, where young people engage in circle conferences.

180 There are a number of processes that fall under the banner of restorative justice. Restorative justice processes seeking restorative justice outcomes include victim-offender mediation, community and family group conferencing, circle sentencing, restorative programs in juvenile justice and programs in indigenous justice: United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programs (Criminal Justice Handbook Series, 2006) 13-29.
182 Ibid 402.
184 Ibid 221.
approach to deal with the aftermath of selected crimes, is now available in most states.\textsuperscript{186} A long-term study has been carried out in South Australia to investigate the effectiveness of this sentencing or diversion option in our justice system and the results indicate positive outcomes for both offenders and victims, whereby there is reduced offender recidivism and increased victim satisfaction after a crime.\textsuperscript{187} These positive outcomes have been replicated in international studies.\textsuperscript{188} However, many critique restorative justice initiatives, in particular due to the potential power imbalances that are inherent in the process. For instance, there have been debates about whether these processes are appropriate for victims of serious crimes such as sexual assault, due to potential significant power imbalances.\textsuperscript{189} The effectiveness of any program will depend on the model chosen and the role of the third party who

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\textsuperscript{188} An important report on restorative justice is Lawrence Sherman and Heather Strang, \textit{Restorative Justice: The Evidence} (Smith Institute, 2007). The authors researched conference type processes in the United Kingdom, United States and Australia. They claim that where there is a third party process that includes a face to face meeting among all parties connected to a crime, their research shows that this process substantially reduces repeat offending for some offenders (but significantly not all offenders), increased diversion, reduced victim stress symptoms, increased satisfaction for victims and offenders with justice in comparison with traditional criminal justice processes, reduced victims desire for violent revenge, reduced costs when used as a diversion from criminal justice processes and reduced recidivism in adults, or equaled the rate for youth, in comparison to prison. The third parties in this study were police persons and were all trained in substantially the same manner.

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facilitates the process, as well as associated case management initiatives.  

The New Zealand courts were one of the first jurisdictions to adopt a conferencing model, passing relevant legislation in 1989, *The Children, Young Persons and Their Families Act 1989*. In Australia conferencing began with a police-run process known as the *Wagga Wagga* model, and other states and institutions have evolved their own practices adopting a variety of third party approaches. For example, in Victoria a small conferencing program has operated in the juvenile justice jurisdiction since 1995. A pre-sentence diversionary pilot program began in the Melbourne Children’s Court and was operated by a non-government organisation with non-police facilitators. The process has continued through a variety of non-government providers, such as Anglicare and Jesuit Social Services, and was significantly expanded in October 2006. In Victoria conferencing operated without a specific legislative base until 2006 when conferencing was added as a sentencing option under s 415(1) *Children, Youth and Families Act 2005* (Vic).

There is increased institutional acceptance of restorative justice and conferencing in Victoria. Recently, restorative justice was integrated into the operation of the new multi-jurisdictional court, the Collingwood Neighbourhood Justice Centre, through the passing of the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic.). Along with therapeutic jurisprudence, the restorative justice philosophy underpins the operation of the new court. Under section 1, the legislation explicitly includes a commitment to therapeutic jurisprudence and restorative justice. The Neighbourhood Justice Centre is a pilot program providing conferencing at the court.

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190 A reduction in re-offending and other issues relating to crime such as victim stress, may depend upon the model and context of conferencing practice. For a discussion of a particular model and context in New Zealand, where conferencing practice has been pioneered and extensively implemented: Gabrielle Maxwell and Allison Morris, ‘Youth Justice in New Zealand: Restorative Justice in Practice?’ (2006) 62 *Journal of Social Issues* 239.


192 Ibid 189.


194 Ibid.
for offenders under 25 years of age. This is the first attempt to include restorative justice conferencing for adults in Victoria. With the increased use of restorative justice and conferencing through the advent of the new legislation, training programs have changed and there has been an increased emphasis on skill development in the form of competency-based learning. The Victorian Association for Restorative Justice has lately released details of a voluntary accreditation system in 2009, based on the new voluntary mediation accreditation system.  

The dynamics of the conferencing process differ from mediation in that restorative justice conferencing frequently articulates a philosophy of repairing harm and explicitly apologising for wrongdoing. This is particularly the case in the context of criminal offences but may also apply in circumstances such as school bullying, workplace conflict and community building. This philosophy differs from mediation, which aims to resolve a problem, dispute or conflict. This problem-solving rhetoric does not necessarily require apology or acknowledgement of any harm. In mediation, the third party will generally emphasise that no decision needs to be made about the substantive issues in dispute. In the civil jurisdiction, the fear of litigation arising from an apology may also be one of the reasons that mediation frequently avoids acknowledgement of harm. Mostly, in conferencing in the criminal justice context a wide range of people will attend the conference including family members, police, support-people such as youth workers, victims and victim support workers.

The well-known academic John Braithwaite provided a paradigm for offender rehabilitation adopted by many practitioners and agencies using conferencing. Many models of practice developed from his theory of re-integrative shaming. In his approach the aim for the victim in conferencing is to make the harm resulting from the offence clear. For the offender, the aim may be to provide a forum for ‘reintegrative shaming’. This process provides the offender with the opportunity to

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understand the effects of his/her crime and a process of ‘shaming’, not the person but the act, grants the opportunity for forgiveness and re-integration back into the community. Research has also shown positive effects for the victim in that often they are emotionally more capable of ‘moving on’ after experiencing a conference due to changes in emotional responses to the crime, such as reduced anger and fear.\(^\text{198}\)

Clearly, re-integrative shaming raises the issue of emotion in restorative justice processes. Often an apology will occur in the conferencing process or through other restorative justice processes, such as the offender writing a letter of apology to be read in court.\(^\text{199}\) One of the important practice issues in conferencing is the need to deal with the emotional concerns of parties, both victims and offenders.\(^\text{200}\) For the offender shame can work to assist in rehabilitation, although the notion of ‘shaming’ has been critiqued in the literature. It has been argued that a better outcome in conferencing is that it may involve a promotion of empathy in the offender rather than shame.\(^\text{201}\) Arguably, shaming is a problematic outcome in conferencing and may create barriers to successful conflict engagement.\(^\text{202}\) Recognition of the emotional benefits of restorative justice conferencing, where victims can recover from the effects of negative emotions through experiencing the conference, is increasing.\(^\text{203}\)

The understanding of power in conferencing is relatively unsophisticated and has largely been approached from a modernist discourse in the consideration of power imbalances amongst both victims and offenders. The literature mostly deals with the concern of ‘balancing power’. For example, victims are said to be at risk of being re-

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\(^\text{201}\) Ibid.

\(^\text{202}\) Scheff and Retzinger above n 60.

victimised in conferencing processes, particularly regarding sexual assaults. A number of approaches have been raised to deal with the issue of power. Braithwaite argues that the narrative element of conferences helps to re-story the participants’ experiences. Braithwaite states that: ‘In restorative justice conferences, after each individual has their stories listened to, new stories that allow new identities are co-authored by a plurality of stakeholders in the injustice. Interestingly, Winslade and Monk have recently argued that postmodernist approaches can be applied to restorative justice processes and that the storytelling aspects are similar in relation to the two approaches. Overall, there are synergies in the approaches of transformative, narrative and restorative justice conferencing in that they all explicitly address the emotional dimensions of conflict and all have a focus on empowering party storytelling, although they differ in the ways that they articulate interventions. Although narrative mediation is the most clearly framed around postmodernist and social constructionism theory, both transformative and narrative mediation acknowledge power concerns and see the value of re-storying conflict experiences.

3.5 THERAPEUTIC JURISPRUDENCE: A FRAMEWORK FOR CHANGE TO LAW AND LEGAL EDUCATION

Therapeutic jurisprudence is an approach to legal practice that promotes holistic problem-solving by courts, tribunals and associated services in our legal and justice system. Stemming from the work of United States academics, Bruce Winick and David Wexler in the mental health field, and now widely applied in both criminal and civil law, therapeutic jurisprudence is an attempt to chart the impact on the emotional life and psychological wellbeing of those affected by decisions of our justice

204 Braithwaite posits that power rests in conferencing with the stakeholders rather than the third party and due to the “plurality of voices” there is less need for the convenor to act to address power concerns as participants will collectively deal with these concerns: Braithwaite, n 181, 396.
206 Ibid 428.
207 Winslade and Monk, above 173, 215.
system. The approach draws on the work of the social sciences in charting the therapeutic or anti-therapeutic effect of decisions by courts and, more widely, by justice agencies. As noted previously, therapeutic jurisprudence can be included among those non-adversarial approaches to the law that attempt to move away from our adversarial system and seek innovative ways to solve the problems that appear in our legal and justice system. The success of therapeutic jurisprudence, particularly in Australia, lies in the promotion of diverse initiatives, such as problem-solving courts and correctional programs. It is also advocated as a paradigm to temper the litigious culture of lawyers and promote practices that assist to further the client’s overall wellbeing, including the use of psycholegal hotspots when counselling clients. Therapeutic jurisprudence has been a powerful framework for challenging assumptions about traditional legal practice and encouraging lawyers to engage with clients’ emotional needs, but there has been resistance from lawyers who see this approach as merely re-packaging what the legal profession already routinely engage with as part of legal practice.

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having a paternalistic focus,\textsuperscript{214} seeking to extend the social control of the state as the court plays a more active role in supervising the lives of those who come before it, proponents argue that it has made a major contribution to law reform.\textsuperscript{215} Therapeutic jurisprudence can be seen as a movement rather than a theory and it has focused on achieving change in the law and justice system that benefits the public.\textsuperscript{216}

The mediation movement’s focus upon alternatives to litigation that reduce stress and cost has resonance with the aims of therapeutic jurisprudence. This is because both value the emotional benefits of clients coming to agreement with the other party to a dispute, rather than engaging in stressful litigation.\textsuperscript{217} For the practice of mediation, there is value in a philosophy that promotes practice that deals with emotion and provides a greater degree of procedural justice. Thus there are clear links between therapeutic jurisprudence and emergent models of mediation.\textsuperscript{218} Mediation is known for its therapeutic effect when incorporating storytelling, an explicit attribute of both narrative and transformative models.\textsuperscript{219} Emotional expression is particularly valued in the kinds of legal practices promoted by therapeutic jurisprudence and in this respect it has links with restorative justice processes.\textsuperscript{220} For instance the use of apology, in mediation and other legal processes, has been a focus of research and writing in the


\textsuperscript{218} Gary Paquin and Larry Harvey, ‘Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection’ (2002) 3 Florida Coastal Law Journal 167. The transformative and narrative model, in particular, have therapeutic outcomes.

\textsuperscript{219} Ibid.

therapeutic jurisprudence movement and is also used in restorative justice.\textsuperscript{221}

Therapeutic jurisprudence contributes a major critique of legal education to the field of law.\textsuperscript{222} It offers a framework for re-imagining legal education with a focus on authentic learning that promotes a law students’ understanding of law in context and emotion in legal practice. For example, Bruce Winick has argued traditional legal pedagogy limits an understanding of the emotional dimensions of conflict and the psychological concerns of clients due to a privileging of the rational in legal education. He advocates clinical and experiential learning for law students’ that builds skills in dealing with emotion in legal practice.\textsuperscript{223} Using therapeutic jurisprudence as a framework in legal education has been valuable in improving clinical programs in law schools,\textsuperscript{224} and it can also be used in lawyer professional development and training, and judicial education.\textsuperscript{225} In addition, this framework can inform pedagogy, helping law teachers to understand the value of authentic learning in law and the benefits of introducing students to holistic practice.\textsuperscript{226} It accords with new initiatives in legal education, such as the ‘Balance in Legal Education’ movement in the United States, which is attempting to reduce law student stress through curriculum renewal and

\textsuperscript{221} King et al, above n 15, 28-31.
\textsuperscript{226} Winick, above n 223, 471-474.
improved pedagogy.  

3.6 CONCLUSIONS
Emergent theory and practice in negotiation and mediation provides new frameworks for dealing with conflict. These second generation approaches provide opportunities for rethinking how we deal with conflict and may influence legal practice. The relational world-view, coupled with a focus on more than merely problem-solving, opens up added dimensions in conflict engagement. The recognition in many emergent approaches that rational discourse should not dominate conflict engagement allows for a more holistic approach to disputes. Notably, however, emergent theories in this area are not homogenous in their approach as philosophies and intervention strategies differ. Nor are all practitioners of first generation approaches unskilled in dealing with issues such as emotion as practice varies and emotion has increasingly been engaged with as part of integrative negotiation and facilitative mediation. In contrast in much of second generation practice is an acknowledgement of and for some, an explicit privileging of emotional concerns in conflict. For example, although legal discourse generally does not value concerns relating to emotion, many recent models of mediation and allied non-adversarial practices such as restorative justice and therapeutic jurisprudence value emotion and its expression. The transformative model is explicitly and fundamentally concerned with emotion and draws extensively from psychological discourse to articulate ways to deal with emotion in the mediation. The narrative model recently emphasised the need to see emotion as constructed in societal discourse, a reaction to power circulating in the mediation, rather than as an essentialist attribute of the parties. Restorative justice and therapeutic jurisprudence premise their diverse practices on the need to address emotion and promote the emotional wellbeing of participants.

In contrast the first generation facilitative model of mediation, although often said to deal with emotion, frequently does so in a simplistic manner and fails to explore the benefits that may arise from emotional expression. Collaborative law deals with the issue of emotion as part of its collaborative process. This approach though, is less theoretically grounded than second generation practice and draws from the

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management discourse of Fisher and Ury. Critically the evaluative model of mediation, which is the practice that most lawyers currently favour, generally sidelines emotion as the focus is on rights.

For most of the models of mediation discussed in this chapter, culture and power are seen in modernist terms. Narrative mediation is the only model that explicitly deals with culture and power in a postmodern sense and this approach is arguably the most theoretically robust. Transformative mediation does not address the culturally specific nature of its practices and although it does deal with power from a postmodern sense, it does not premise its interventions and practices from this discourse. However, much of the second generation writings in this area have a more nuanced view of power than the problem-solving models of facilitative and evaluative mediation. In particular, the facilitative model draws from a positivist paradigm and as such is limited in its engagement with power. It is also Western-centric and practitioners do not appreciate the dominance of cultural norms drawn from the United States that frame conflict in this model. It is a first generation approach to conflict that fails to attend to nuances of party engagement due to its framing of conflict. The evaluative model is largely framed around rights-based discourse and does not sufficiently acknowledge the impact of culture and power on conflict engagement. Both models align with the positivist orientation of the dominant stories of legal practice. Although, the facilitative model approaches negotiation from a co-operative perspective and can include creative brainstorming, the emphasis on individual interest accords with modernist principles evident in the law.

Similarly, individualistic concerns are the focus of the rights-based evaluative model of mediation. This model reinforces largely adversarial orientations to conflict that mirror the litigation process. Collaborative law draws mainly from theory and practice associated with first generation negotiation paradigms and thus tends to adopt a modernist view of power and sees culture as essentialist. The writings relating to restorative justice and therapeutic jurisprudence also do not generally articulate a postmodern view of power, although there are exceptions such as approaching restorative justice conferencing from a postmodernist perspective.

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In legal education an understanding of the various approaches to negotiation and mediation available in the field allows students to see that there are a variety of ways to conceptualise legal practice. Learning about both first and second generation practice allows students to see the repercussions of explicit and implicit theories that inform practice. Students can see the ways that the legal system frames conflict with the dominance of the individualistic construct often leading to a failure to deal with relationships. If exposed to diverse models students can learn to appreciate the dangers of an instrumental focus on settlement and the potential to silence some parties’ concerns, particularly vulnerable groups. They can understand that an over adherence to the rational in negotiation and mediation can mean that emotional concerns are sidelined. Understanding postmodernist and social constructionist perspectives can also help students see that there are a number of differing interventions to address issues of emotion, culture and power. Student learning about different models in negotiation and mediation can raise the prospect of conflict transformation for clients who engage in these forms of ADR. Arguably, lawyers who understand the full potential of negotiation and mediation can better assist in the holistic engagement with client’s legal problems. Such an aim would be in keeping with the movement of therapeutic jurisprudence and the primacy of the mental well-being of clients.

The inclusion of a range of models and non-adversarial practices in ADR in legal education will help to determine what the legal profession regards as legitimate practice in court-connected disputes. The future of lawyers’ practice and the degree to which lawyers understand first and second generation practices and adopt a non-adversarial approach will be affected by their experiences in law school and the content and pedagogy of courses such as ADR. This thesis examines the content of ADR courses to assess whether emergent models of negotiation and mediation and discourses of emotion, culture and power, amongst other issues, are being taught to law students. The movement of therapeutic jurisprudence argues for a legal pedagogy that evolves from the traditional, passive delivery of doctrine to one that assists students to be holistic practitioners. This thesis examines the pedagogy adopted in ADR and the trends in learning and teaching. Importantly, the content and pedagogy of ADR and its place in legal education are all affected by a number of influences, including the accreditation of law programs, which are discussed in chapter four.
CHAPTER 4
ADR AND LEGAL EDUCATION

4.1 INTRODUCTION
The legal curriculum at law schools in Australia is affected by a number of influences including government—at both state and federal levels, universities, the legal profession, law students and law staff.\(^1\) For example, government and the legal profession regulate admission to practice as a lawyer in each of the states of Australia.\(^2\) Each state requires university education through an accredited law degree for admission.\(^3\) Law school degrees are based on a variety of required knowledge areas, colloquially known as the ‘Priestley 11’, which were articulated in a report of a committee chaired by Mr Justice Priestley in 1992.\(^4\) For admission to practice graduates also undertake supplementary training completed through a practice-focused qualification referred to as practical legal training (PLT), or a legal traineeship involving work-integrated learning at a law firm or government department.\(^5\) The Law Admissions Consultative Committee (LACC) is the body that promotes consensus amongst the various states in Australia regarding admission requirements to practice in law.\(^6\) In Australia, the Council of Australian Law Deans (CALD), made up of representatives from the thirty-two law programs\(^7\) is also influential in legal education policy.


\(^3\) For information on admission in each state: Law Admissions Consultative Committee (LACC): http://www.lawcouncil.asn.au/lacc.cfm at 3 January 2012.


\(^5\) In Victoria PLT can be completed at an institute such as Leo Cussen http://www.leocussen.vic.edu.au/cb_pages/ptc.php at 3 January 2012 or a student can undertake a traineeship program that requires completion of some modules in the PLT http://www.leocussen.vic.edu.au/cb_pages/traineeship_programs.php at 3 January 2012.

\(^6\) For detail on the LACC, above n 3.

Legal education at universities in Australia, as well as in the United States and other parts of the Western world, has been regularly reviewed and critiqued. Topics such as the appropriate content and pedagogy of law programs, the imperative to adapt legal education to meet the changing needs of law students and the profession, including the need to better prepare law students for legal practice through the inclusion of skills training are constantly debated. Legal education is a significant site for the shaping of lawyers’ practice as law schools determine the knowledge, skills and ethical interpretations students need to acquire in order to become a lawyer. The accreditation requirements for admission for lawyers shape legal education and ultimately legal practice. Other factors also affect legal education such as trends in university education, including funding considerations, the underlying philosophy of law teachers in terms of content and pedagogy, the increasing importance of educational theory to law teaching, and the marginalisation of critical theory in many


law programs. Lawyers may even be accused of using their knowledge to legitimise their monopoly in legal services; a monopoly premised largely on an adversarial frame of practice. Importantly, for the concerns of this thesis, ADR in legal education has become more valued as it is now seen as an area that can temper the adversarial framework of much of the law and encourage non-adversarial, interdisciplinary practice in lawyers.

In this chapter I describe and discuss ADR and legal education in Australia. My aim is to set the context for an analysis of current ADR content and pedagogy and the wider policy concerns in legal education in Australia. Thus this chapter provides background for the analysis of data in chapters five, six and seven. I first discuss the role of ADR in legal education in Australia. Then I outline the accreditation of law programs and consequent implications for the teaching of ADR. I canvass literature relating to the content and pedagogy of ADR courses in law programs. Lastly, I explore the use of communities of practice in legal education and relate this approach to teaching of ADR.

4.2 ADR AND LEGAL EDUCATION
For many years, research and discussion have contributed to the definition of what students should achieve through their legal education. There has been wide investigation of graduate attributes that law students should acquire including substantive legal knowledge, legal skills, broader generic skills, and ethics. Although there is a move towards greater emphasis on teaching legal skills in many

12 Ibid.
law school programs in Australia, they are not taught across the board.\textsuperscript{16} ADR courses taught in law programs generally include the legal skills of negotiation and mediation practice.\textsuperscript{17} However, ADR is not merely a skills program and arguably should include both theory and practice elements.\textsuperscript{18} Other legal skills such as interviewing clients; legal analysis and problem solving; legal research; writing clear and concise letters and legal documents; and presenting a client’s case persuasively in court are also taught in law courses.\textsuperscript{19} Advocacy skills are most often gained through students engaging in moots.\textsuperscript{20} Skill development, either embedded in substantive law subjects or taught in specific subjects devoted to legal skills, also allows students to develop generic university graduate attributes.\textsuperscript{21} For instance, the university-wide graduate attribute of communication is an integral part of mediation training through such skills as active listening and asking open-ended questions.\textsuperscript{22}

There is a growing focus on teaching what a lawyer does as well as what a lawyer

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\textsuperscript{16} Castles and Hewitt, above n 10, 91-92.
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\textsuperscript{18} These issues are discussed in chapters five, six and seven.
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\textsuperscript{20} Moots are simulations of court hearings and in Australia these most often involve students taking on advocacy roles in role-plays of appeal decisions: Bobette Wolski, ‘Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum’ (2009) 19 Legal Education Review 41.
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\textsuperscript{22} Listening is integral to mediation and a key skill to be taught in training: Clare Coburn and Ann Edge, ‘Listening to Each Other: The Heart of Mediation and Dialogue’ (2007) 18 Australasian Dispute Resolution Journal 19, 19. In this article Coburn and Edge show the importance of listening to transforming conflict and the need for the mediator to cultivate the capacity to deeply listen: 22-26. Mediators must use active listening and open ended questioning to listen to party’s stories, including issues of power and culture: Tony Bogdanoski, ‘The Importance and Challenge of Active Listening in Mediation’ (2009) 20 Australasian Dispute Resolution Journal 206, 210-211.
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The influential MacCrate report on legal education in the United States emphasised that legal skills are an essential aspect of lawyer education. Australian reviews of legal education have long argued for the inclusion of legal skills in the law curriculum, although to date they have been unsuccessful in mandating their place in law programs. The 1987 Pearce report, one of the most significant reports into legal education in Australia, advocated for an increased integration of theory and practice for law students. This report critiqued the law schools in existence at the time of the research, and provided recommendations regarding ways to improve content and pedagogy. These included a focus on legal skills as well as doctrine, and increased small group learning to facilitate student understanding, rather than a focus on lectures. Since the Pearce report a number of new law programs have been introduced, both at undergraduate and postgraduate levels, and there has been a significant increase in the numbers of students studying law. In 2003, Richard Johnstone and Sumitra Vignaendra documented the large increase in the number of universities in Australia offering law programs, and noted both the diverse nature of these law programs and the increased teaching of legal skills. Despite this growth in skills-based teaching, they observed that case-based, teacher-centred lecturing continued to dominate legal education.

In 2009, Susanne Owen and Gary Davis authored a report for the Australian Learning and Teaching Council and the Council of Australian Law Deans, entitled Learning

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24 alternative dispute resolution processes are part of the 10 fundamental lawyering skills, see American Bar Association, Legal Education and Professional Development: An Educational Continuum, Report of the Taskforce on Law Schools and the Profession: Narrowing the Gap (the MacCrate Report) (1992).
27 Keyes and Johnstone, above n 1, 548.
28 Johnstone and Vignaendra, above n 4, 1.
29 Ibid 2-5.
and Teaching in the Discipline Area of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment. In this report they explored the graduate attributes for the discipline of law including the knowledge, skills and ethics taught to law students.\textsuperscript{30} This report, building on Johnstone and Vignaendra’s stock-take of legal programs, found that many law schools continued to focus on teaching doctrine in large classes, with limited engagement through small group pedagogy and more innovative practices, such as role-play, clinical education, collaborative learning and exploration of ethics.\textsuperscript{31} Although there were examples of change, such as the adoption of online learning by some law schools, there was still widespread use of case-based pedagogy that focused on students learning how to solve legal problems in the various substantive law areas. Teaching generic graduate attributes such as critical thinking skills in law programs increased.\textsuperscript{32} However, budgetary constraints are a key concern in the provision of skills programs in undergraduate legal education due to the high cost of small-group learning and thus initiatives in programs for legal skills are often curtailed.\textsuperscript{33}

The introduction of Juris Doctor programs is a new development in Australian legal education, following the model in the United States.\textsuperscript{34} This kind of postgraduate program allows increased income from student fees. In Australia, postgraduate law programs are permitted to charge fees, an option that is presently unavailable to undergraduate law studies. This funding model is full-fee recovery and this frees the law schools adopting this type of program from reliance on Australian Commonwealth funding of tertiary education. Juris Doctor programs generally offer


\textsuperscript{31} Ibid, ch 3.

\textsuperscript{32} Ibid 59-60.


\textsuperscript{34} Owen and Davis, above n 30, 19.
smaller classes with flexible options in postgraduate learning and teaching strategies and thus are likely to offer more teaching of legal skills, without the same concerns for costs as some undergraduate law programs.

In Australia, lawyers were originally apprenticed to legal practices in order to gain admission to practice. In time, the education of law students moved to universities and a connection with legal skills, as opposed to substantive legal knowledge, weakened with this move away from immersion in legal practice. In 2007 a United States report by the Carnegie Foundation on reform in legal education advocated a return to the ‘apprenticeship’ style of legal education through three key apprenticeships: (i) cognitive, (ii) practical, and (iii) identity and purpose. This report argues for an integrated approach that includes legal analysis, clinical practice and the development of professional identity. In an effort to promote improved legal pedagogy, a report by Roy Stuckey and others provides detailed suggestions for improved learning and teaching strategies in law schools in the United States. The Carnegie report also argues that students need to be better prepared for professional life due to the complexity of present day legal work. More generally the authors suggest that professional roles in society require:

…self-reflexivity, the development of understanding of how the past has shaped the present and how one’s own situation is related to the larger social world, as well as entertaining and probing possible

37 Keyes and Johnstone, above n 1, 543-545.
38 Sullivan et al, above n 8.
40 Ibid 29.
41 Stuckey and above n 8.
models of identity—are all important elements of a formative pedagogy for tomorrow’s professionals.\footnote{Sullivan et al, above n 8, 33.}

The authors suggest that legal education needs to be more interdisciplinary, ‘…forging more connections with the arts and sciences in the larger academic context’ in order to achieve better graduate outcomes and to enhance self-reflexivity in students.\footnote{Ibid.} ADR is well suited to help achieve this goal. It has progressively been accepted into legal education due to the growing use of negotiation, mediation and other alternative options in the law. It is already interdisciplinary because it draws from a range of disciplines, such as management, social science and international studies.\footnote{Jeswald Salacuse, ‘Teaching International Business Negotiation: Reflections on Three Decades of Experience’ (2010) 15 International Negotiation 187, 188.} However, despite growing legitimacy in the legal curriculum, ADR risks being co-opted and transformed by the traditional constructs of legal education and legal scholarship. The focus of law schools on ‘theory over practice, scholarship over teaching, [and] cognitive over ethical engagement’\footnote{Sullivan et al, above n 8, 114.} may mean that ADR teachers need to shift their focus from interdisciplinary concerns to ‘legal’ issues through the analysis of case law, legislation, and the lawyers’ role in ADR, in order to better succeed in academia. A focus on interdisciplinary theory and experiential learning may mean that ADR teachers run the risk of being marginalised in the legal academy.\footnote{Ibid 113-114. There is some evidence of this trend in the data collected in this thesis; discussed in chapter six.}

One of the biggest concerns in Australia is the funding of legal education. This is a key issue, as funding will impact on the content and pedagogy of a law program. Legal education has traditionally been framed around the ‘liberal’ law school, but as Paul Maharg argues:

… this model is breaking up, economically, commercially, culturally, educationally, not merely under pressure from underfunding and
increased demand on resources, but under the pressure of neo-liberalist policies and globalisation.\footnote{Paul Maharg, \textit{Transforming Legal Education: Learning and teaching the Law in the Early Twenty-first Century} (Ashgate, 2007) 5.}

Australian legal academic Margaret Thornton\footnote{Margaret Thornton, ‘The Law School, the Market and the New Knowledge Economy’ (2007) 17 \textit{Legal Education Review} 1.} contends that neo-liberal forces have impacted negatively on Australian law schools, students and staff in recent years. Thornton points to policy changes in higher education that have introduced market forces into universities.\footnote{Ibid 487-489.} Previously universities were funded and governed with ideas of the ‘public good’ as the dominant construct of their purpose and operations.\footnote{Simon Marginson, \textit{Markets in Education} (Allen and Unwin, 1997) 237-240.}

With the rise of neo-liberalism in Australia a ‘user pays’ framework was introduced into higher education, justified on the basis that social and economic benefits accrued to the students who completed tertiary education.\footnote{Ibid 4.}

From 1990, Australian undergraduate tertiary students, including law students, moved from a fully government funded tertiary system to one that is only partially funded. Thus law students now repay a large part of their legal education costs.\footnote{Johnstone and Vignaendra, above n 4, 3.} Significantly, in 1996 a differential system of charging university students was introduced. In this system, law students are charged the highest possible amount of student contribution,\footnote{Ibid 4.} so that law and medicine are the most expensive courses in Australia. Yet unlike medical schools, law programs receive the lowest amount of

\footnote{Margaret Thornton, ‘The Idea of the University and the Contemporary Legal Academy’ (2004) 26 \textit{Sydney Law Review} 481.}
funding from the government for a tertiary discipline area, and this has meant significant budgetary constraints. Diminished funding arrangements impact on small-group learning and the provision of skills programs. The changes to higher education, and the consequent need for universities to engage in corporatist strategies to meet budget shortfalls have led to many university administrations expanding both local and international student numbers in existing law programs, as well as leading several universities to introduce new law programs. These strategies were adopted due both to high student demand for law programs and to the perception that law was both prestigious and relatively inexpensive to run. This has led to a significant growth in law student numbers at a time when there is less funding for law schools. Students as paying consumers of legal education have also become more discerning about their educational experiences and more demanding about its quality. Unfortunately, these wider changes in Australian legal education have largely had a negative impact on law teaching. Due to the pressure of increased numbers of students, many law schools have resorted to larger class sizes and emphasised examination assessment, with comparatively few research tasks, due to the lower costs of assessment by examination. Assessment is now also less likely to include

54 David Weisbrot, ‘Foreword’ in Sally Kift, Michelle Sanson, Jill Cowley and Penelope Watson, *Excellence and Innovation in Legal Education* (LexisNexis, Butterworths, 2011) vii. The funding of various discipline areas is presently under review in Australia and a variety of funding reforms are being proposed, including the deregulation of law student fees to increase overall university funding due to high student demand: Julie Hare, ‘UNSW Calls for Deregulated Law, Business Fees’ *The Australian*, 14 June 2011 http://www.theaustralian.com.au/higher-education/unsw-calls-for-deregulated-law-business-fees/story-e6frgcjx-1226074767638 at 3 January 2012.

55 Thornton, above n 48, 6-7.

56 Johnstone and Vignaendra, above n 4, 3.

57 Ibid.

58 Keyes and Johnstone, above n 1, 548-549. Universities in Australia grapple with increased Commonwealth government regulation and the need to respond to market pressures in higher education. Universities have generally adopted centralised governance structures that can impede academic initiative: Simon Marginson and Mark Considine, *The Enterprise University: Power, Governance and Reinvention in Australia* (Cambridge University Press, 2000) 5-6.

59 Thornton, above n 48, 16-18.
reflective tasks, as this type of assessment is time-consuming to prepare and mark.\textsuperscript{60} Therefore many law students do not engage with tasks that promote reflection on issues related to professional identity. Additionally, many law schools have progressively moved away from engaging with theory due to the view that theory is not important for admission to practice.\textsuperscript{61} Although critical discourses in legal education are valued and advocated by some scholars there is often resistance from other colleagues and from some universities.\textsuperscript{62} The many benefits of critical theory, drawn from the social sciences, include increased student awareness of power concerns in the law\textsuperscript{63} and the need to develop a reflexive\textsuperscript{64} approach to legal practice. However, the influence of social science theory, in terms of both content and pedagogy, is increasingly marginal in most law programs.\textsuperscript{65} Thornton argues that there is now a focus on legal knowledge that promotes a technical approach to the law closely aligned with business discourses, instead of an approach that incorporates theory, including liberal and postmodern discourses.\textsuperscript{66} In some law schools business discourses dominate as these discourses connect with a desire shared by students and the university to improve employment outcomes. The study of theory is seen to be disadvantageous to securing a job as a lawyer\textsuperscript{67} whereas neo-liberalism contributes to the perception that technical knowledge is valuable and that it contributes to economic

\begin{thebibliography}{99}
\bibitem{61} Margaret Thornton, ‘Gothic Horror in the Legal Academy’ (2005) 14 \textit{Social & Legal Studies} 267.
\bibitem{64} Law teaching can promote a community of inquiry that questions established views. Arguably, this approach may impact the student development of ideas and thus result in change to legal practice in the future: Joanne Robuck, ‘Reflexive Practice: To Enhance Student Learning’ (2007) \textit{1 Journal of Learning Design} 77.
\bibitem{65} James, above n 63, 60.
\bibitem{66} Thornton, above n 49.
\end{thebibliography}
In the United States Lawrence Krieger argues that the rise of this kind of legal education ‘dehumanises’ students through the dominance of the rational, positivist approach in teaching substantive law, together with an uncritical adoption of the adversarial framework. The stated aim of most law programs is to assist students to ‘think like lawyers’ and research is beginning to demonstrate that this pedagogy can negatively impact upon the mental health of law students. For example, law teacher discussion of superior court decisions tends to suppress moral quandaries posed by the law and encourages students to sideline issues of emotion in legal concerns. The overall competitive orientation of many law schools is evident as students compete for the highest grades in order to secure the best employment upon completion of their law degree. Some students struggle in the law school environment and research in the United States has highlighted mental health concerns in students. In Australia, research into law students’ mental health has also shown high levels of depression for some students, higher than for other disciplines such as medicine.

Elizabeth Mertz contends that the language of law school, and the pedagogy of law

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68 Ibid.
71 Krieger, above n 69, 258-259.
teachers contribute to students ‘losing their moral compass’.  

Through the use of tapes and observational notes she charted the practices in United States law schools that encourage law students to develop an intellectual approach of ‘thinking like a lawyer’. Such analytical thinking is largely divorced from the moral dimensions of conflict and it is constructed through an adversarial, linguistic exchange between lecturers and students. This kind of interaction in the classroom encourages an attitude of intellectual superiority in law students. Students learn to reify the kind of legal argument that consists of competing standpoints and interpretations of cases and legislation, as this approach to ‘thinking like a lawyer’ is modelled by law teachers in the classroom. In contrast, Mertz found that emotional and social justice concerns are downplayed by academics when teaching and thus many students may adopt an amoral approach to legal problem-solving. Similarly in her work charting the rise of the new lawyer, Julie Macfarlane argues that emotional considerations of client’s problems are considered irrelevant in legal education and that this approach reinforces a rights-based approach to legal problem-solving. Krieger makes the compelling point that this approach to law, with its attention to the fine distinctions of legal argument, is not the predominant role of most lawyers in practice. Given that a high proportion of litigation is settled prior to a court hearing, this assertion seems likely to be true. From the foregoing discussion it would seem that students’ frame of

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74 Elizabeth Mertz, The Language of Law School: Learning to Think Like a Lawyer (Oxford University Press, 2007).
75 Ibid 4
76 Ibid 5.
77 Ibid ch 5.
79 Macfarlane, above n 9, 33.
80 Krieger, above n 69, 277.
morality may shift through the experience of legal education due to the emphasis on adversarialism, although more research is required to clearly establish the mooted links between an emphasis on adversarialism and student wellbeing.

ADR, with its focus upon non-adversarial practice, provides an area of legal education that tempers students’ experience of adversarialism, through a shift to collaborative problem-solving. 82 Not all students will study this discipline area until an ADR course is compulsory. In response to the kinds of dilemmas raised through research by Mertz and Macfarlane new movements in legal education in the United States seek to humanise and provide balance in legal education. 83 Krieger suggests an agenda where law teachers model an approach that does not reify objective rational discourses in the law. Rather he suggests that teachers acknowledge both the realities of practice and the need to respect students’ diverse conceptions of morality and identity. 84 Macfarlane argues for the need to promote non-adversarial practice to better support the emotional development of students and encourage holistic problem-solving in practice. 85 Carrie Menkel-Meadow states that problem-solving is insufficiently prioritised in legal education and argues that it should be integrated throughout the curriculum so that human needs and the psychological and moral questions inherent in legal disputes are not neglected. 86 This approach is also clearly emphasised in the therapeutic jurisprudence movement, discussed in chapter three. Introducing a therapeutic jurisprudence focus to the curriculum fosters improved student understanding of the emotional and psychological impact of the legal system on court users, and the development of holistic problem-solving skills in students. 87 A focus on

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84 Krieger, above n 69, 300-321.
85 Macfarlane, above n 9, 230-232.
therapeutic jurisprudence, along with humanising the legal education movement, can also inspire a legal pedagogy that allows students to integrate personal issues of identity with those of professional identity in law school.\textsuperscript{88}

Some suggested initiatives from therapeutic jurisprudence scholars include the use of simulations\textsuperscript{89} and clinical education.\textsuperscript{90} These kinds of strategies are often aimed at engendering understandings in students that integrate theory and practice and that include a therapeutic, proactive approach to clients’ needs.\textsuperscript{91} Such ‘active learning’ approaches to student learning imply pedagogy that has educational constructivism as its basis. This theory suggests that students learn by constructing knowledge through activities, and by building on their previous knowledge.\textsuperscript{92} The teaching of negotiation and mediation commonly includes role-plays where students develop skills in communication and negotiation techniques, as well as skills in mediation in the role of

\begin{itemize}
\item[89] For instance Winick suggests the use of reflective exercises, such as his rewind exercise, case studies, interviewing in the field, simulations and clinical education for students to learn of the emotional dimensions of disputes: Winick, above n 87, 442-474.
\end{itemize}
the third party facilitator. Importantly, research in Australia has established that ADR may contribute in a positive manner to students’ mental health due to the widespread use of active learning approaches that emphasise emotional understanding and expression, as well as promoting connection and belonging through activities like role-plays and group debriefing. This is a significant finding as the benefits of ADR learning and teaching provide multiple opportunities, not only to help students to understand non-adversarial practice and holistic problem solving, but also potentially to assist with the challenges of law school in terms of student mental wellbeing.

Changes in legal education have also resulted in increased stress for law teachers. Law teachers grapple with the twin dilemmas of providing quality learning and teaching experiences to larger cohorts of students, and the rising need to engage in research in a climate where research is increasingly valued over teaching. The ways that legal academics approach their teaching and research are affected by the culture of their law school and the ‘individual academic identities forged within that culture.’ Increasingly, the research culture of Australian universities is affected by the same neo-liberal policies that more broadly affect tertiary education. The marginalisation of theory in legal education due to the increasing dominance of business discourses is mirrored in the move away from social science research agendas in law and other disciplines. Research projects that focus on theoretical


96 Ibid 35-44.


concerns are less acceptable in Australian law schools, and other faculties of the universities that value research that is positivist in nature and does not challenge business interests. New systems of Commonwealth research assessment and tighter controls relating to research funding can work against academic freedom and propel academics into the kinds of research, both in subject and methodology, that fit with larger corporatist aims of universities. This trend may have implications for the teaching of ADR as first generation practice and pedagogy, as described in chapters one and three, may be more acceptable than other discourses to neo-liberal and business discourses due to their positivist, individualistic approaches to conflict and dispute resolution.

Second generation practice, drawing from the social sciences, may be less appealing to ADR teachers in their teaching and research due to this marginalisation of theory in legal education and research. The labelling of ADR as primarily about skill development also affects the ways that this area is valued in the legal academy, as skills research and teaching is generally seen as less intellectually rigorous and lower in prestige than other areas of substantive law. Thus, in any discussion of the contribution of ADR to the development of lawyers of the future, the construction of ADR as a skill will influence the content and pedagogy of this area. Accreditation will influence whether ADR is deemed to be a necessary skill in the legal curriculum.

4.3 ADR and ACCREDITATION REQUIREMENTS
In this section I discuss ADR and accreditation concerns for admission to practice as a lawyer. As noted, the right to practice as a lawyer requires university education in

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100 Ibid 6.
101 Ibid 7-8. The present system of research assessment in Australia is known as the Excellence in Research in Australia (ERA) Initiative http://www.arc.gov.au/era/default.htm at 3 January 2012.
eleven areas of knowledge, known as the ‘Priestley 11’. All accredited law schools in Australia provide knowledge of these eleven areas through either stand-alone courses, or as modules in other subjects. Significantly, these knowledge areas do not need to be subjects in their own right. The various areas may be offered in any form that the law schools deem fit, and thus a combination of knowledge areas in the legal curriculum is not uncommon. In addition, individual teachers wield significant power in terms of content and pedagogy in these discipline areas, as well as in electives, although law teachers are inevitably affected by the larger discourses relating to legal education.

In Australia, requirements relating to accreditation of programs in law are presently in flux with three different initiatives completed in 2009 and 2010 that will affect the content and pedagogy of law programs. These initiatives are now discussed and related to one of the central concern of this thesis: the place of ADR in legal education. Firstly, although not mandating the teaching of ADR new quality requirements in voluntary standards for law schools provided by CALD articulate a need to teach the law in a ‘context’ that includes theoretical concerns drawn from a liberal discourse. This initiative may influence the teaching of theory in ADR and other law courses, but is not likely to include critical theory, such as postmodernist theory. In response to concerns about mental health issues for law students, described above, the standards also require a focus on pastoral care, where law schools are

103 Johnstone and Vignaendra, above n 4, 4. These eleven are: ‘contract, tort, real and personal property, equity (including trusts, criminal law and procedure, civil procedure, evidence, professional conduct (including basic trust accounting) administrative law, federal and state constitutional law, and company law’: 4-5.

104 Where the traditional model of law teaching is adopted individual teachers may be largely divorced from what other teachers are doing in their respective classrooms. Teachers tend to protect their individual areas: Keyes and Johnstone, above n 1, 547. Arguably then teachers wield significant power over the content of the individual courses.


106 Ibid standard 2.3.3.
expected to provide practical methods to promote student mental health.\textsuperscript{107} Arguably this initiative may be achieved in part through the teaching of ADR. The CALD quality standards have only been approved by CALD since November 2009, and it will take some time for Australian law schools to implement them. As the standards are presently voluntary in nature, there is no guarantee that law schools will comply.

Secondly, one long-debated change is the introduction of legislation to uniformly regulate the legal profession across Australia. There is a draft bill presently under consideration by the Council of Australia Governments (COAG): the \textit{Legal Profession National Law}.\textsuperscript{108} At the moment each Australian state regulates admission to practice as a lawyer.\textsuperscript{109} The draft legislation, released in December 2010 and amended in September 2011, would provide national uniformity in a number of areas including the knowledge areas required for admission to practice as a lawyer. Required knowledge areas are specified in Schedule 1 of the draft National Rules, under rule 2.2.5(2) (b). At present, ADR is not specifically mentioned. There is, however, a requirement that disposition other than trial is addressed in the knowledge area of civil procedure and this may be interpreted to include negotiation of settlements and ADR options. This is an area routinely included in civil procedure courses in Australia and may mean that ADR is addressed in one or two topics in a curriculum focused on litigation. Thus the proposed legislation, as it stands, would not materially alter the present approach to ADR to meet new accreditation requirements.

Thirdly, there are also new challenges for Australian law schools with recent changes to the Commonwealth policy on higher education. Initiatives in higher education policy in Australia have begun to prioritise the international dimensions of tertiary

\textsuperscript{107} Ibid standard 2.9.1.


\textsuperscript{109} For example, in the state of Victoria under the \textit{Legal Profession (Admission Rules)} 2008 those who wish to be admitted to the legal profession in Victoria must have completed academic qualifications approved for admission: Rule 2.01. Additionally, those persons seeking to be admitted must have completed practical legal training (post university education) that includes competency standards: Rule 3.01. The competency standards require learning relating to a variety of legal skills, such as negotiation.

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education and the need to be competitive with elite universities worldwide.\textsuperscript{110} The \textit{Review of Australian Higher Education} (the Bradley Review)\textsuperscript{111} noted that the reach and standard of higher education in Australia had begun to lag behind other Organisation for Economic Co-operation and Development (OECD) countries and that Australia needed to increase funding, improve staff/student ratios and value teaching in universities and other providers.\textsuperscript{112} Amongst a number of recommendations, the report called for a new national quality assurance regime in higher education. In response to this report, the Australian Federal government has recently introduced a new regulatory regime to ensure quality in the tertiary sector. This regime requires all higher education providers to meet Threshold Standards in order to enter and remain in the sector.\textsuperscript{113} The Tertiary Education Quality and Standards Agency (TEQSA) was established through the passing of the \textit{Tertiary Education Quality and Standards Agency Act 2011} (Cth). The agency will regulate and evaluate tertiary providers from January 2012. Selected discipline areas have articulated threshold learning outcomes (TLOs) including for the Bachelor of Laws, under the Federal Government Learning and Teaching Academic Standards project.\textsuperscript{114} In 2010, funding was provided to develop benchmark standards in law, as part of a new Higher Education Quality and Regulatory Framework and these standards were completed in December 2010.\textsuperscript{115}

The standards require minimum education in legal knowledge, skills and ethics and

\begin{itemize}
\item Ibid xi-xvi.
\item Australian Learning and Teaching Council, \textit{Learning and Teaching Academic Standards Project: Bachelor of Laws: Academic Standards Statement} (December, 2010). Notably, these standards are for undergraduate law programs but Juris Doctor (postgraduate law programs) standards are presently being developed.
\end{itemize}
have been developed to align with Australian Quality framework bachelor levels.\textsuperscript{116} Although supported by CALD,\textsuperscript{117} some reservations have been expressed from the LACC who have had feedback from the profession criticizing the standards where there are requirements relating to generic graduate attributes such as collaboration and teamwork.\textsuperscript{118} To develop these standards, the discipline leaders considered law standards in other countries, such as the United States and the United Kingdom, and then consulted with law schools and the legal industry in Australia. Draft standards were distributed, comment was sought, and the final standards were amended. The authors note that the:

Threshold Learning Outcomes (TLOs) were defined in terms of minimum discipline knowledge, discipline-specific skills and professional capabilities including attitudes and professional values that are expected of a graduate from a specified level of program in a specified discipline area. The process took account of and involved the participation of professional bodies, accreditation bodies, employers and graduates as well as academic institutions and teachers.\textsuperscript{119}

Notably, these TLOs are wider than the required knowledge areas that are presently used in Australian legal education in that they specify skills and professional capabilities. CALD endorsed the TLOs in November 2010.\textsuperscript{120} There are six TLOs: TLO 1: Knowledge, TLO 2: Ethics and professional responsibility, TLO 3: Thinking skills, TLO 4: Research skills, TLO 5: Communication and collaboration and TLO 6:

\begin{itemize}
  \item TLO 1: Knowledge
  \item TLO 2: Ethics and professional responsibility
  \item TLO 3: Thinking skills
  \item TLO 4: Research skills
  \item TLO 5: Communication and collaboration
  \item TLO 6:
\end{itemize}

\begin{itemize}
  \item \textsuperscript{116} Ibid 9.
  \item \textsuperscript{117} CALD has endorsed these standards in their meeting of November 2010: Ibid 1.
  \item \textsuperscript{119} ALTC, above n 115, 3.
  \item \textsuperscript{120} Ibid 4.
\end{itemize}
Self-management. ADR is relevant to a number of TLOs including TLO 1: knowledge, TLO 3: thinking skills, TLO 5: communication and collaboration and TLO 6: self-management. In relation to TLO 1, the standard requires law students to demonstrate doctrinal knowledge and knowledge of the Australian legal system and the various dispute resolution processes operating in that system. This TLO additionally indicates that students should have knowledge of lawyers’ roles including their role in negotiation. Similarly, TLO 3 relating to thinking skills where amongst a range of skills, law students are required to think creatively in approaching legal issues and generating appropriate responses, which would include ADR. TLO 5 deals with communication and collaboration, and ADR courses routinely include teaching about communication and collaborative problem-solving. ADR can also be relevant to TLO 6 relating to self-management as this area includes the ability for students to learn and work independently, and to be able to reflect regarding their own learning. Thus communication teaching and engagement with emotional issues in ADR as part of conflict engagement would assist addressing TLO 6.

These discipline standards indicate the degree that legal education is engaging with reform and the importance of ADR to more recent constructions of professional practice by the explicit and implicit inclusion of ADR, particularly of negotiation and mediation in the standards. Similarly, as indicated in chapter one, law reform bodies and governments value the contribution of ADR to the legal system and thus advocate the inclusion of ADR in the legal curriculum. These influences on legal education mean that there is pressure on law schools to change curriculum: for instance in 2011 there has been an audit of ADR offerings in Victorian law schools by

121 Ibid 10.
122 In TLO 1 knowledge of the Australian legal system is defined as including amongst a number of areas, ‘variety of dispute resolution processes’: Ibid, 13.
123 Under this TLO knowledge of ‘principles and values of justice and ethical practice in lawyers’ roles’ include ‘roles of representation, advocacy and negotiation’: Ibid, 14.
124 Ibid 18.
125 Ibid 22-23.
126 For example in relation to TLO 3 on Thinking Skills, the standards talk of ‘thinking creatively in approaching legal issues and generating appropriate responses … requires graduates to be familiar with a range of alternative dispute resolution processes, such as negotiation and mediation’: Ibid 19.
the Victorian government to assess how ADR is taught in law programs and one of the most prestigious universities in Victoria, Monash University, is reviewing its curriculum informed by recent standards initiatives such as the TLOs.\(^\text{127}\) The LACC’s failure to endorse the TLOs indicates that the place of ADR in legal education is not yet assured. These requirements may not become the basis for admission to practice, and instead may be an ancillary requirement from the Federal Government. However, the introduction of TLOs still raises the importance of the inclusion of ADR in the legal curriculum, as many law schools, similar to Monash University, are likely to see the standards as a benchmark for content and pedagogy in legal education.

4.4 THE CONTENT AND PEDAGOGY OF ADR

In this section, I discuss selected literature in relation to the content and pedagogy of ADR. Before the 1980s ADR was not widely included in law school education. Initial debates about legal education and ADR centred on the need to include this discipline area in the law curriculum.\(^\text{128}\) In the last thirty years, both in Australia and the United States,\(^\text{129}\) ADR has become accepted in most law schools.\(^\text{130}\) The discipline area of ADR is often categorised as a skill area and the inclusion of this type of offering, as an integrated module or stand-alone\(^\text{131}\) course, has grown in law programs. Although there has been growing acceptance of ADR in law schools, this acceptance has not necessarily impacted on, or brought discernible change to the overall curriculum of

\(^\text{127}\) Neil Twist, Director Appropriate Dispute Resolution, Department of Justice, email to Deans/Heads of Law Schools in Victoria, October 2011; Monash University Faculty of Law, *Curriculum Review, Consultation Paper*, (July 2011), 4-6.


\(^\text{129}\) For a recent update upon the inclusion of ADR in law programs in the United States, including a discussion of programs that focus upon ADR in an integrated manner C. Michael Bryce ‘ADR Education From a Litigator/Educator Perspective’ (2007) 81(1) *St John’s Law Review* 337.


\(^\text{131}\) For example, one of the first Australian compulsory first year ADR courses was at La Trobe University entitled ‘Dispute Resolution’: Judy Gutman, Tom Fisher and Erika Martens ‘Teaching ADR to Australian Law Students: Implications for Practice in Australia’ (2008) 19 *Australasian Dispute Resolution Journal* 42.
Ronald Pipkin argues that law teachers in the United States, who introduced ADR into legal education, had hopes of changing a large part of the curriculum to reflect non-adversarial approaches to disputes. However in the United States this kind of change is not yet evident in law programs. In Australia, debate about the inclusion of ADR courses centres on the concerns about whether to include this area as a stand-alone course, or integrate it into other substantive law courses. Early research into ADR in legal education, undertaken in 1988, showed that ADR was offered as an elective in some Australian law programs, but this research is now dated. Importantly, ADR is often termed Dispute Resolution to indicate that the area should not be seen as an alternative to litigation but as one of a spectrum of legal choices.

The pedagogy of ADR subjects will frequently reflect the interdisciplinary focus of the area, a focus that includes not only law but also humanities, social sciences and

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134 In the United States there has been progress in the adoption of ADR subjects but the kind of radical change to law school curriculum where an integrated model is adopted has not been widely implemented: Nancy Rogers, ‘No Panaceas, Only Promising Avenues: Frank Sander’s Legacy for Dispute Resolution in Law Schools’ (2006) 22 Negotiation Journal 459.
136 This research showed that out of ten law programs that responded to a survey on ADR teaching two offered elective stand-alone ADR courses: JE Effron, ‘Breaking Adjudication’s Monopoly: Alternatives to Litigation Come to Law School’ (1991) 2 Australian Dispute Resolution Journal 21, 21-22. This was said to be a major increase from the previous decade: 22.
137 Hilary Astor and Christine Chinkin, ‘Dispute Resolution as Part of Legal Education’ (1990) 1 Australian Dispute Resolution Journal 208.
management perspectives.\textsuperscript{138} Legal education and ADR encompass teaching about various alternative processes, including negotiation, and will often include learning about the knowledge and skills used by a mediator in disputes through experiential role-plays.\textsuperscript{139} This course area may also include consideration of the role of the lawyer\textsuperscript{140} in the ADR processes. Recent data from professional associations confirms that ADR in United States is well represented in law schools. The fact that there are no longer large increases in subject offerings in this area indicates that growth is beginning to plateau.\textsuperscript{141}

Lawyers are said to gain a ‘standard philosophical map’\textsuperscript{142} through their legal education. This map usually privileges the role of litigation in dispute resolution and arguably derives from the nature of legal pedagogy. The focus in law schools on the teaching of appellate decisions and the use of the Socratic, or case-based, teaching methods has been said to promote an adversarial approach in students’ orientation to conflict.\textsuperscript{143} New approaches in ADR learning and teaching\textsuperscript{144} may be impacting on

\begin{footnotesize}
\textsuperscript{138} Boulle provides a list of universities providing qualifications in mediation and notes that there are courses in ADR and/or mediation in faculties of ‘law, humanities, social science and business’ see Laurence Boulle, \textit{Mediation: Principles, Process, Practice} (LexisNexis Butterworths, 3rd ed, 2011) 463. For instance negotiation is commonly taught in the area of international relations, using concepts from first generation practice: Daniel Druckman ‘Frameworks, Cases and Experiments: Bridging Theory with Practice’ (2010) 15 \textit{International Negotiation} 163.

\textsuperscript{139} Edwin Greenebaum, ‘On Teaching Mediation’ (1999) 2 \textit{Journal of Dispute Resolution} 115. This is in contrast to traditional teaching practices of law schools that have focused upon doctrine and legal problem-solving, with little attention given to skills such as advocacy, negotiation or generic communication skills: Le Brun and Johnstone, above n 36, 8-10.


\end{footnotesize}
lawyers’ approach to ADR, but more research is required to establish the extent of change and whether it is occurring in specific areas of practice, such as in family law where non-adversarial approaches have long been promoted by government.

Unlike many substantive and procedural legal subjects, the teaching of ADR does not rely upon cases and legislation. One of the benefits of the wide use of role-play in ADR courses is that the pedagogy adopted is more active than in most traditional law courses. The pedagogy employs experiential learning approaches that incorporate authentic learning scenarios. Menkel-Meadow highlights the potential of ADR to shift dispute resolution from a myopic concern with rights through the inclusion of insights from a range of disciplines. Howard Gadlin highlights the danger of settlement driven ADR processes that fail to address the psychological nuances of conflict, and neglect the larger societal stories that impact upon conflict resolution processes. Pat Chew focuses upon culture in ADR teaching stating that it is ‘the perception-shaping lens through which we experience conflict.’ He critiques the legal profession and the court system’s lack of reflection in regard to culture. He also provides some reflections based upon his own teaching practice and advocates a shift to an understanding of cultural relativism in the teaching of ADR.

Pipkin argues that approaches to ADR teaching in law school had their genesis in

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negotiation and mediation short-course training that was originally offered by such institutions as Harvard University.\textsuperscript{150} Early in the evolution of ADR teaching in the legal curriculum, academics offered these courses as electives in law schools, and adopted the role-play pedagogy.\textsuperscript{151} The pervasive nature of this pedagogy is notable in that it has continued for some thirty years and is only lately receiving sustained critique.\textsuperscript{152} Michelle LeBaron and Mario Patera speculate that the adversarial frame of British and United States legal systems reproduce positivist approaches, embedded in common law systems, to negotiation practice and pedagogy.\textsuperscript{153} Kenneth Fox argues that first generation content and pedagogy has been exported from the United States and is the dominant approach to negotiation teaching.\textsuperscript{154} This approach adopts modernist philosophies and constructions of power. However, the momentum is shifting and many now question first generation practice and pedagogy.\textsuperscript{155} A series of conferences devoted to the critique of content and teaching of negotiation\textsuperscript{156} and

\textsuperscript{150} Pipkin, above n 133.

\textsuperscript{151} Ibid.

\textsuperscript{152} Christopher Honeyman and James Coben, ‘Introduction: Half-way to Second Generation’ in Christopher Honeyman and James Coben (eds), \textit{Venturing Beyond the Classroom} (DRI Press, 2010) 1.

\textsuperscript{153} Michelle LeBaron and Mario Patera, ‘Reflective Practice in the New Millennium’ in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), \textit{Rethinking Negotiation Teaching: Innovations for Context and Culture} (DRI Press, 2009) 49.


\textsuperscript{155} For example understanding postmodern theory, such as positioning theory, has been advocated for in negotiation: Deborah Kolb, ‘Staying in the Game or Changing It: An Analysis of Moves and Turns in Negotiation’ (2004) 20 \textit{Negotiation Journal} 253. Positioning theory, and general discourse analysis, has been applied to turning points in negotiation: Sara Cobb, ‘A Developmental Approach to Turning Points: “Irony” as an Ethics for Negotiation Pragmatics’ (2006) 11 \textit{Harvard Negotiation Law Review} 147. Conflict transformation theory has been applied to negotiation as well as mediation: Linda Putman, ‘Transformations and Critical Moments in Negotiation’ (2004) 20 \textit{Negotiation Journal} 25. For detailed discussion of theoretical concerns in ADR see chapter three of this thesis.

\textsuperscript{156} Hamline Law School, \textit{Second Generation Global Negotiation Education} http://law.hamline.edu/dispute_resolution/second_generation_negotiation.html at 3 January 2012.
mediation\textsuperscript{157} have been held around the world. Proponents of second generation pedagogy argue that there is an over-reliance on role-plays in first generation pedagogy relating to the teaching of negotiation and mediation. Nadja Alexander and Michele LeBaron argue that role-plays, while sometimes effective, can be overused with many students disconnecting from set roles, particularly where the scenarios and characters are culturally inappropriate.\textsuperscript{158} Second generation pedagogy, whilst still largely endorsing thoughtfully designed role-plays used in a targeted manner,\textsuperscript{159} also advocates a variety of learning and teaching practices including adventure learning\textsuperscript{160} (where students venture out of the classroom to engage in ‘real life’ negotiations), and online learning.\textsuperscript{161} Emotion and the concerns of culture are pervading influences in second generation learning and teaching strategies.\textsuperscript{162} Learning designs in this discipline area arguably should take into account the culture and knowledge base of students; the ‘who’ of negotiation education and adapt pedagogy accordingly.\textsuperscript{163} These critiques of negotiation are not reliant on a particular model of practice, but rather ask for the consideration of more sophisticated frames of theory and practice in

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\textsuperscript{157} Harvard University, Mediation Pedagogy Conference, 2009 http://www.pon.harvard.edu/daily/mediation-pedagogy-conference/ at 3 January 2012.
\textsuperscript{158} Nadja Alexander and Michelle LeBaron, ‘Death of the Role-play’ in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), Rethinking Negotiation Teaching: Innovations for Context and Culture (DRI Press, 2009) 179.
\textsuperscript{159} Noam Ebner and Kimberlee Kovach ‘Simulation 2.0: The Resurrection’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 245.
\textsuperscript{160} James Coben, Christopher Honeyman and Sharon Press ‘Straight Off the Deep End in Adventure Learning’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 109.
\textsuperscript{161} David Matz and Noam Ebner, ‘Using Role-play in Online Negotiation Teaching’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 293.
\textsuperscript{162} For example in relation to emotion: Melissa Nelken, Andrea Kupfer Schnieder and Jamil Mahuad, ‘If I’d Wanted to Teach About Feelings, I Wouldn’t Have Become a Law Professor’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 357. For example in relation to culture: LeBaron and Patera, above n 153; Fox above n 154.
\textsuperscript{163} Roy Lewicki and Andrea Kupfer Schnieder, ‘Instructors Heed the Who: Designing Negotiation Training with the Learner in Mind’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 43.
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relation to emotion, power and culture. Similarly, critiques of mediation practice and pedagogy do not uniformly identify one model as the ‘best’ to practice, but rather raise concerns with dominant practice. Emergent models of mediation practice and pedagogy are growing in number and have in common a critique of long held constructions of practice that are often reliant on limited theorisation. Second generation practice and pedagogy should include a better engagement with theory in the areas of emotion, power and culture. It should also incorporate variety in pedagogy that includes role-plays but also other learning and teaching strategies such as adventure learning.

4.5 COMMUNITIES OF PRACTICE IN ADR
In order to raise awareness of innovations in ADR practice and pedagogy, teachers in law programs can engage in a community of practice. Jean Lave and Etienne Wenger\(^\text{164}\) analysed learning in apprenticeships and traced the development of understanding from the ‘novice’ to the ‘expert’ through engagement with situated\(^\text{165}\) activities and mentoring from a ‘master’. They highlight the benefits of learning from membership of a community and the peripheral learning that results from immersion in the culture of an activity. The authors argue that:

…legitimate peripheral participation is not itself an educational form, much less a pedagogical strategy or a teaching technique. It is an analytical viewpoint on learning, a way of understanding learning.\(^\text{166}\)

There are many kinds of communities of practice that assist learning and an individual may be simultaneously a member of a number of such communities, for example in an organisation and also in a family.\(^\text{167}\) Communities of practice can shape our identity as we engage in activities and reflect on them. Wenger argues that learning is:


\(^\text{166}\)Lave and Wenger, above n 164, 40.

‘…the vehicle for the evolution of practices and the inclusion of newcomers while also (and through the same process) the vehicle for the development and transformation of identities.\textsuperscript{168}

Both teachers and students can be part of communities of practice. For example, the Carnegie report advocated for ‘apprenticeship-style’ learning in legal education in the United States.\textsuperscript{169} The approach privileges an ethical professional identity rather than an approach to legal education that primarily focuses on a combination of adversarialism, doctrinal knowledge, and analytical skills. This kind of professional identity arguably includes holistic legal problem solving, and thus values legal skills such as negotiation and mediation. In Australia, Susanne Owen and Gary Davis argue that communities of practice among teachers promote both general and law-specific graduate capabilities.\textsuperscript{170} Research from the 2009 report on learning and teaching strategies in law identified the need to build communities of practice in law teaching.\textsuperscript{171} In the United States, several recent conferences have been held on the teaching of negotiation and mediation. Such events have not yet occurred in ADR in Australia. Currently, the area of ADR lacks such a community of practice to support ADR teachers in law in their endeavours. The practices of ADR teachers have not been debated in this country and the assumptions underpinning content and pedagogy have largely remained unquestioned. The strategy of a community of practice in ADR may provide the opportunity for the collegial sharing of ideas and resources that challenge adversarial competitive approaches to legal education, and inspire a re-imagining of ADR content and pedagogy.

4.6 CONCLUSIONS

Legal education in Australia increasingly acknowledges the need to teach legal skills as well as substantive knowledge of areas of the law. ADR is both a knowledge area and a legal skill. As such it sits between traditional doctrinal courses and courses framed solely around legal skills. It is also interdisciplinary in nature, historically

\textsuperscript{168} Ibid 13.
\textsuperscript{169} Sullivan et al, above n 8, ch 1.
\textsuperscript{171} Owen and Davis, above n 30.
drawing from areas outside the law including the social sciences. Legal education is on the cusp of change. With the potential introduction of a national profession in the near future, the development of voluntary CALD accreditation requirements, and the recently released TLOs, there is likely to be significant change in the future for legal education. TLOs offer the greatest opportunities for strengthening the teaching of ADR in Australia. These standards raise the importance of ADR in legal education as this area is represented in four of the six required areas. Arguably, ADR in legal education is starting to be recognised as a key graduate attribute for law students. The TLOs, although welcomed by some, have been resisted by the LACC and thus the impact on admission may not be as significant as the authors of the TLOs may have hoped. The TLOs are unlikely at present to form the basis of new admission requirements for law. However, they will still form the basis of assessment by the TEQSA in Federal Government initiatives to regulate higher education in Australia. Also law schools, such as Monash University, are responding to the TLOs by reviewing their program offerings in the light of these minimum requirements. If ADR does become more valued in legal education due to the introduction of TLOs, the next area to address will be the quality of ADR offerings in the various law schools. ADR has a history of active learning pedagogy and as such represents an area of the law that adopts ‘deep’ learning principles in contrast to much of the rest of the law curriculum. However, this history has recently been challenged by the advent of second generation pedagogy with its critique of learning and teaching. Second generation practice and pedagogy challenges the dominant first generation Harvard model and encourages students to engage more deeply with such issues as emotion, culture and power. It provides for a future where ADR teachers further develop their efforts to provide an innovative learning experience for students. The degree to which ADR teachers are taking up this challenge is part of the research for this thesis.
CHAPTER 5
NON-ADVERSARIALIASM AND EVOLVING LEGAL PRACTICE

5.1 INTRODUCTION

This chapter outlines the concept of non-adversarial legal practice. I describe and discuss notions of ‘adversarialism’ and ‘excessive adversarialism’ and contrast these approaches with emergent paradigms in legal practice that privilege non-curial dispute resolution, or non-adversarial practice. These emergent concepts of practice mainly draw on first generation paradigms in negotiation and mediation. This chapter charts recent constructions of legal practice, such as those articulated by Canadian academic Julie Macfarlane,¹ that focus upon non-adversarial paradigms. The rise of a wider model of legal practice, sometimes known as non-adversarial justice, that includes ADR but also other emerging trends in law such as problem-solving courts, is also discussed. In this chapter I analyse the data in this study relating to non-adversarialism and evolving legal practice. The analysis of the data, including interview and survey data and the content analysis of course guides, indicates that the majority of ADR law teachers in this research both support and teach non-adversarial legal practice based on the norms of first generation ADR practice. Also, this study shows that a non-adversarial justice approach to legal practice is increasingly taught in ADR courses in Australia, extending the content of ADR courses to include developments in law that draw from therapeutic jurisprudence. I lastly explore sites of change for legal culture including the key site of legal education,

5.2 NON-ADVERSARIAL PRACTICE V ADVERSARIALISM

Lawyers’ use of approaches apart from litigation, and their evolving non-adversarial orientations are increasingly recognised both in Australia² and internationally.³ Carrie Menkel-Meadow has argued that the rise of ADR in our legal and justice system

¹ Julie Macfarlane, The New Lawyer: How Settlement is Transforming the Practice of Law (University of British Columbia Press, 2008).
requires lawyers to shift their approach to suit their changing role. Changes in legal culture require lawyers in ADR to adopt a frame of non-adversarial practice focused on encouraging the collaborative problem-solving of legal disputes. This frame includes a construction of legal practice where non-curial options are privileged over litigation. Macfarlane has argued that changes in courts and in society more generally require a new approach to law. According to Macfarlane’s approach of ‘conflict resolution advocacy’ lawyers evaluate conflict, consider a range of options and appropriately counsel a client regarding their most suitable options. The beginning point for this approach to client counselling is not litigation but exploration of the full range of ADR options, including negotiation.

Non-adversarial approaches are growing in Australian legal practice. Lawyers have always engaged in some level of negotiation and problem solving for their clients, as only a small percentage of matters reach a full court hearing. With changes to the Australian legal and justice system non-adversarial approaches have been adopted by some sections of the profession dependent upon the context of the legal problem, such as in family law. Legal practice is also changing in the United States and Canada where new paradigms of practice that promote more holistic approaches, are

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5 This kind of practice may require a different ethical framework for lawyers when engaging in ADR: Ibid 430.
6 Macfarlane above n 1, 30-34.
7 Ibid 109.
8 Ibid 110-117.
9 King et al, above n 2, 231.
10 Ibid 6-9.
11 Ibid 10-16.
12 Family Law lawyers have a history of engagement with ADR and increasingly show a sophisticated understanding of their possible roles in alternative processes: Donna Cooper and Mieke Brandon, ‘Lawyers’ Role Options in Family Dispute Resolution’ (2011) 22 Australasian Dispute Resolution Journal 198.
gaining momentum. According to Christine Parker and Adrian Evans, adversarial advocacy is still the dominant paradigm of the conception of the lawyer’s role in Australia, but they argue that lawyers have the capacity to adjust their practice to fit the circumstances of a legal problem. The idea of adversarial advocacy is grounded in the belief that a lawyer should strive to advocate for her client’s position, pursuing every legal advantage in a committed and competitive manner, to the extent allowed by the law. A lawyer is committed to the client’s interest in a partisan manner and is not accountable for the moral implications of choices made in the litigation process, except where legal ethical principles may be transgressed. The construct of adversarial advocacy is most pertinent to the role of the criminal lawyer who must zealously guard against the power of the state and protect his or her client’s rights through submission of all legitimate arguments based in law without moral judgments regarding either his or her client, or the arguments. According to Parker and Evans, ‘The principle of partisanship means that the lawyer should do all for the client that the client would do for themselves, if the client had the knowledge of the lawyer.’ This zealous advocacy is tempered by a lawyer’s duty to the court and the need, amongst other issues, not to mislead the court, although there are limited effective sanctions for breaches of ethical conduct. This notion of the need for partisan advocacy has influenced lawyers’ roles even in areas where such a role may fail to serve their clients adequately.

The impact of zealous advocacy on present-day lawyering, combined with the high cost of legal services, has resulted in a general distrust of lawyers both in Australia and in other jurisdictions. In considering the rise in distrust for lawyers in the United States Marc Galanter provides a taxonomy of anti-lawyer themes; specifically lawyers

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13 See generally Daicoff, above n 3, 1; Macfarlane, above n 1, 24.
14 Christine Parker and Adrian Evans, Inside Lawyers’ Ethics (Cambridge University Press, 2007) 14.
16 Ibid.
17 Ibid.
18 Ibid 14.
19 King et al discuss negative public perceptions of the legal system due to its ‘adversarial’ nature: King et al, above n 2, 1-5.
as corrupters of discourse, fomenters of strife, betrayers of trust and economic predators. After analysing representations of lawyers in media and popular culture, as well as in polls ranking the various professions, Galanter argues that in popular opinion, lawyers are seen to escalate conflict (often for their own monetary reward) rather than deal with conflict in a constructive manner. The education and culture of lawyers may mean that some lawyers approach problems as ‘gladiators’; an approach which many clients have learned to value, without realizing that this gladiatorial behaviour may increase their stress during the litigation process. This construct of practice increases the public perception that lawyers are far from being peacemakers. Galanter argues that, ‘the things for which lawyers are despised are closely related to the things for which they are esteemed.’

In a sustained critique of the adversarial system and legal culture Menkel-Meadow articulates a postmodernist perspective. Her view challenges the premise of the adversarial system that there is a sole version of the facts that will be accepted through the adversarial process. This perspective rejects the view that there is one ‘truth’ and points to the plurality of stories that exist around any dispute. Menkel-Meadow argues that postmodern theory alerts us to the need for a range of approaches in our legal system. She comments that the adversarial system should be confined only to those disputes for which it is appropriate, and that we should search for other options including multi-person, multi-perspective, deliberative and participative processes to more adequately satisfy the full range of human needs in conflict. She also contends that the spectrum of ADR processes helpfully contributes to a plurality of options in our legal system. She further cautions that lawyers must resist ‘importing’ adversarial values to these new approaches. In this respect, she argues ‘[l]awyers and third-party neutrals will clearly have to learn new roles to play in

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21 Ibid 637.
23 Ibid 42.
24 Ibid 37.
Greater choice in dispute resolution options will allow the opportunity for lawyers to practice a variety of paradigms of ethical practice, including assisting a client to find a solution to their legal dispute through collaborative problem-solving in mediation. Jacqueline Nolan-Haley also argues that the adversarial culture of lawyers can be modified by engagement with ADR and in particular, mediation. She states that: ‘Mediation offers enormous potential for lawyers to recognise and honour the missing human dignity dimension in current versions of adversarial lawyering.’

However, as Menkel-Meadows cautions, too often lawyers transfer the culture of the courtroom to the mediation table and colonise collaborative processes. Some firms, due to their practice culture, may encourage an aggressive approach in civil matters based on the adversarial paradigm. The increase in the evaluative approach to mediation, as discussed in chapter one, is largely caused by the co-option of the process by lawyers to align with the traditional adversarial culture. Similarly, the behaviour of lawyers in mediation as representatives may undermine the aims of facilitative and other forms of mediation. For example, Parker and Evans observe some lawyers in mediations in Australia adopt an adversarial approach. Some of this behaviour may be the unconscious extension of habits more suited to the courtroom but these writers note that excessive adversarialism, such as aggression, emotional posturing, misleading and bullying may also be adopted as tactics by lawyers to subvert the purposes of mediation and ADR. The authors point out that professional

25 Ibid.
26 Ibid 43.
28 Ibid 1370-1371.
30 Macfarlane, above n 1, 13.
31 Menkel-Meadow, above n 29, 5.
32 Parker and Evans, above n 14, 122.
33 Ibid.
conduct standards will apply to ADR, just as they do in litigation, and that therefore there are sanctions available for conduct that is misleading, or where clients perjure themselves.\textsuperscript{34} Similarly, where a lawyer attempts to find out information from the other side with no intention of entering into the mediation in good faith they can be sanctioned for abuse of process and contempt of court.\textsuperscript{35} This strategy is known as a ‘fishing expedition’. However, detection of such transgressions can be an issue due to the private nature of ADR processes such as negotiation and mediation.

Australian Federal and state government legislation now stresses the need to foster sincere attempts at ADR processes. Recent changes to family law legislation in Australia have included the requirement to engage in genuine negotiation in family dispute resolution to assist this culture change.\textsuperscript{36} Good faith negotiation in mediation has been judicially considered and is required by common law.\textsuperscript{37} The inclusion of some requirements in relation to ‘good faith’ or ‘genuine’ negotiation is becoming more common in legislation relating to dispute resolution.\textsuperscript{38} Importantly, as discussed in chapter one, the National Alternative Dispute Resolution Advisory Council (NADRAC) has recommended that legislation drafted in the Federal jurisdiction includes a requirement for ‘genuine steps’ to be taken prior to litigation and this recommendation has resulted in the passing of the \textit{Civil Dispute Resolution Act 2011} (Cth). This legislation requires engagement with pre-action procedures. Under ss 6-7 applicants and respondents must file ‘genuine steps’ statements prior to litigating. These genuine steps statements must include detail about party initiatives to engage with the dispute in a manner that promotes settlement. The options available are wider than ADR and may merely require the sharing of information such as the details of a claim, prior to litigating. Under s 9 lawyers have a duty to advise clients of the need to

\textsuperscript{34} Ibid, 125.
\textsuperscript{35} Ibid, 126-7.
\textsuperscript{36} See s. 60I \textit{Family Law Act 1975} (Cth).
file a genuine steps statement and must assist them to do so.

Lawyers may be wary in negotiation and mediation, due to the possibility that information disclosed in the processes may later be used in litigation. Although confidentiality is assured under the common law in negotiation and mediation, there is no guarantee that, where a dispute does not settle, the other party will not apply the knowledge gained during these processes in subsequent litigation. Confidentiality can also be required by the relevant legislation governing the negotiation or mediation process such as under Family Law Act 1975 in family dispute resolution. This legislation has some notable exceptions such as under s 67ZA where information relating to child abuse must be reported. The problems of confidentiality may present a barrier to non-adversarial approaches in negotiation and mediation, if lawyers are reluctant to engage in these processes due to fears of disclosure.

Macfarlane argues that the construct of adversarialism has a high status that privileges and reifies the adversarial orientation. This approach may be interpreted as masculinist in that combative aggressive tactics in litigation are often associated with traditional male culture. Combined with the generally privileged position of many

40 National Alternative Dispute Resolution Advisory Council (NADRAC), Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice Through People (2011) 3-5.
41 Lawyers can be reluctant to let their clients speak due to the fear of disclosure of information: Olivia Rundle, ‘Barking Dogs: Lawyers Attitudes Towards Direct Disputant Participation in Court Connected Mediation of General Civil Cases’ (2008) 8 Queensland University of Technology Law and Justice Journal 77; 81-86. There is case law and legislation dealing with confidentiality which are beyond the scope of this thesis, see: Tania Sourdin, Alternative Dispute Resolution (LBC Thomsons, 3rd ed, 2008) 241-258.
42 Macfarlane, above n 1, 101.
43 Ibid 13. See generally Carol Smart, Feminism and the Power of Law (Routledge, 1989).
lawyers this may mean that lawyers are reluctant to change the status quo. Macfarlane posits that there are three key professional beliefs that inform the norms of legal professional behaviour. She acknowledges that these beliefs are not universally held and that there are diverse groups, or communities of practice in the law, willing to embrace non-adversarial practice. Nevertheless she sees value in articulating the prevalent professional beliefs to assist in understanding the legal profession in Western countries, its history of adversarialism, and the challenges that a shift to non-adversarial practice poses for many lawyers.

Macfarlane notes that one professional belief is the default to rights evident in the legal profession. She states:

A belief in the primacy and superiority of rights-based conflict resolution is introduced by legal education, reinforced by communities of practice, and memorialized in professional codes of conduct.

A rights-based orientation to conflict is based on a belief that the law provides the appropriate adjudication on moral rights and individual property. Macfarlane argues that this view, one that Leonard Riskin has also identified as the ‘lawyers’ philosophical map’, leads lawyers to see their role as persuasively arguing for the moral rights of their clients in a manner that convinces a court of the superiority of their claims. Then, rather than seeking to persuade the other party of the strength of their arguments, lawyers seek to convince a court of the soundness of their legal

44 With the increase in law programs in Australia there has been widening of the socio-economic and ethnic backgrounds of law students: Susanne Owen and Gary Davis, Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment (2009) 43-47.
45 Macfarlane, above n 1, 27.
47 Ibid 49.
48 Ibid.
49 Law school education can mean that students develop a culture that disputes are dealt with as adversaries to be decided by a third party through the operation of legal principles: Leonard Riskin, ‘Mediation and Lawyers’ (1982) 43 Ohio State Law Journal 29.
In this frame of practice each lawyer strives to gain the upper hand against her opponent. This approach may lead to excessively zealous conduct in adversarial advocacy for their client. A focus upon moral rights may obscure the underlying issues of conflict ‘since rights arguments are couched in terms of right and wrong rather than in terms of what is expedient, feasible, or wise’. The default to a rights approach can also mean there is a belief in a possibility of a ‘win’ right up to the courtroom door. But since much of litigation is ultimately settled prior to trial, this approach can result in last minute compromises that fail to deal with all the concerns of clients and mean that clients are charged for the preparation of a case that does not proceed. Use of a rights-based paradigm in legal practice may neglect the practical and emotional issues in disputes, and potentially rob a client of the opportunity to deal with these concerns. Amongst the legal profession, there is a perception of high status associated with the discourse of rights and some may view a more holistic approach to client’s overall needs as ‘soft’ or low status. This construction of negotiation and mediation as less desirable than the advocacy of rights may represent a challenge to traditional masculine adversarial approaches and embody a ‘feminine’ approach to conflict resolution that incorporates an ‘ethic of care’. Importantly, as the data gathered for this thesis shows, the participants in this study demonstrate a commitment to non-adversarial practice. This commitment incorporates the norms of first generation ADR practice and a rejection of the view that a rights discourse should prevail in legal practice or education.

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50 Ibid.
51 Macfarlane, above n 1, 49.
52 Ibid 50.
53 Ibid 53.
54 Ibid 52-54.
5.3 PROMOTING NON-ADVERSARIAL PRACTICE IN LAW

5.3.1 THE VALUE OF ADR TO NON-ADVERSARIAL PRACTICE

My analysis of the interview and survey data and the content analysis of the course guides show that all the participants in this study recognised the value of ADR as alternatives to litigation processes. This is not surprising given that the majority of teachers interviewed taught ADR as a stand-alone course and thus might be expected to be highly committed to alternative processes to litigation. However, the three teachers who taught a combination of ADR and civil procedure also expressed strong support for ADR processes, as reflected in the following 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… is to let the students know that there is a genuine alternative to going to litigation (V 6 (a) p 12).

…dispute 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 (V 5 (c) p 1).

Of those teachers who taught ADR in a stand-alone course, a common view was that ADR promoted non-adversarial practice in general. Teachers believed that a comprehensive understanding of ADR processes was necessary for a lawyer to fully advise a client:

…it’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 (Q 3 (a) p 17).

56 As noted in chapter two the data was separated from the participants and coded. V signifies Victoria, 5 shows the number of the university in Victoria and (a) shows this is one the first of a number of participants from that university interviewed. Finally p 35 shows the page number of the transcript.
I believe it is important for lawyers to have the ADR string to their bow, if they are to properly advise their clients (Q 5 (a) survey p 7).

Additionally, many participants linked non-adversarial practice to the need to provide holistic problem-solving for clients. For example, one teacher reflected:

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 (Q 3 (a) p 2).

These views were supported by the content analysis of the course guides (see Appendix G). It was clear from the course guides in all of the ten stand-alone ADR courses offered in law schools that non-adversarial practice was part of the curriculum. The framing of this practice was based on integrative bargaining techniques, as promoted in first generation practice. In all of these course guides there was some reference to lawyers’ engagement with, and choice of ADR processes and the possible ethical dilemmas of those choices (see category one Appendix G). The aim was to introduce ADR to students so that they could understand the opportunities these processes offered to dispute resolution as well as help students appreciate the limits of litigation. For example the learning outcomes of one course in Queensland were as follows:

**LEARNING OUTCOMES**

By the end of this course, you should have:

1. Enhanced your understanding of the nature of conflict;
2. A greater appreciation of the range of processes used in efforts to manage conflict and resolve disputes;
3. Improved your awareness of the communication skills used in dispute resolution practice;
4. Developed your appreciation of the uncertainties of dispute resolution practice. You need to learn how to deal effectively with unstructured situations, how to work collaboratively as well as recognising the
limitations of 'legal' solutions to some problems. You should also subject the legal system to analysis and criticism;

5. An enhanced understanding of the ethical and professional responsibilities owed by dispute resolution practitioners, including mediators and lawyers;

For the students taking this course this example demonstrates an overall commitment to developing non-adversarial practice understanding and skills, where ADR is prioritised in legal practice. Nearly all stand alone ADR courses in this study dealt with the nature of conflict and responses to conflict by parties to disputes.

5.3.2 ADR TEACHERS’ VIEWS OF THE LEGAL PROFESSION AND ADR

The ADR teachers were asked their views about the approach of the legal profession to dispute resolution. Most participants believed that lawyers now dealt with ADR in practice, but there was some scepticism about lawyers’ level of commitment to the processes. One participant commented on lawyers’ traditional frame of practice, where litigation is privileged, and contrasted that with a frame that prioritised the needs and perspectives of parties:

So from 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 it [litigation] doesn’t necessarily resolve it either…So what’s the element of success? And is it an external thing or is it a…do you ask the parties? Do you ask both parties, one party? (V 5 (a) p 35).

Another participant also noted that litigation is privileged and that ADR is perceived as operating on the periphery of legal practice:

…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 is part of what they do (V 1 (b) p 5).

Similarly, one participant regretted that learning about collaborative problem solving approaches in ADR may not immediately impact on the privileging of adversarialism 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? (V 2 (a) p 22).

The privileging of litigation paradigms means that there may be an impact on the way that ADR is practised in the legal context.57 One participant in this study noted the ‘colonisation’ of mediation by lawyers echoing concerns expressed by Menkel-Meadow that the institutionalisation of ADR will result in the ‘colonisation’ of ADR by the adversarial system58:

...some firms in Melbourne...don’t even take their clients into [the] mediation [room], 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...But we always tell our students not to go out too idealistic because they’re going to come up against a very strong culture...basically a barrister/mediator just expressing an opinion or shuffling messages backwards and forwards [in the mediation]. However, in other areas and in some contexts there is a lot of scope for lawyer/mediators to do things differently and to empower clients and so on. But these things take a while to change. But I mean definitely some lawyers will be


58 Menkel-Meadow, above n 29, 5.
much more open to interest-based problem solving than would have been the case previously (Q 2 (a) p 7).

Although the majority of teachers of stand-alone courses shared this view of the legal profession, in contrast those who taught ADR combined with civil procedure appeared more confident of the place of ADR in litigation. This confidence may not be unequivocal as two out of three teachers of combined courses saw ADR simply as a case management tool rather than a process that incorporated integrative bargaining.

One of the key issues for this research was the investigation of the models of negotiation and mediation taught in ADR courses in legal education. The analysis of the interviews and the content analysis show that when teachers taught ADR in a stand-alone course, the dominant model was the Harvard integrative model for negotiation, and the facilitative model of mediation based on the integrative approach. If collaborative law was included in the curriculum, it was seen to use the integrative model of negotiation. Only three teachers reported using collaborative law extensively in their classes, but some teachers commented that they might include it in more detail in future courses, as it was an emerging area of practice. Participants noted that it was generally difficult to introduce a new area of practice due to the volume of material covered each semester. Thus first generation practice dominated as the preferred approach for teachers interviewed in this study.

First generation practice was the standard for both content and pedagogy by the majority of teachers in this study as nearly all teachers taught the theory of integrative bargaining and also used this model in role-plays. Although some teachers occasionally discussed other models in their classes, the integrative model for negotiation and the facilitative model for mediation were taught in all courses. These approaches dominated the material discussed in class and formed the basis of the model used in role-plays. Many teachers taught the distributive model of bargaining in a seminar or lecture. Only one teacher in the study included this model of negotiation in a role-play as an addition to the integrative approach to negotiation. Generally ADR teachers identified the distributive model as an approach that was to be avoided in ADR, in that they associated this approach with an adversarial frame of practice. Although most negotiations will include a distributive element, teachers in this study largely rejected an approach to negotiation where distributive approaches
dominated. There was a clear preference for the integrative approach.

Only one of the three combined ADR and civil procedure teachers adopted the approach of teaching first generation practice in negotiation and mediation. The other two teachers who taught ADR and civil procedure did not deal with a ‘model’; that is, they did not differentiate between negotiation and mediation models. It seemed that they believed there was only one way to frame negotiation and mediation practice. They saw these processes as tools to encourage settlement of litigation. Their understanding of ADR did not draw from the integrative/facilitative discourse rather the teachers appeared to be ignorant of any theoretical background. In contrast all the stand-alone ADR teachers understood and taught the principles of integrative bargaining. The teachers who taught ADR without addressing theory also failed to include role-plays in their learning and teaching design. These teachers did not include experiential learning approaches, and ADR was a relatively minor part of the curriculum.

Significantly, even though the evaluative approach is widely practiced in court-connected contexts, most ADR teachers in stand-alone courses criticised this approach in class, and most did not routinely warn their students about the realities of contemporary legal practice where evaluative ADR may still be the norm. For example, two teachers in the study reflected on the ways that they would highlight the drawbacks of the evaluative model to students:

Although we talk about the spectrum of [dispute resolution] in the unit, we focus in on mediation and in that discussion we will say these are the forms of mediation that are available. I talked in my lectures about sort of liability issues and highlighted the fact that liability issues are much more likely to be of concern in evaluative mediation than … for example facilitative… I suppose that’s the critique aspect of it and the indirect critique is that we teach facilitative (V 2 (a) p 11).

So I do teach about evaluative mediation and we do talk about it how it’s different. And we talk about its application in the context of commercial disputes…particularly perhaps commercial disputes where the parties are using, you know retired judges or eminent lawyers to act
as mediators. And we talk a little bit about it in the context of neutrality because clearly there’s a significant problem with the idea of neutrality and evaluative [mediation]…[it] sort of really just doesn’t work. (N 1 pp 7-8).

Another teacher noted the dissonance between the primacy of the facilitative model in her teaching of mediation and the realities of practice for her students once they graduate:

I would suspect that once they get out in practice and see at least how mediation is practised in the Supreme Court, for example, in Tasmania that they’ll think it wasn’t all it was cracked up to be because it’s not practised properly. It’s conciliative, settlement negotiation, with a big push, so it’s not mediation down there. I’d like to think that most of the students go out there with the belief that mediation is a really good option but I suspect what then happens is they find that practically it’s difficult to do or to do properly (Q 1 (b) p 11).

One teacher took the strong view that it would be inappropriate to teach evaluative mediation other than to critique this model. His perspective was that lecturers should promote the ideal of what should occur in practice rather than support the status quo:

No I don’t think you should teach it, well except insofar as it is a way of pointing out some contradictions, I don’t think there is a model that’s useful…educational institutions are change agents [and] you shouldn’t be reflecting bad practice (V 3 (a) p 13).

Another teacher in the study, who stated that she taught a range of models, included evaluative mediation, but only used the facilitative models in her role-play strategies.

…I tend to favour the facilitative and evaluative models myself.
Students practice only facilitative mediation (Q 4 (d) survey p 6).

Where the teachers in this study included the evaluative model of mediation it was mainly to critique the model, although some suggested that they taught the suitability of the evaluative approach in some contexts. None of the teachers used the evaluative
model of mediation in role-play simulations. One teacher used the distributive model of negotiation in role-plays and then contrasted this approach with integrative bargaining. This teacher expressed the view that lawyers should be conversant with both models.

Generally, the teachers of stand-alone ADR courses evidenced a desire to effect a normative change to legal practice and to shape the changing legal identity of their students by introducing them to paradigms of non-adversarial practice. This is a laudable objective, in keeping with first generation practice and pedagogy in negotiation and mediation, although it may lead to some disappointment when students experience ADR processes in legal practice once they graduate. The teachers’ commitment demonstrates resistance to the traditional adversarial culture. The teachers’ commitment is also in line with much of the policy change in our legal and justice system that promote non-adversarial practice in law.

5.3.3 VALUING THE SPECTRUM OF LEGAL PROCESSES

Whilst teachers in this study generally failed to support distributive approaches to negotiation and the evaluative approach to mediation, they fostered students’ understanding of the importance of litigation in appropriate cases. This fits with a second key professional belief identified by Macfarlane, namely the ‘authority and respect that attaches to the formal legal process.’

Macfarlane found that a belief in the fairness of the system is widely held amongst lawyers, although this belief may not extend to the fairness of outcomes in the legal system. Many lawyers remain unsure of the meaning of ‘justice’ for their clients although they believe that the process that clients will experience in the legal system is procedurally fair. Concurrent with this belief is the understanding that a lawyer may exploit the system in their representation of their client to the degree that the system allows: ‘Evidently, there is a broad tolerance for procedural games as long as they fall within the given norms of the community of practice or broader culture and they are not seen as a challenge to the fundamental legitimacy of the system.’

59 Macfarlane, above n 1, 54.
60 Ibid 55.
61 Ibid 56.
The view that the system of law is procedurally fair and thus has value was supported by some of the participants in this study. Many of the participants valued ADR highly but also valued the option of litigation. This view was expressed by both ADR stand-alone teachers and teachers who combined the teaching of ADR with civil procedure. In contrast, the two non-law course co-ordinators teaching ADR in social science programs were not so confident about the legal system. They located their subjects in opposition to litigation. For example, one participant noted:

…for 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 (V 2 (c) p 2).

Similarly, a law teacher noted that the importance of a range of approaches 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…I mean they’re [like one-]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 (Q 4 (a) p 2).

According to Macfarlane, a third key professional belief is the idea of the ‘lawyer in charge’. This refers to practice where lawyers assume a sense of entitlement, drawn from their education and expertise, that gives them the ‘right’ to assume authority and autonomy in the decisions made regarding a dispute.62 For example, one participant referred to this framing of legal practice in the context of working with other disciplines:

I don’t think lawyers have traditionally ever been very good at multi-disciplinary work, because lawyers, I think, think that legal knowledge is superior to a lot of other knowledge (Q 1 (a) p 8).

62 Ibid 59.
Most lawyers believe that clients should accede to the advice of the lawyer regarding both strategy and the merits of a dispute. The lawyer has the ‘technical expertise’ that places them in a position of power vis-à-vis the client. In Macfarlane’s view ‘The roots of such assumptions over power and control in the lawyer-client relationship lie in the epistemology of law school and professional legal training.’

In this study participants identified the need to teach law students to ‘think like a lawyer’. A part of this approach to legal education includes the technical knowledge associated with being a lawyer:

I think students should be able to think like a lawyer, in a sense of being able to critically analyse information, sift through a whole lot of stuff and work out what’s important, and go to the right facts, work out how to provide advice and so on, I think that that’s really important (V 5 (a) p 36).

Another participant noted the importance of understanding substantive law relating to litigation as well as the role of ADR:

I think it’s important for the students to know the procedural rules of the Supreme Court as a model and also the County Court and Magistrates’ Court. It’s important for them to know the various time limits and it’s important for them to know…the function of pleadings etc. Those things are just as important as ADR (V 6 (a) p 14).

Some participants also identified the frame of legal education as largely black-letter law and a litigation-focused culture:

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63 Ibid.


65 Macfarlane, above n 1, 60.
I think our focus is very much a litigation-based focus throughout the whole of the curriculum and so I think students do end up with a partisan mindset (N 1 (a) p 10).

Another participant noted the focus upon cases as the dominant frame of law teaching:

…many lawyers will still teach with a case-book approach and a problem solving approach and the reality of practice is that…most young lawyers seldom actually get into a litigated trial these days. That really the practice floor is about negotiation and about analytical and reasoning skills. And I don’t think that the negotiation and communication skills that are essential, are well supported in many law schools at all (Q 1 (c) p 3).

Lawyers of the future need to cultivate understanding and skills that assist in the majority of practice. As this participant has noted communication skills are essential in this new role.

In tracing the paradigm of ‘lawyer in charge’ Macfarlane notes that clients fall into two categories: commercial and personal services. Where the client is a commercial one, the ‘lawyer in charge’ paradigm may not be supported and lawyers may be required to more actively engage with the client in relation to decision-making about process and content concerns. In contrast, personal services clients tend to be less assertive, but the literature relating to access to justice, has recently supported the notion of the more active client in this context as well as the commercial context.

The rights-based focus of much of legal practice and the privileging of the adversarial model can contribute to the ‘lawyer in charge’ paradigm of practice. The technical power of the lawyer (the understanding of legislation and relevant case law) means that the account of the legal dispute that the client brings to the lawyer can be reduced to a story of rights-based concerns. Other interests, such as the emotional, personal and business issues, may be marginalised, with the focus upon facts that support legal

66 Ibid.
67 Ibid 59-60.
arguments. Macfarlane notes that:

A traditional adversarial model of legal services that centers on technical advice—‘taking instructions’ which in effect means telling the client what is best for them—allows lawyers to control the relationship between themselves and their clients. It limits their professional role to that of technical expert (with which they are generally comfortable) and at the same time limits the intrusion of emotional and other less predictable dimensions of conflict resolution.  

A focus on rights in framing solicitor/client interactions is a traditional view of practice that has been critiqued by a number of legal writers. The increase in ADR options in courts and the policy practices of governments, where options such as mandatory mediation and collaborative law are privileged resist the key beliefs outlined by Macfarlane. These changes mean that the profession is evolving to meet the challenges to traditional practice represented by the rise of ADR initiatives. In Macfarlane’s view, a change to lawyers’ culture in Canada and the United States does not require a paradigm change, but rather an evolution of practice, a shift of lawyers’ focus from litigation to collaborative problem solving. In Australia, initiatives at both state and Commonwealth level, outlined in chapter one, collectively represent the beginning of a movement to non-adversarial legal practice in government policy. In the legal profession it is unclear how much non-adversarial practice has been adopted although it is evident that some cultural change has occurred as many lawyers must now engage with ADR as part of court processes. Lawyers of the future will need to be schooled in ADR and understand non-adversarial frames of practice. As noted, the teachers in this study are largely proponents and advocates of non-

68 Ibid 62.
69 Daicoff above n 3.
70 Ibid.
71 Macfarlane, above n 1, 96-97.
72 Approaches depend upon the culture of the lawyer: Robert Mnookin, Scott Peppet and Andrew Tulumello, Beyond Winning: Negotiating to Create Value in Deals and Disputes (Belknap Press, 2000) 167.
adversarial practice and thus might be said to be leading a change in culture whilst they consider the option of litigation for disputants as one of an array of possible process choices.

5.4 LAWYER’S ROLE IN ADR
There are a number of barriers to changing the legal adversarial culture. These include entrenched interests, a perception amongst many in the profession that ‘nothing is wrong’ with present day practice, the contested meanings of the terms ‘adversarial’ and ‘non-adversarial’ and the high status linked to adversarial culture coupled with the low status linked to non-adversarial ‘peacemaking’ approaches. Thus lawyers appear to persist with the vigorous model of adversarialism, even though this model may disadvantage their client, due to the increased stress and greater length of the litigation process when adversarial tactics are used. An adversarial approach may also impact negatively on the legal system itself.73

The difficulties of changing the traditional legal culture were noted by one participant in the context of law students entering the profession and attempting to use ADR in practice:

…maybe they’ll be an articled clerk or a junior solicitor in the litigation section and they’ll say ‘Well why don’t we try ADR?’…and the solicitor they’re working for [will] say ‘Not on your nelly!’ (V1 (a) p 4).

Lawyers will vary in their approach to adversarialism and some jurisdictions may be less adversarial than others.74 For example in the family jurisdiction, research has shown support for the proposition that many lawyers actively engage with ADR and seek to promote the interests of their clients, and the children of their clients in a non-

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73 Parker and Evans, above n 14.

adversarial manner.\textsuperscript{75} However, there is also a perception that some lawyers in family law stymie settlement prospects, which can impact negatively upon children.\textsuperscript{76} For example, in the recent report, \textit{Enhancing Inter-professional Relationships in a Changing Family Law System},\textsuperscript{77} some family dispute resolution practitioners voiced perceptions of family lawyers as excessively adversarial.\textsuperscript{78} These findings contrast with earlier research that suggests that family lawyers practice in a non-adversarial child focused manner.\textsuperscript{79}

Most participants in the research for this thesis noted that context was important when considering the degree of adversarialism exhibited by lawyers\textsuperscript{80} and that non-adversarial practice was more common in the family law jurisdiction:

...[I believe] that [there] are highly used settlement techniques such as in family law, where that’s the norm, and there’s areas where that’s not the norm, and so it would depend (V 1 (b) p 6).

Lawyers operating in mediation with an adversarial mindset may exhibit a reluctance to genuinely engage in the process of negotiation and mediation, a tendency to spend a lengthy time talking about the law, cross-examining disputants, talking ‘for’ the client to ensure that information is not divulged that may later be used in litigation,

\textsuperscript{75} Lawyers in the family law jurisdiction are often not practicing in an ‘adversarial’ model: Ibid.

\textsuperscript{76} King et al, above n 2, 125.


\textsuperscript{78} Ibid, ix.


\textsuperscript{80} In family law, the way that lawyers should conduct themselves in ADR processes has been discussed: Cooper and Brandon, above n 12; Donna Cooper and Mieke Brandon, ‘How Can Family Lawyers Effectively Represent their Clients in Mediation and Conciliation Processes’ (2007) 21 \textit{Australian Journal of Family Law} 288. Lawyers can act to protect the interests and experience of women who are the recipients of domestic violence: Rachael Field, ‘Using the Feminist Critique of Mediation to Explore the Good, the Bad and the Ugly: Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia’ (2006) 20 \textit{Australian Journal of Family Law} 45.
and a general reluctance to negotiate in terms of interests rather than positions. As I have noted throughout this thesis, in some jurisdictions the litigious mindset is transferred from the courtroom to the mediation room. Chris Guthrie argues that this is an inevitable approach given lawyers’ background and education. John Lande posits that lawyers are transformed in some ways by exposure to mediation processes, but that this transformation may only be superficial. Susan Daicoff in her research into the legal profession in the United States found that lawyers have been shown to have a ‘thinking’ approach to conflict rather than a ‘feeling’ approach. That is, she suggests they are drawn to the rational rather than the emotional and this may be one reason why they have chosen law as a profession. The conduct and behaviour of lawyers when adopting a non-adversarial approach in negotiation and mediation have only recently being articulated and include approaching the other party and their lawyer in a manner that promotes dialogue, resists competition, facilitates discussion of all aspects of a dispute, encourages expression of emotional concerns, and assists clients in creative problem-solving. This emergent literature is crucial for the framing of teaching in this discipline area.

Some of the teachers interviewed for this study expressed some confusion regarding the appropriate role for lawyers in ADR. While supportive of the use of ADR processes in litigation they were less clear about how to teach the appropriate role of lawyers engaged in ADR. Two of the participants in this research saw the lawyers’

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81 Parker and Evans, above n 14, 122-123.
86 Since the conduct of the interviews for this thesis a new book dealing with lawyers’ roles in mediation has been published in Australia: Samantha Hardy and Olivia Rundle, Lawyers and Mediation (CCH, 2010).
role as important, but largely ill defined:

…[teaching] lawyers’ roles in mediation [is important] 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 [in practice] (Q 1 (b) p 3).

…in 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] 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 (V 5 (b) p 9).

Other teachers were clearer about how they taught about the role of the lawyer in ADR:

…we teach short courses as a profession on representing clients in mediation and negotiation so the answer is again, it’s a top-up theme…and it doesn’t have to be lawyers, it’s how people behave in negotiations, whether they behave as good cop, bad cop, whether they behave as gentle host. So it’s not a lawyer topic it’s a person topic, how people can behave, what’s in the range and diagnostically how they should behave to be helpful (Q 4 (b) p 8)

I think the lawyer’s role, that that comes out in a negotiation reading, which we have…from a book called Beyond Winning: the Challenge of Dispute Resolution (V 5 (a) p 15)

The lawyer’s role in ADR and the kinds of approaches to clients’ legal issues emerged as a major theme of this research. How law teachers framed this role in their discussions of their teaching evidenced a support for the role of the lawyer as
collaborative problem-solver using integrative bargaining theory drawn from Harvard negotiation theory and Fisher and Ury. As discussed in chapters one and three, this approach constructs conflict in individualist rather than relational terms. Lawyers are seen as non-adversarial advocates, who eschew the excesses of zealous adversarialism and assist clients to solve their problems holistically. This view of legal practice is consistent with much of the theory and practice of ADR as offering empowering processes that involve disputants.

5.5 EVOLVING LEGAL PRACTICE

A number of writers in the United States, Canada and Australia have advocated for changes to legal practice to include a focus on ‘problem-solving’. Modifying the traditional adversarial approach of lawyers is interlinked to literature reflecting upon the developing role of the lawyer with the rise of ADR and settlement. As noted in section 5.2, the philosophy of ADR and, in particular, mediation has informed the work of academics and practitioners searching for new paradigms of lawyer behaviour. For example Jacqueline Nolan-Haley has identified the shift to ‘problem-solving’ as an important development in the way lawyers practice representing a move away from the traditional litigious mind-set. She acknowledges that lawyers have always been involved in solving legal problems for their clients, but identifies the problem-solving movement as providing a multidisciplinary framework for the role of lawyers in dealing with clients’ problems more holistically. She views the philosophical approach of much of mediation practice, the interest-based approach, as an important foundation to this movement.

The problem-solving approach to legal practice was strongly supported by all the teachers interviewed for this research. This support was evident where teachers taught ADR in a stand-alone subject devoted to the area or where ADR was combined with civil procedure. For example, teachers stated:

89 Ibid.
90 Ibid 248.
…there really is a change in the skills that lawyers need. They need to be able to go to court, or they need to be able to work with their clients, but they also need to understand the realities of the commercial world and the fact that person wants the thing solved rather than won (V 3 (b) p 1).

I would see ADR as being about giving students an increased awareness of problem-solving (Q 3 (a) p 2).

I think you’re trying to provide them with some practical skills in terms of communication and negotiation, and I think you are also equipping them to be involved in an ADR process and understand how interest-based negotiation works…(Q 1 (c) p 8).

This view of lawyers as problem solvers is not necessarily new to the profession, as acknowledged by Nolan-Haley, but this approach to legal practice has rarely been a priority in legal education, as one participant noted:

…lawyers have occupied a place as dispute resolvers for a very long time…that aspect of lawyering which hasn’t always been clearly articulated in the past in law degrees (V 2 (a) p 9).

In Australia, academics Parker and Evans identified legal practice that incorporates an ‘ethic of care’ or a relational approach to lawyering that ‘focuses on lawyers’ responsibilities to people, communities and relationships.’ This approach draws upon the works of Carol Gilligan and Thomas Shaffer in developing an ethical framework that moves beyond technical legal concerns to include a holistic approach to client issues including emotional and relationship dimensions of problem-solving. The ethic of care approach focuses upon relationships in the conflict and engages with reconciliation of these relationships where appropriate. Adherence to an ethic of care means a lawyer engages in a respectful, empowering relationship with her client. The wider network of relationships for the lawyer also impacts upon her lawyering role.

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91 Parker and Evans, above n 14, 31.
92 Ibid 32.
93 Ibid 36-7.
Parker and Evans argue that this approach to practice is most appropriate for lawyers engaged in ADR and processes that deal with problem solving and interest-based mutual gains opportunities. Several participants expressed support for the frame of lawyer’s practice in ADR used by Parker and Evans. For example one teacher commented that:

…in relation to the ethics of care paradigm that that’s where most lawyers involved in ADR are going to be situated (V 2 (a) p 23).

The focus upon the teaching of the discipline area of ADR as a problem-solving mechanism has resonance with the legal skills identified as important for lawyers. This approach frames the lawyers’ role as dealing with the client’s legal problem, including issues relating to personal concerns, as well as the facts of the legal dispute. As noted earlier in this chapter Macfarlane has analysed the role of the lawyer in dispute resolution, focusing upon an approach to legal practice that she terms ‘conflict resolution advocacy’. Her view of legal practice extends problem-solving to engaging with the wider dimensions of client conflict and includes an understanding of the emotional dimensions of dispute resolution. Many of the participants who taught dedicated ADR subjects, expressed views that were supportive of Macfarlane’s wider view of the legal role. Two teachers who taught civil procedure combined with ADR did not articulate a teaching approach that could be said to support this construction of legal practice. These teachers were less inclined to promote non-adversarial practice. This may be due to the focus upon litigation in their courses and in their approach to practice. Although they valued ADR they did not evince a shift in practice along the lines of non-adversarial practice. The exception was one of the courses in Victoria that combined civil procedure with ADR. This third combined course in the data was clearly designed to make the shift to non-adversarial practice in line with changes in legal policy where such an approach is progressively more privileged.

A focus upon problem-solving is articulated by Macfarlane as she promotes an

94 Ibid 131.
95 This issue is discussed in detail in chapter four of this thesis.
96 Macfarlane, above n 1, 96-97.
understanding of legal practice that attempts to empower clients and include relationship issues in the framing of legal problems. Macfarlane points to the changing dynamics in legal practice due to the significant increase in the settlement of litigation in both North America and Canada. Similar trends towards the increasing settlement of legal disputes are evident in Australia, although more empirical work is required to establish the impact of ADR processes such as mediation on settlement rates. Legal advocacy that incorporates a focus on alternative processes privileges ADR options such as negotiation and mediation and looks to the courts as a last option in the dispute resolution spectrum. Such an approach to the changing role of legal professionals suggests a pursuit of the client’s interests, but not in an aggressive or competitive style. Whereas adversarialism is likely to privilege the litigation process, seeing this process as the primary or ultimate option in dispute resolution, legal practice of the kind that Macfarlane advocates uses ADR as the foundation point in client counselling regarding a dispute. She argues that litigation should be retained, but as an option of last resort. This approach may also encourage early dispute resolution with the consequent benefits for clients. But this approach may also mean fewer pre-trial processes to ascertain in full the legal position of a party through discovery and interrogatories and thus hamper settlement.

97 Ibid 96.
99 Macfarlane, above n 1, 97.
100 Menkel-Meadow, above n 4.
102 This approach changes the frame of legal representation from the adversarial advocate to creative problem solver focused upon client needs: Harold Abramson, ‘Problem-Solving Advocacy in Mediations: A Model of Client Representation’ (2005) 10 Harvard Negotiation Law Review 103. See also in the Australian context commentators views that there is a continuing need to change the frame of lawyer’s approaches to conflict: Anne Ardagh and Guy Cumes, ‘The Legal Profession Post-ADR: From Mediation to Collaborative Law’ (2007) 18 Australasian Dispute Resolution Journal 205.
103 Macfarlane above n 1, 110.
that is informed about the relative strengths of each party’s case.\textsuperscript{104} A non-adversarial approach to legal practice would include client counselling\textsuperscript{105} as a fundamental part of dispute resolution where a lawyer seeks to identify the position of the client from a holistic perspective and thus addresses all the dimensions of the conflict.\textsuperscript{106}

In my research, one participant expressed the tensions between advocacy and adversarialism and the need for more debate and research in this area:

Because lawyers are not mediators, they are not neutral, they are partisan and so the question is how can you be partisan, how can you be an advocate for your client in a way which is appropriate (N 1 p 16).

The findings of this study highlight the need for further research into the understandings of Australian law teachers and practitioners of the meanings of non-adversarial approaches for lawyers. Macfarlane’s recent work is an academic attempt to fill the gap in the literature regarding the role of lawyer. Her work is based in part on empirical studies in Canada. The notion of advocacy is ‘reclaimed and redefined’\textsuperscript{107} in Macfarlane’s ‘conflict resolution advocacy.’ This type of advocacy can incorporate partisan support and argument for a client’s position but also include a commitment by the lawyer to promote ‘peace’.\textsuperscript{108} This can mean that lawyers need to modify notions of zealous advocacy to better incorporate client wishes, client

\begin{footnotesize}
\begin{enumerate}
\item NADRAC has recently considered this issue in its review of civil litigation at the federal jurisdiction: NADRAC,\textit{ The Resolve to Resolve: Embracing ADR to Improve Access to Justice in The Federal Jurisdiction} (2009) ch 7.
\item The counselling needs to include discussion of the emotional impact of dispute resolution options. This approach looks at the broad range of ADR through practice informed by therapeutic jurisprudence and preventative law: Andrea Kupfer Schneider, Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes’ (2000) 5\textit{ Harvard Negotiation Law Review} 114; See also the ‘understanding model’: Gary Friedman and Jack Himmelstein,\textit{ Challenging Conflict: Mediation Through Understanding} (American Bar Association, 2008) ch 1.
\item Macfarlane, above n 1, 97.
\item Ibid.
\end{enumerate}
\end{footnotesize}
empowerment and changes in communities of practice.\textsuperscript{109} The teachers in this research who taught ADR stand-alone courses are at the forefront of debating issues of non-adversarial practice in alternative processes. Their efforts in engaging and teaching about this concept introduces a new generation of potential practitioners to non-adversarial approaches and also, importantly, begins to ‘paint in’ the detail of what non-adversarial practice might mean.

When a non-adversarial approach is adopted there is less of a focus upon legal rights and more of a focus upon the emotional, relationship and procedural justice issues in a dispute. Advocates must be able to see what both their client and the other side need from the process in dealing with conflict.\textsuperscript{110} This does not mean that legal rights are sidelined, but rather that these rights are considered in the context of the whole of the client’s circumstances.\textsuperscript{111} Lawyers acting in this kind of practice will need to relinquish some status. Clients may also need to perceive the role of the lawyer differently, expecting less advice and input from the lawyer and anticipating more client empowerment. In this respect it is important to discuss the role of the lawyer prior to the ADR process or some level of client dissatisfaction may arise. Also, some clients are more able to act as their own advocate in ADR than others and it may be that lawyers need to assess their client’s abilities prior to the process.\textsuperscript{112}

In this study a number of participants expressed the view that ADR can encourage clients to be more engaged in holistic problem solving. Holistic practice now characterises a range of practices in disciplines including medicine and law.\textsuperscript{113} In the legal profession a number of different approaches fall under the umbrella of holistic practice. A useful frame in this discussion is the approach where a lawyer looks beyond the presenting legal problem of a client and considers the underlying causes of the problem.\textsuperscript{114} In the legal profession there are some who advocate for an

\textsuperscript{109} Ibid 109.
\textsuperscript{110} Ibid 113.
\textsuperscript{111} Ibid 123.
\textsuperscript{112} Ibid.
\textsuperscript{113} King et al, above n 2, 81.
\textsuperscript{114} Ibid 85.
interdisciplinary approach to legal disputes that allow for engagement with emotional and spiritual concerns. Holistic problem solving thus has synergies with therapeutic jurisprudence as this approach engages with emotional concerns in the law and attempts to achieve better psychological outcomes for the client. It also has links with transformative mediation as it attempts to achieve some personal growth for the client. In this study participants expressed support for widening the frame of traditional legal practice to include a more holistic approach. This notion centred around dealing with a client’s concerns in more depth than traditional legal practice under adversarial constructs, but did not go so far as including spiritual dimensions to problems. For example, two participants expressed the need for widening the traditional frame of legal practice. One took the view that clients should be encouraged to think of the impact of their decisions on others and what concerns are important to address in conflict. Another participant saw ADR as shifting power between lawyer and client:

Because law has a long tradition, and part of ADR is about de-legalising, or busting myths and making things easier for people. And it’s also, I guess, empowering ordinary people and, to some extent, disempowering lawyers, (Q 1 (a) p 8).

Emotion is a key concern when dealing with conflict through the various processes of ADR. In her work Macfarlane talks of the need to deal with relationship concerns and emotion in law and ADR through conflict resolution advocacy. In chapter three, the importance of emotion in conflict and dispute resolution and lawyers’ difficulties in engaging with emotions in conflict were canvassed. In this study a majority of participants supported the inclusion of emotion in the study of ADR. They demonstrated a familiarity and engagement with emotion as a necessary part of dealing with conflict. Participants’ views about emotion are discussed in detail in chapter seven. A concern with emotion is also part of the Australian practice approach of non-adversarial justice discussed in the next section.

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115 Ibid 85-86.
116 This participant’s view was also referred to in section 5.3.1 and a quote was given.
117 Macfarlane, above n 1, 33.
5.6 THE RISE OF NON-ADVERSARIAL JUSTICE

New movements that critique traditional legal practice, extend the frame of lawyers as problem solvers and include larger trends in the law, such as restorative justice and therapeutic jurisprudence, have recently been articulated by several academic writers in both Australia and internationally. For example, Susan Daicoff has recently explored the emergence of alternative stories of lawyers’ construction of practice in the United States and some other Western countries such as Australia and New Zealand. She talks of the disillusionment that some lawyers feel with the present legal and justice system and points to a variety of different approaches to lawyering that have been articulated to deal more holistically with clients’ concerns and provide a more rewarding approach to lawyering. These emerging stories place an emphasis on clients’ needs and non-adversarial practices such as ADR. Daicoff connects a number of different stories of the law and justice system, which she calls ‘vectors’ of a new movement; one she describes as the comprehensive law movement. She links the disillusionment with the positivist approach to the law with the dominance of rational approaches in legal discourses since the Enlightenment.

Daicoff includes therapeutic jurisprudence, preventative law, procedural law, procedural justice, creative problem solving, holistic justice, transformative mediation, restorative justice, collaborative law and problem solving courts as part of this new movement.

Following from the work of Daicoff, Arie Frieberg points to the rise of non-adversarial approaches to conflict in both criminal and civil jurisdictions in Australia. He notes that most matters in criminal law are issues of sentencing rather than contests relating to the guilt or innocence of an accused. In recent years problem solving courts have been introduced by most state governments in Australia to minimise re-offending through holistic approaches to sentencing. Many initiatives

118 See Daicoff, above n 3. In this article Daicoff focuses upon transformative approaches rather than facilitative or evaluative models of mediation, due to the focus upon settlement in these latter two models: 49.
119 King et al, above n 2, ch 1.
120 Frieberg, above n 71.
121 Ibid.
122 King et al above n 2, 138.
in this area draw upon the philosophy of therapeutic jurisprudence. Frieberg identifies interest-based negotiation and appropriate (rather than alternative) dispute resolution as part of a general re-thinking of the adversarial system, contributing to the rise of non-adversarial justice. A new book, Non-Adversarial Justice, by Michael King, Arie Frieberg, Becky Batagol and Ross Hyams expands on these ideas and gives more detailed accounts of the rise of different paradigms in law in the Australian context. This kind of practice is said to better deal with emotion in conflict and legal disputes, and adopts a range of practice options to be used as the need arises in legal practice. In my study, participants agreed that ‘things were changing’ in legal practice. For example one participant commented:

Well it’s an acknowledgement that there are several trends emerging in the law that are tending towards a more comprehensive and psychologically optimal way of dealing with legal disputes. The various vectors that Susan Daicoff identified share some common features. One is to look at the problem not simply in legal terms but in terms of the social context, so it has a background in legal realism and social justice theory… (V 1 (c) p 1).

Four universities, three in Victoria and one in Queensland, now include non-adversarial justice material in their curriculum. In two universities non-adversarial justice was introduced as a separate course from the ADR subject in the curriculum, although the names of the subjects differed. In the other two universities the traditional ADR course included selected material relating to non-adversarial justice. For example, a participant who included non-adversarial justice material in the ADR course stated:

123 Therapeutic jurisprudence was in discussed in detail in chapter three of this thesis.
124 King et al, above n 2.
I said to them, “I want to give two lectures on non-adversarial justice,” so I’ve sort of increased that in our teaching, because it’s just so contemporary and it’s good for students (V 2 (b) p 3).

This teacher saw no difficulty in changing the course content to include new areas associated with ADR. This suggests fluidity in the evolution of ADR subjects that can capture emerging concerns in the law and legal practice.

…this trend of looking at the social context of a problem and trying to solve it holistically, so restorative justice, therapeutic jurisprudence, collaborative law, alternative dispute resolution, holistic justice, procedural justice, they are all different threads that can be integrated into an approach. You could all it non-adversarial, you could call it comprehensive, you could call it optimising the law… (V 1 (c) p 2).

However a possible negative repercussion of the adoption of this type of course is that ADR becomes one of many topics within this broader topic area. If this approach is taken, teachers risk diminishing the focus on experiential learning and role-plays to teach the theory and practice of negotiation and mediation. For example, in one of the courses that focussed on non-adversarial justice in Victoria the course content did not include extended role-play experience for the students and such a strategy risks losing an important element of the ADR skills mix. The particular value of role-plays as the signature pedagogy of ADR is discussed in chapter seven.

Although many participants spoke of including mention of restorative justice in their courses, only two universities included therapeutic jurisprudence explicitly in their courses on ADR. Two ADR teachers spoke of therapeutic jurisprudence when discussing wider non-adversarial processes. As discussed in chapter three, therapeutic jurisprudence is aligned with developments in ADR. It is a recent trend in practice and philosophy that promotes holistic problem-solving that addresses emotional and psychological well-being in clients. The wider framing of the curriculum, where ADR is only one topic amongst many, appears to be a new trend in the teaching of this area, although notably stand-alone non-adversarial justice courses were taught along with possible electives in ADR in those universities which offered courses in the topic. The development of non-adversarial justice does point to a rethinking of the law program...
where the opportunity to study ADR is complemented by studies more widely in non-adversarial processes as reflected in the following comments:

…[we decided] to call it non-adversarial dispute resolution because there was another unit in our law school called ADR but it essentially is just teaching students how to be mediators whereas we were designing a unit that would be teaching them how to be lawyers in a range of processes and come at those processes with the right mentality and philosophy (Q 2 (a) p 2).

…we give them various stuff on the theories and backgrounds of conflict, and of non-adversarial practices. Start with a bit of general stuff, and then we go into specific applications: family law, criminal law, civil disputes, and then we come back to ideas of what does that mean for what a lawyer does, what does that mean for what courts do, what does that mean for what governments do, judges. So it’s kind of a three part, so with the theory, specific fields and then coming back to themes (V 1 (a) p 9).

This trend towards the development of courses in ‘non-adversarial justice’ draws on the developments in legal and justice practice. However, as will be seen in chapters six and seven of this thesis which of the various models of ADR are taught tends to reinforce constructions of the law especially if they are based on first generation practice that may privilege modernist theoretical underpinnings of practice.

5.7 LEGAL EDUCATION AS A SITE FOR CHANGE
For Macfarlane there are three key sites to bring about change to the legal profession to achieve non-adversarial practice more widely in the law. These are firstly, legal education, where an overhaul of pedagogy and content is required; secondly, changing practices in the judiciary, such as judicial mediators and promotion of innovative holistic problem-solving judging, and thirdly, interdisciplinary practice.127 Although legal education is a key site for change the experience of practice for lawyers may be equally formative. The culture of a law firm, where adversarialism may be promoted may be as significant as the experience of legal education. The

127 Macfarlane, above n 1, 223-4.
impact of the understandings formed in law school and the early years of practice require further research. Another influence on cultural shifts in legal practice is through the power of the state to change legal processes through legislation, for example mandatory mediation in courts such as the Supreme Court in Victoria, the changes to case management brought about by the courts, although as has been indicated throughout this thesis these initiatives may be resisted by lawyers.128

To address these risks to practice, legal education can attempt to shape lawyers of the future into non-adversarial practitioners who holistically deal with client concerns including emotions. As noted in chapter four, in the United States proponents of therapeutic jurisprudence lobby to include pedagogical strategies in legal education that help students to appreciate the emotional and relational dimensions of legal practice.129 A promotion of non-adversarial approaches and even further, the introduction of concepts from second generation practice to law students, although alone insufficient to change legal practice, would play an important role in bringing about change in the legal culture.

5.8 CONCLUSIONS
This chapter has considered the construction of adversarialism in legal practice and canvassed new and evolving approaches to practice that are sometimes termed non-adversarial, relying on interest-based negotiation and collaborative problem-solving. Macfarlane has named these approaches ‘conflict resolution advocacy’ where lawyers are involved in holistic and empowering legal practice that privileges ADR over litigation.

In summary, the findings of the research described in this chapter demonstrate ADR teachers in both stand-alone courses and those combined with civil procedure, 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. Teachers spoke of the need to discuss a range of ADR options in their courses and the importance of the use

128 These concerns have been discussed in chapter one of this thesis particularly in relation to the work of Tania Sourdin and her evaluation of practice in mediation in the Supreme and County Courts of Victoria: Tania Sourdin, Mediation in the Supreme and County Courts of Victoria (2009).
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. Participants in this research generally expressed support for non-adversarial practices and adopted first generation practice paradigms.

Teachers in this study who taught stand-alone ADR courses and one teacher of the combined courses showed support for the notion of the lawyer as problem solver. This view of legal practice was largely in alignment with frameworks advanced by proponents of therapeutic jurisprudence and the comprehensive law movement. These frameworks support a shift from traditional adversarial practice to a more holistic approach to law. Non-adversarial practice was well supported by the teachers in this study who taught stand-alone ADR courses. However, these teachers were not confident that the legal profession had made a similar shift in approach to practice. Despite their commitment to non-adversarial practices, teachers did not reject litigation as an option in the ADR spectrum and believed that students should understand that litigation is appropriate for some contexts.

The commitment to non-adversarial practices led most teachers of stand-alone courses to critique the distributive/evaluative models of practice. The teachers who supported these approaches were in a minority. Only two of the group of stand-alone ADR courses expressed strong support for these approaches. However, there may be some concern that teachers adopting this approach are not preparing students adequately for the realities of legal practice where distributive/evaluative practices generally dominate current practice. Importantly, the focus on non-adversarial practice based on first generation paradigms, does serve to resist the traditional adversarial constructs of the legal system. Arguably, second generation non-adversarial practice would frame lawyers’ efforts in conflict differently and further extend the development of the legal culture. Although particular models, such as the narrative and transformative models, are unlikely to be used in most legal disputes, the approach of considering emotion, power and culture from postmodernist perspectives would be of value to both lawyers and their clients. Such a frame would assist in holistic problem-solving of legal disputes.

The rise of non-adversarial justice as a subject, or part of a subject, in the law
curriculum was clear from the data. Although teachers in this area represented only a small number in the sample at the time that this data was gathered, these courses show a potential change to ADR teaching to include wider discourses of conflict and legal practice drawing upon the philosophies of restorative justice and therapeutic jurisprudence. This trend provides the possibility of extending ADR to incorporate developments in comprehensive law as outlined by Daicoff and offers the opportunity for law schools to incorporate content and pedagogy that more fully engages with holistic problem-solving in legal practice. The danger of the wider discussion of theories and application of non-adversarial justice is that second generation practice and pedagogy may be sidelined. This is because a course in this area may become overburdened with content and provide little opportunity for the critical theory elements of second generation practice. The rise of non-adversarial justice in the teaching of this area demonstrates the continuing evolution of the discipline area of ADR in legal education. This evolution will be affected not only by emergent theories in conflict engagement and the role of lawyers in disputes, but also by the forces affecting legal education in Australia and internationally. Issues in legal education that impact on the legal curriculum can be described as the discourses that shape law school’s offerings to students. In the next two chapters I introduce a framework from Nickolas James’130 discourses of legal education, for investigating my data that deepens understanding of how ADR is positioned in legal education.

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CHAPTER 6
ADR AND LEGAL EDUCATION: THE DISCOURSES OF DOCTRINALISM, VOCATIONALISM AND CORPORATISM

6.1 INTRODUCTION

Nickolas James considers the trends in Australian legal education that I have described in chapter four through a typology of discourses. He has identified six discourses of legal education.1 He notes that legal education is not a ‘stable and consistent body of knowledge and practices’2 and that these six discourses compete for dominance. James argues that these discourses are modes of power-knowledge. Drawing on the work of Michel Foucault, he argues that discourses produce knowledge and through discourses power is exercised and maintained. He identifies the six discourses as doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism.3 These discourses are highly salient to reflect on because they shape, amongst other factors, the subjects that are taught in legal education, both in content and pedagogy.4

James developed these six discourses through the analysis of Australian texts and practices5 including descriptions of programs on the websites of Australian law schools. James’ discourses affect the teaching of ADR as a discipline area in the legal curriculum. In this chapter I explore discourses of doctrinalism, vocationalism and corporatism in legal education as applied to ADR through my analysis of the data gathered for this thesis and consider how respondents saw the place of ADR in the competing discourses of legal education. I consider legal education discourses in the context of educating future lawyers about ADR. In chapter seven, I deal with the

2 Ibid 378.
3 Ibid.
4 James posits that each law teacher does not remain loyal to one particular approach but might simultaneously adhere to a number of approaches, see Nickolas James, ‘The Marginalisation of Radical Discourses in Australian Legal Education’ (2006) 1-2 Legal Education Review 55.
5 Nickolas James, ‘Power-Knowledge in Australian Legal Education: Corporatism’s Reign’ (2004) 26 Sydney Law Review 587, 591. James argues that these discourses are limited to Australia as there are significant differences in United Kingdom and United States legal education: 591.
discourses of liberalism, pedagogicalism and radicalism. I begin my exploration of the data in the light of the six discourses with a discussion of doctrinalism.

6.2 DISCOURSES OF LEGAL EDUCATION APPLIED TO ADR

6.2.1 DOCTRINALISM

One of the more dominant discourses in legal education is the doctrinal approach. The doctrinal discourse privileges the black letter approach to learning and teaching in law. More critical discourses, such as feminism, critical legal studies and postmodernism, can be marginalised by this approach with its focus on ‘what law is’ rather than engaging in a radical critique seeking to explore what law could be. Law teachers who favour a doctrinal approach tend to adopt teacher-centred pedagogy where lecturers provide the knowledge of appropriate cases and legislation in a discipline area, and assessment concentrates on students providing the ‘correct’ answer to legal case studies in examinations. Mostly, there is little focus on the wider context of legal problem-solving. Doctrinal approaches privilege a legal positivist understanding of the law, where law is seen as a quasi-science. This approach legitimises and reinforces lawyers as providers of specialist knowledge. This focus on doctrine has gradually been tempered with the call for law programs to provide a skills focus. Recent law standards initiatives in Australia progressively require teaching of social justice concerns and law reform in legal education, topics that

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6 James above n 1, 380.


moderate the impact of doctrinalism.\textsuperscript{11}

ADR curriculum generally does not focus upon doctrine. Although there is a growing body of relevant cases and legislation, in comparison to other substantive areas of law, doctrine is minimal. While there is significant growth in legislation dealing with ADR, particularly mandating processes, the focus in most ADR courses has been on the description of various ADR processes and learning skills in negotiation and mediation.\textsuperscript{12} Amongst teachers of stand-alone ADR courses in this study there was a strong consensus that ADR courses differed from substantive law courses due to this lack of doctrine and the focus on interdisciplinary topics such as the nature of conflict and communication. For example, one participant recounted re-drafting a course outline to include a substantial amount of doctrine in order to have the subject accepted by the learning and teaching committee of the law school. She described her colleagues as ‘black letter lawyers’ and she believed she needed to reassure them that an ADR course would fit their doctrinal frame of acceptable law courses:

I referred in the proposed outline to case law about confidentiality and court rules in relation to referral to mediation and I made it look really lawyerly (Q 1 (b) p 2).

By masking the ADR content with the appearance of traditional legal doctrine this law teacher was able to gain acceptance of her subject. In this way she overcame concerns that ADR is too interdisciplinary\textsuperscript{13} to be a legitimate area of study in law. A number of teachers reported feeling this kind of marginalisation by the wider

\textsuperscript{11} Notably, the Council of Australian Law Deans (CALD) voluntary standards, discussed in chapter four, now require law to be taught ‘in context’ with attention to doctrine but also issues of social justice and law reform. See CALD \textit{The CALD Standards for Australian Law Schools} (2009) http://www.cald.asn.au/docs/CALD\textquotesingle20\textperp%20standards\textperp20project\textquotesingle20-%20final\textperp20%20adopted\textperp2017\textperp%20November\textperp2009.pdf at 3 January 2012. See also the discussion of the threshold learning outcomes below.


community in their law school due to the lack of doctrine taught in their courses. For example, one teacher who taught an elective ADR stand-alone course noted:

But I also feel that there’s a lot of kind of you know, suspicion about the area that I work in. That there’s still a bit of an idea in the context of XXX law school that perhaps dispute resolution is a bit sort of light on, you know it’s a bit unserious, a little bit Mickey Mouse…And I think that that’s because it departs from traditional notions of what law’s about. In other words it’s a bit, there’s not a great deal of doctrine, legal doctrine which is taught…So that there’s this kind of failure to understand…the breadth and depth of dispute resolution. And there’s also I think a suspicion about dispute resolution that, because it does stray away from the classical notions of law as a scientific endeavour which is very much focused on objectivity (N 1 pp 13-14).

This teacher notes that ADR does not fit within the positivist frame of other law courses that are focused on doctrine. The positivist view of the law, where legal doctrine is seen as akin to an objective science is challenged by the alternative paradigms of ADR.14 The wider dimensions of ADR, including an interdisciplinary focus, can seem alien to law teachers whose focus is largely on doctrine. For these teachers, ADR may be constructed as divorced from the usual practice of law and thus less valuable in terms of legal scholarship. A participant from Queensland commented in relation to her colleagues that they did not value the teaching of ADR. She believed they saw various ADR subjects as largely the same in content and bereft of doctrine. This participant expressed frustration with the ignorance of her colleagues and their failure to realise that ADR courses do have some doctrinal content. Her frustration is an indication of the low status pertaining to ADR in the view of some law staff:

I know a lot of people who think whether you teach mediation or negotiation or advanced mediation or dispute design or whatever, that it’s all the same thing…there’s a lot of law involved in all of those topics. Not just mediation (Q 1 (a) p 8).

14 As will be discussed in chapter seven this teacher was one of the few in this study who taught second generation practice in her course.
As indicated by this participant, ADR law teachers in this study did not eschew doctrine. The contents analysis of the guides shows that most of the law courses in the study, whether combined with ADR or as stand-alone courses, included at least some level of legal doctrine. In contrast, the two social science ADR courses that were electives available to law students did not include any legal doctrine (see Appendix G). This indicates the different ways the discipline area of ADR may be taught. It can be focused on the development of skills and theory in ADR and it can also include the law pertaining to ADR. The legal education context of most of the courses in this study meant some doctrine was included in these courses.

An impression of a lack of legal substance in the teaching of ADR can come from students as well as from other staff. For instance, another participant from Queensland commented on the need for students to accept the differing content and pedagogy of ADR subjects:

And she said ‘There's no cases and there's no legislation. I'm not learning anything.’ And I said, ‘No, this is a skills unit essentially.’ And also there’s a lot of theory in our unit as well, but because it wasn’t black letter, because she didn’t have cases and legislation (we do actually include some of that later on), she felt she wasn’t learning anything (Q 2 (a) p 3).

A Victorian ADR teacher also spoke of the small percentage of students who did not value any subjects in a law degree that did not privilege black letter law:

…some graduates thought this was a Mickey Mouse subject (V 2 (a) p 2).

For some students only doctrine-focused content is acceptable in the legal curriculum. One teacher in the study argued that it was important to pace law students when introducing them to negotiation and mediation theory and practice. She acknowledged the resistance of some students to interdisciplinary theory and skills because of their preference for an adversarial approach:
…because you know a lot of them are already thinking this is terribly touchy-feely and why am I bothering with this? [They think] I just want to sue them out of the ground (V 5 (c) p 2).

Thus the predominance and privileging of doctrine in the legal curriculum can mean that ADR subjects are not highly valued by some staff and students. This issue is linked with the fact that ADR is not a required subject for admission to practice as a lawyer in the various states in Australia. Presently all compulsory areas of law that must be mastered for admission to practice in Australia are doctrinal, such as contract or evidence law. This fact, coupled with the lack of emphasis on legal doctrine in ADR, can mean that this area is seen as ‘second rate’.

6.2.2 VOCATIONALISM
The discourse of vocationalism suggests that ADR in legal education may be increasingly valued due to the changing nature of legal practice. Discourses relating to vocationalism privilege legal curriculum that contributes to the development of the legal practitioner.\textsuperscript{15} The focus of this discourse is on the training of graduates to ‘think like lawyers’ and develop a professional identity.\textsuperscript{16} Thus the focus is on knowledge areas, skills and ethics appropriate to practice.\textsuperscript{17} Although not presently mandated as part of university legal education, legal skills are taught in many law programs.\textsuperscript{18} As indicated in chapter four many legal skills, including ADR, are included in the new standards in legal education, the threshold learning outcomes (TLOs) released in December 2010.\textsuperscript{19} However, ADR is both theory and skills education. This discipline

\textsuperscript{16} Sullivan et al, above n 14, ch 1. As discussed in chapter four in the Carnegie report the authors argue that more should be required of law schools than teaching law students to ‘think like a lawyer’.
\textsuperscript{19} Australian Learning and Teaching Council (ALTC), \textit{Learning and Teaching Academic Standards Project: Bachelor of Laws: Academic Standards Statement} (December, 2010).
area covers a number of learning outcomes that a law student should master as part of their studies. ADR is relevant in four prime areas out of the six TLOS. These include TLO 1: knowledge, TLO 3: thinking skills, TLO 5: communication and collaboration and TLO 6: self-management.\textsuperscript{20} Although ADR is not currently mandated for admission as a lawyer in Australia, learning outcomes from ADR courses are arguably vital for contemporary legal education.

The teachers in this study consistently expressed support for the compulsory inclusion of ADR in the legal curriculum. Participants stated that this was due to the changing nature of legal practice and the need to ready lawyers for a world of work where ADR is standard in legal practice. In the interviews quoted below, two teachers expressed the view, shared by many participants, that ADR was necessary to prepare students for legal practice:

I think the teaching of law students in ADR is critical on two fronts. The first is if we interpret ADR broadly to include negotiation, conflict management skills, conflict transformation in a broad sense, then it seems to me that lawyers have needed this sort of training so long as there have been law schools, so these are essential skills. The second thing in terms of teaching ADR [is] as part of the legal system’s systemic response to conflict management (V 3 (a) p 1).

Any student who has any involvements with, you know, drawing up commercial contracts, who has any contact with people who are in conflict, you know, does any work with the court or tribunal is going to come into contact with alternative dispute resolution. I mean whether they like it or not, or know anything about it or not, it’s pretty much inevitable nowadays. So it seems to me that it’s no longer really excusable for law schools to be teaching litigation, when it’s effectively…focusing on a very small part of legal practice. And they should be talking also about alternative dispute resolution which is a much more significant part of legal practice (N 1 (a) p 2).

\textsuperscript{20} Ibid 10. There are also ethical issues in ADR that are relevant under TLO 2: Ethics and Professional Responsibility.
Many teachers in this study thought that the main vocational contribution of ADR is in building negotiation and mediation skills in law students and fostering a non-adversarial approach to legal disputes. The skill-building focus was emphasised in all courses that dealt with ADR as a stand-alone course. Two of the three ADR courses that were combined with civil procedure lacked a skills focus as these courses dealt with ADR through lecture/seminar material and omitted experiential learning. Only one of the three courses in ADR combined with civil procedure used a skills process and included the integrative bargaining approach. In this course, and the stand-alone ADR courses, participants described the central role of skills teaching in their curriculum. For example, participants commented:

It’s a skills based subject, okay, so that our students come out with skills. And this is [about] skills, a communication skill, negotiation skills and rudimentary mediation skills (V 2 (b) p 13).

Yeah, and so that’s really, should be the foundation I think of ADR practice for lawyers, is negotiation skills, then you build on that an understanding of other processes including mediation, arbitration as well, but then you need some…process skills for those various processes (V 3 (a) p 8).

As well as integration of skills into law students’ future legal practice beyond graduation, mediation and negotiation skills can also be immediately useful in students’ personal lives. ADR courses generally involve a focus on communication skills for lawyers and usually teach skills such as empathic listening, summarizing and reframing. Several participants, in both Victoria and Queensland, commented on the opportunity to teach communication skills in these courses that were useful in students’ personal as well as professional lives. One participant noted the positive feedback to her strategy of linking the course to broader life skills:

The thing that I think worked well, and I had a lot of students say to me afterwards, things like this was the first subject I did in law school that actually has some real use not just as a lawyer but in every day...

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life. So those sorts of comments were really good and I guess that's what I wanted them to get out of it that it was kind of related to their legal practice but it was much bigger than that (Q 1 (b) p 6).

Other ADR teachers, in both Victoria and Queensland, noted that positive student feedback usually linked to the realisation that the skills could be used beyond the legal context:

It’s intensive practical skills, it’s taught by an enthusiastic crew. People routinely say things like, ‘This is the best course I ever did at uni,’ or ‘This is so practical. It’s not just for work, it’s also for my life skills.’ You obviously get that kind of buzz (V 1 (d) p 4).

People like it because it’s skilled, because it’s different, because they’re building something, a personal skill that’s going to stay with them, whether or not they’re lawyers (Q 1 (a) p 9).

One of the primary objectives I think is to skill students up in processes that they’re likely to encounter when they practice. I think there’s broader objectives in that I do think that teaching ADR skills [gives skills] more broadly in terms of negotiation, even if they never practice as a lawyer, and also assists them in terms of facilitating meetings and a whole host of other communication skills. So I suppose on the one hand, you’re actually skilling people up to work in legal practice, on the other hand you’re also skilling them up with more generic skills that are useful in other professions…no matter where they go after law school, which I think is appropriate these days, given that not everybody proceeds into…practice (Q 1 (c) p 1).

The new law standards, the TLOs, include the area of communication and collaboration.22 The standards require skills such as active listening and specifically refer to negotiation as an oral skill used in effective, appropriate and persuasive

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22 TLO 5 deals with communication and collaboration: ALTC, above n 19, 20.
communication. In the content analysis of the guides for this study, ten of the thirteen ‘main’ ADR law courses included generic communication skills in the course objectives in some form. All stand-alone ADR courses included communication requirements (see Appendix G). My finding shows that communication skills are integral to the curriculum of courses taught by the majority of teachers in this study. Thus ADR courses are a vehicle for developing broader communication skills as well as specific skills in negotiation and mediation.

The TLOs include a standard about self-management, an outcome that can also be achieved in an ADR course. Self-management includes the ability for students to learn and work independently and to reflect on their own learning, so that they can progress both personally and professionally. Anna Huggins argues that in law schools this learning outcome requires ‘emotional intelligence, personal development, communication skills, resilience and self regulation.’ Self-management is also valuable in terms of assisting students with mental wellbeing. ADR serves this learning outcome through the teaching of topics such as emotional intelligence and communication skills. Therefore the vocational discourse is increasingly important in ADR and is reinforced by the new standards in law, released after the data for this study was gathered. However, the construction of ADR as focused on skills—both legal and interpersonal skills—aligns with first generation practice and pedagogy. Michelle LeBaron and Mario Patera suggest that law courses that adopt the integrative/facilitative approach to content and pedagogy focus largely on skills and

23 Ibid 21. The standards distinguish between communication skills that are necessary for advocacy and those for interviewing, negotiation and mediation.

24 Ibid 22.

25 Ibid 22-23.


27 Ibid 26-29.

28 This issue is discussed in more detail in chapter seven.
include little theory other than the ‘win-win’ discourse of integrative bargaining.\textsuperscript{29} This issue is discussed in detail in chapter seven.

Additionally, the ways that ADR is included in the legal curriculum will contribute to whether this area is taught primarily with a skills focus. My study establishes that ADR is widely represented in law schools in Australia. The data shows that each university in the study included ADR in their curriculum (see Appendix H). ADR was a stand-alone course, either elective or compulsory, or was combined with another area, such as civil procedure. Participants also referred to various areas of ADR, primarily negotiation and mediation, being taught as a module in other substantive law courses such as first year contract law. However, there was little uniformity in the way that ADR was taught to students. Three universities in the study included ADR as a stand-alone academic course: La Trobe University, RMIT University and University of Southern Queensland. Three universities included ADR in a combined ADR with civil procedure compulsory course: University of Melbourne, Deakin University and Victoria University. Three universities provided ADR as an elective, preceded by a module integrated with earlier compulsory substantive law course(s): Bond University, Queensland University of Technology, Griffith University. Another three universities provided ADR as an elective only: Monash University, University of Queensland and James Cook University. In Victoria Monash University also offered another elective that included ADR with non-adversarial justice.

Of the universities that included ADR as a stand-alone academic course, one law school positioned the course as a first year compulsory course and two had ADR as a later year compulsory course (see Appendix H). The literature in ADR argues for the inclusion of ADR in first year in order to challenge the adversarial paradigms of most other substantive law courses.\textsuperscript{30} The aim is to include ADR early in a law program so

\textsuperscript{29} Michelle LeBaron and Mario Patera, ‘Reflective Practice in the New Millennium’ in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), \textit{Rethinking Negotiation Teaching: Innovations for Context and Culture} (DRI Press, 2009) 48-50.

that non-adversarial approaches are part of a law student’s ‘standard philosophical map’ in place of the philosophy that disputes are decided by third parties in court. This approach was adopted in only one law school where ADR was a stand-alone course. Two out of three law schools that combined ADR with civil procedure included this course as a compulsory later year course. One law school included its combination course as a first year compulsory offering and had done so after a major curriculum review. The course was deliberately included as a first year offering in order to introduce students to dispute resolution paradigms that included both ADR and litigation options. In the interviews, the majority of teachers were of the view that ADR should be included as a first year course, to combat the adversarial constructs of much of the rest of legal education. There was strong support for a first year positioning of ADR, but no clear agreement on the way that this positioning might be achieved.

The literature on legal education has progressively expressed support for the integration of legal skills, including ADR, in substantive law courses.31 Grounding legal skills in real world contexts drawn from problem-solving scenarios in substantive law courses provides situated learning for various skills including those taught in ADR.32 Such an approach might mean that negotiation skills are part of a


problem posed in contract law. In this study, in the law schools where ADR was integrated into substantive law courses and then offered as an elective in later years, the teachers stated that ADR was usually included in first year subjects, such as contract or tort law. One teacher described integration of various legal skills in the following way:

So if you’re teaching commercial law you must teach interviewing also, and you must assess interviewing…if you teach torts, you must teach negotiation…there’s twenty of those skills units that are mandatory in [our] LLB degree and substantive teachers have to learn how to teach the skills modules (Q 4 (b) p 2).

According to one teacher, an integrated approach gave students the chance to practice ADR skills in a range of courses and provided more opportunities for building skills:

You can expose them to a range of practices. It’s difficult to create the space in which they can actually engage in those different practices simply by reason of time…The idea is that there'll be material contained in a range of courses rather than there being a compulsory ADR course (Q 3 (a) p 3).

However, it can be problematic to integrate ADR, with the complexity of mapping the various legal skills, and potential resistance from other law staff. Also, staff who have to teach the skills might in time reduce the ADR content due to the competing need to include doctrine in their substantive law course. As one teacher noted in regard to their integrated curriculum:

I think it [ADR] gets lost. Every time there’s a curriculum review it gets mapped. So 2003 was the last curriculum review with a whole lot of transition stuff in the first year and skills and ‘what not’ were developed and done…but since then things have dropped off and units

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have added things or discarded things so we've just done another curriculum review and it’s getting mapped again (Q 2 (a) p 4).

Some participants in this study supported integration whilst expressing doubts about the lack of ADR expertise among teachers who taught the subjects where ADR was integrated. In his evaluation of integration of ADR into substantive law courses in the United States, Ronald Pipkin identifies lack of commitment and expertise of non-ADR teachers as a problem in some universities. One teacher believed this lack of expertise posed a significant barrier to the success of an integrated approach to ADR:

…one of the things about integrating it or having it [as a] more substantial part of the law curriculum is [teachers’] worry that they don’t have any skill base to draw on themselves (V 2 (a) p 24).

One teacher suggested training staff in ADR skills to address this dilemma. Another advocated recruiting practitioners who could draw on their ADR experience however, he noted that practitioners usually lacked the academic credentials that universities value:

…I also know integration is doomed to fail because it requires so much [in terms of] resources. You’d have to sack half your staff and you’d have to hire practitioners who have become academics. So you’d have to change the nature of your hiring policy, which the universities won’t do. So integration is a noble ideal which will only succeed in a few places (Q 4 (b) p 10).

Some teachers in this study stated that only a limited amount of time can be devoted to ADR in a substantive law course as this area has to be ‘fitted in’ to an already full curriculum. It is unlikely that an integrated approach to the inclusion of ADR would include in-depth discussion of the variety of models of ADR as the time devoted to ADR is constrained by its placement in a substantive law course.

The last option is to provide ADR as an elective choice. Where ADR is an elective

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this means that only a small percentage of the students in a particular law school will have the opportunity to study this area as an academic course. Therefore, a student’s experience might be limited to hearing of ADR in another subject such as an introductory law course. ADR was usually offered only as an elective in the more established, prestigious universities in the sample, with the exception of the University of Melbourne. As indicated, the University of Melbourne now has a first year compulsory course in ADR combined with civil procedure. Recently, another prestigious university, the University of Western Australia, has introduced a Juris Doctor program and has included a first year course called Dispute Resolution that is dedicated to ADR and does not include civil procedure. These developments suggest that when law schools review their course offerings, the vocational discourse will lead to greater prominence for ADR courses in the curriculum. This rise in the significance of ADR will be reinforced by the release of the TLOs. The standards are likely to be the impetus for many law schools to review their curriculum and this may lead to a greater focus on ADR. As noted previously in this thesis, the release of the TLOs and the need to regularly review curriculum has led to a recent review at Monash University, one of the law schools in this study.

My findings show that teachers of ADR stand-alone courses in this study consistently argued that ADR should be a compulsory course in some form. This objective is achieved where ADR is combined with civil procedure courses, as civil procedure is a compulsory knowledge area for admission to practice. Similarly, where ADR is integrated as a module in another law course, ADR will be compulsory if that course

35 In Australia the most prestigious universities are known as the ‘Group of Eight’, and collectively promote their research and teaching. Included are Australian National University, University of Sydney, University of New South Wales, University of Melbourne, Monash University, Adelaide University, University of Western Australia, University of Queensland. See Group of Eight Australia http://www.go8.edu.au/ at 27 November 2011. Another association is the ‘Australian Technology Network of Universities’ that includes Curtin University of Technology, University of South Australia, RMIT University, University of Technology Sydney and the Queensland University of Technology. See Australian Technology Network of Universities http://www.atn.edu.au/ at 3 January 2012.

36 University of Western Australia, Law School: The Future of Law at UWA (2011) 2.

37 Monash University, Faculty of Law, Curriculum Review, Consultation Paper (2011) 4-6. At the time of writing the results of this review had not been announced.
is compulsory, such as contract or tort law. Although these approaches assure student engagement with ADR, the quality of the learning and teaching experience in terms of theory and practice of ADR may not be assured. In two of the three courses where ADR was combined with civil procedure, the ADR component was marginal to the discussion relating to litigation. In one course that combined ADR with civil procedure there was some inclusion of ADR theory and practice, but it was largely confined to first generation practice. From my analysis it would appear that combining ADR with civil procedure reduces the class time and opportunity for exploration of ADR. Similarly, an integrated approach to the inclusion of ADR will generally mean that only a limited amount of time will be devoted to the theory and practice of ADR. In contrast, a compulsory stand-alone ADR course, as adopted in three of the universities in this study, gives the best opportunity for students to explore ADR theory and practice in depth as a complete semester is devoted to the area. In a compulsory course in ADR there would be more opportunity to explore the full range of ADR models and practices. Positioned in the first year of a law program such a course would provide students with sustained engagement with non-adversarial practice and combat the dominant adversarial frames of much of the rest of legal education, as well as provide the space for the teaching of diverse models. This approach might also be combined with a curriculum that integrates ADR in later compulsory courses to ensure students learn of ADR in ‘situated’ contexts.

6.2.3 CORPORATISM
Law schools and universities are anxious to maintain legitimacy in their course offerings so that their law degree contributes to the overall corporatist strategy of a university; adding to both income and prestige.\textsuperscript{38} In the context of legal education corporatism relates to ‘the set of statements and practices about legal education produced by law schools, law teachers and legal scholars that emphasise and prioritise the accountability of teachers and students, the efficiency of the teaching process and

\textsuperscript{38} Margaret Thornton, ‘The Law School, the Market and the New Knowledge Economy’ (2007) 17 Legal Education Review 1, 5-6; 19-22.
the marketability of the law school.’\textsuperscript{39} The influence of corporatism in legal education is profound in both content and pedagogy. For instance, there are now university initiatives to govern pedagogy through evaluation of subjects and programs.\textsuperscript{40} One participant expressed some concerns in relation to university evaluation of individual subjects and the trend to require student survey data regarding teaching experience:

\begin{quote}
Student evaluations are increasingly important for funding and therefore for what we’re being told to do, and there’s no doubt that we’re being encouraged to increase our [evaluation] numbers. In some ways I think that’s beneficial to students, in some ways I’m cynical about it (V 1 (a) p 7).
\end{quote}

A Queensland participant, who had also taught in law schools in two other Australian states, acknowledged that evaluation by students could affect curriculum choices:

\begin{quote}
They did the standard evaluation, the student evaluation of teaching and learning. I asked them very specific questions…[including] would they recommend it to other students, how useful was it as part of their law degree, those sorts of questions (Q 1 (b) p 19).
\end{quote}

Most teachers in this study reported that they received high evaluations and positive feedback in their courses due largely to the practical, situated nature of their pedagogy. In a recent critique of the Australian National University law programs, law students at the university expressed a level of dissatisfaction with pedagogy due to the over reliance on doctrinal teaching, valuing practical learning linked to their

\textsuperscript{39} James, above n 5, 588. James states that ‘The success of corporatism within the discursive field of Australian legal education is shown to be a consequence of various social and historical contingencies. These include the history of intervention by the Australian government into legal education; the obligations imposed upon law schools in order to qualify for both public and private funding; the charging of student fees; the influence of management theory and scholarship; and the marketability of ‘law’ as an educational product’ 590.

\textsuperscript{40} See for a discussion of Course Experience Questionnaire (CEQ) http://www.itl.usyd.edu.au/CEQ/ at 3 January 2012.
profession.\textsuperscript{41} This is an example of the way that law students in Australia are increasingly more vocal about their studies and what they see as relevant. Arguably, positive student evaluations are a means for ADR teachers in law schools to raise the profile of their courses. However, in my research there were some concerns expressed by a minority of teachers about student evaluation. For instance, the rising importance of the corporatist valuation of student feedback may mean that teachers must guard against negative feedback. Students may rate a course negatively when they feel they are not studying a legitimate area of law and practice that contributes to their admission as a lawyer and assists in legal practice. In this study three teachers commented on this concern and described adjusting their courses in response. For example, one teacher included readings and placed increased emphasis on links between ADR and the changing role of lawyers in legal practice.

Student perceptions of ADR may affect evaluation figures if students see this area as unnecessary, and this may be especially evident if the students are required to study the course because it is core in a law program. One teacher in this study reported that some students, mainly those entering as graduates, complained to the Dean that the course content of the compulsory ADR course was irrelevant. In a subsequent review the school decided that graduate entry students would not be required to take the compulsory ADR course. At the time of interview this teacher advised that the program would be amended to achieve this change. The ADR course content at this university was focused upon first generation practice. It is possible that students, persuaded by the corporatist discourse, could be even more dissatisfied if a teacher included second generation practice, with its emphasis on critical theory, in an ADR course. Research into Australian legal education has shown a decline in the number of law courses based on high levels of theory that are offered as these courses lack vocational appeal for students.\textsuperscript{42} Therefore, it may be important to frame an ADR course as relevant to admission and the practice of law to ensure that students evaluate the course positively.

\textsuperscript{41} Annan Boag, Melanie Poole, Lucinda Shannon, Christopher Patz and Fern Cadman, \textit{Breaking The Frozen Sea: The Case for Reforming Legal Education at the Australian National University} (2010) vii-xii. The report also recommended the teaching of law in context at ANU, including more theory.

\textsuperscript{42} Johnstone and Vignaendra, above n 17, 107. Student demand was generally higher in commercial law courses.
Efficiency has also become a major issue in law school education due to the lack of sufficient funding of undergraduate courses in this area. As discussed in chapter four, students pay for a part of their degree through government charges in the Australian university education system. Australian law students pay the highest fees on the fee scale for their degree. In contrast the Federal government contributes to law schools the ‘lowest amount that it contributes to any discipline.’\(^{43}\) Thus many law schools struggle to fund high-cost pedagogy, such as simulations and legal clinics.\(^{44}\) A strong theme that has emerged in this research is the degree to which ADR teachers, who taught in stand-alone ADR subjects, were affected by funding concerns. This concern was not evident for two of the law teachers who taught in subjects where ADR and civil procedure were combined. These teachers did not include experiential learning in their learning and teaching design.

The development of skills in negotiation and mediation can be a time-consuming and costly exercise due to the need for experiential role-plays and small group learning. The tension of balancing cost considerations with providing quality learning in the skills of negotiation and mediation was a frustration for many of the research participants. For example, a law teacher in Queensland noted the strain on teachers when attempting this kind of pedagogy and the fact that many will abandon the approach:

Well if you run any classes, skills class, it’s very labour intensive both in organising role-plays and then supervising them. So it’s very exhausting and hard work, and expensive to get the right number of people there. So given that, what most people do is they don’t do it. They go back to theory, because skills teaching [is] too exhausting (Q 4 (b) p 14).

Similarly, a participant in Victoria expressed frustration with cost concerns in

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\(^{44}\) Jeff Giddings, ‘Contemplating the Future of Clinical Legal Education’ (2008) 17 Griffith Law Review 1. Insufficient funding of legal skills simulations can negatively impact on pedagogy and student learning: Giddings above n 31, 278.
providing weekend intensive assessment of students’ legal skills by industry coaches. In order to meet budget constraints the course assessment was changed to allow tutors to assess the ADR skills in tutorials, which could be described as less beneficial for students learning:

…there was a range of coaches and assessors and that’s a very expensive exercise when you start talking about 200 students…but then the Head of School said this is too expensive and so we had to modify...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 (V 2 (a) p 7).

Cost was a consistent theme for every interviewee teaching in undergraduate law ADR stand-alone courses: each of the teachers in this category commented upon cost concerns. Those teachers who taught ADR as an elective capped student numbers to ensure quality learning and teaching outcomes. However, this approach was not possible in undergraduate compulsory ADR courses where numbers could be as high as approximately 300 students. In these courses, cost concerns impacted on pedagogy and reduced the degree of small group learning desired by teachers. Notably, cost issues were not a concern in the core ADR courses in the two postgraduate law degrees that were part of this study. Experiential learning was unthreatened in the ADR stand-alone course and the combined ADR and civil procedure courses that were core courses in the Juris Doctor programs. Teachers in these two courses reported that if numbers were high, multiple classes were offered to ensure high quality pedagogy, or alternatively additional staff members were employed to assist the teacher. The Juris Doctor programs are largely funded independently of Commonwealth government funding in Australia and thus have more resources
available for pedagogy.\textsuperscript{45} This suggests that present Commonwealth government funding of undergraduate law courses may be insufficient to teach ADR as a core course that builds skills through experiential learning. Universities in Australia seem to perceive law programs as providing prestige for a relatively low cost.\textsuperscript{46} However, the perception of ‘cheap prestige’ is only sustainable where there is inadequate attention to teaching legal skills, and most learning and teaching is confined to large lectures. This approach to learning and teaching limits the opportunities of law schools to provide quality legal education and scholarship. Importantly, for the concerns of this thesis, Margaret Thornton argues that currently business discourses dominate legal education and theory, marginalising courses that discuss theory and law reform:

On the one hand, those areas of law understood to be facilitative of commerce and which involve practical skills and technical excellence, the linchpins of legal practice, are favoured. They include contract, corporations, trade practices, competition, intellectual property and taxation law, taught from a technocratic rather than a critical perspective. Economic globalisation has also given the cluster of offerings around international business law, comparative law and private international law a boost. On the other hand, those areas possessing no obvious use value, such as critical understandings of legal studies, encompassing critique and theory of all kinds, can be discomforting because they illuminate and interrogate the how, the why, the is and the ought to of law.\textsuperscript{47}

\textsuperscript{45} Juris Doctor programs can favor small seminar style classes and intensive teaching as students are often in paid employment: Maree Sainsbury, ‘Intensive Teaching of Graduate Law Subjects: McEducation or Good Preparation for the Demands of Legal Practice’ (2008) 1 & 2 Journal of the Australasian Law Teachers Association 247, 248-249.

\textsuperscript{46} James, above n 5, 602.

Theory is marginalised in legal education largely because corporatism values a marketable product. Prospective and ongoing students generally value legal education that links with the profession and the prospect of employment as a lawyer rather than socio-legal scholarship per se. There is thus a nexus between vocationalism and corporatism creating a powerful story that law schools should have good links with, and high awareness of the profession, although this approach may marginalise teaching and research that is critical of the profession. The influence of practicing lawyers may mean that courses focus on black letter law and technical skills rather than theory and critique.

The adoption of ADR by government and courts and to some extent the legal profession, means in most instances that ADR could be said to enhance the marketability of law programs. Other areas of law, such as international commercial law that draws heavily on business discourses, may contribute more to perceived prestige but given the recognition of ADR as a site for the development of key lawyering skills, this discipline area contributes both to vocationalism and, through marketability, to corporatism. In this respect the strengths of ADR are also its weaknesses. Pedagogies that value small group learning through role-plays and skill development, a common approach in ADR teaching, are often expensive to run as compared to substantive law subjects offered in large lectures. Thus despite the potential benefits of ADR, the subject generally falls foul of the efficiency imperative of corporatism.

Matthew Ball argues that students co-construct their own identities, linking with the profession, the law school and more general discourses in society. They require from law schools education that fits with their construction of the lawyer’s identity: Matthew Ball, ‘The Construction of the Legal Identity: ‘Governmentality’ in Australian Legal Education’ (2007) 7 Queensland University of Technology Law and Justice Journal 444, 457.

It is argued that law schools should gain further autonomy from the influence of the legal profession as links that are too close to the profession can be an impediment to change in legal education: Keyes and Johnston, above n 8, 555.


Keyes and Johnstone, above n 8, 550.
One of the academics who participated in this study was specifically asked by her Head of School to reconfigure an ADR course to reduce costs: ‘[The] brief was to sort of replicate the skills that were taught but not the cost (Q 2 (a) p 8).’ Similarly, another participant was asked to take out experiential learning exercises:

[I] was specifically requested to turn a skills courses (small group teaching) into a theory course in large lecture format—150+ students (Q 1 (d) survey 1).

The cost-cutting measures experienced by law teachers who participated in this study point to the reduction in the potential of law students to learn from ADR if small-group teaching, and experiential learning are threatened. Building student understanding of non-adversarial practice and developing student expertise in the theory and skills of negotiation and mediation, either first or second generation practice, risks being undermined in many law schools in this study by the pressure of the corporatist discourse.

6.3 CONCLUSIONS
Teachers of ADR in law schools in this study articulated a sense of marginalisation. The wider discourses of ADR in legal practice support the increased teaching of ADR in legal education. However the focus on doctrine in law schools in this sample meant that ADR courses were not as highly valued in the legal curriculum as black letter law courses. Due to the reification of black letter law and the high status given to doctrinalism, the interdisciplinary practices of ADR are often discounted in law schools in the two states studied. ADR does not include a heavy emphasis on legal doctrine, although legislation and cases dealing with the area are growing. Rather, ADR generally attempts to deal with first generation theory and with skills increasingly important to present day practice such as negotiation and mediation. The specific skills focus works to further marginalise ADR as skills are not as highly valued as doctrinal teaching.

ADR is well represented in law courses in the two states studied as part of this thesis. In Victoria it was frequently included as a compulsory course. In Queensland ADR material was generally integrated into substantive law courses and was often also offered as a later year elective. Although ADR was part of the law curriculum, the
teachers in this study who taught ADR as a stand-alone academic course did not feel confident of their subject’s position in the legal curriculum. There was a strong preference amongst participants for ADR to become a knowledge area required for admission to practice as a lawyer to safeguard the teaching of this discipline area in law programs. Some teachers were concerned that where ADR is integrated into substantive law courses, there would be insufficient time to address ADR in any depth and that the skills of the teacher may not be sufficiently expert.

This study suggests that the vocationalism discourse supports the inclusion of ADR in the legal curriculum. Law schools may consider its inclusion because ADR contributes to the legal professional identity where non-adversarial practice is privileged by courts and government policy. Teachers in this study saw their role as building students’ skills in negotiation and mediation to prepare them for legal practice. There was also a clear focus on generic communication as shown through interview data and a content analysis of the course guides. According to the teachers these generic communication skills, combined with first generation negotiation and mediation skills, prepared students to address conflict in their personal as well as professional lives. This study also found that skills development is under threat in some law schools from increased budgetary constraints. ADR teachers who taught stand-alone courses to undergraduates, where student numbers were not capped, expressed frustration that the positive student responses to their teaching and learning strategies were undermined by the corporatist discourse and the need to deliver the program with less and less support. For example, the widely adopted pedagogy of experiential role-plays debriefed in small groups by students and requiring teacher feedback to achieve skills development is a costly approach to teaching in this area that often risks reduction due to budgetary constraints. Some teachers in this study directly expressed this risk and reported requests to reduce tutorials focused on experiential learning or re-develop courses so that the costs could be reduced.

There is some room for optimism for ADR based on the recently articulated TLOs in legal education. As noted, these include the teaching of ADR and thus present a marked improvement in the status of ADR in legal education. The standards mean

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that ADR should be a compulsory area of study in a law degree in some form. However, my findings show that the way that ADR is included in legal education is crucial. ADR can be combined with civil procedure and where this approach is taken there is the danger that ADR may be taught with limited attention to theory and practice and be merely ‘tacked on’ to the teaching of litigation. Where ADR is integrated into a substantive law course there is the danger that time constraints and the lack of ADR skills of the teacher will mean that this area is taught without sufficient depth. From my analysis I argue that the inclusion of a first year compulsory stand-alone course in ADR is the best option to ensure the teaching of the full range of ADR theory and practice. Whether such an approach would include second generation practice is addressed in the next chapter where I consider James’ last three discourses: liberalism, pedagogicalism and radicalism.
CHAPTER 7
ADR AND LEGAL EDUCATION: THE DISCOURSES OF LIBERALISM, PEDAGOGICALISM AND RADICALISM

7.1 INTRODUCTION
In this chapter I further explore the discourses of legal education identified by Nickolas James, as applied to ADR. I specifically consider the discourses of liberalism, pedagogicalism and radicalism, and assess the approaches of law teachers in this study through the framework of these discourses. In this chapter I consider the philosophical underpinnings of the teaching practices of the teachers in this study, focusing first on liberalism.

7.2 DISCOURSES OF LEGAL EDUCATION APPLIED TO ADR
7.2.1 LIBERALISM
The discourse of liberalism in legal education values ‘individual freedom, social responsibility and the inculcation of an informed rationality.’ It seeks for universal truths in the legal context and is interdisciplinary, drawing from areas such as psychology and non-Western cultures. Liberalism advocates individual freedom for staff in terms of choices about their courses, and autonomy from excessive regulation from the university, the legal profession, or government. According to this approach students too should have input into legal education. The teaching of law is placed in context where access to justice and issues of fairness are emphasised, often through engagement with ethical concerns in law. Along with social responsibility, liberalism privileges informed rationality in legal scholarship. Liberalism has been a prominent influence in many law schools. However, lately it has been supplanted by

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2 Ibid 389.
5 Ibid.
6 Ibid 167-168.
7 James, above n 1, 391.
doctrinalism which has re-emerged in recent years as an important discourse due to the increased valuing of black letter law.  

New standards in legal education will reinforce the importance of liberalism to legal education. As noted in chapter four the Council of Australian Law Deans (CALD) has included the teaching of law ‘in context’ as part of the voluntary standards for law school education endorsed in 2009. For instance, under standard 2.3.2, CALD requires the curriculum in a law school to allow students to develop knowledge and understanding of various areas including substantive law and ‘the broader context within which legal issues arise, including, for example the political, social, historical, philosophical and economic context.’ The recently released threshold learning outcomes (TLOs) also include these contextual concerns. For instance, as part of TLO 1 on knowledge, the CALD concerns are addressed and then expanded:

... social justice; gender related issues; Indigenous perspectives; cultural and linguistic diversity; the commercial or business environment; globalisation; public policy; moral contexts; and issues of sustainability.

Another area where CALD standards and TLOs may reflect the liberal discourse is in relation to ethics. For instance, the TLOs include wider dimensions of ethical understanding than merely addressing lawyers’ ethical rules and require consideration

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9 Standard 2.3.2 as part of curriculum content states: General requirements: The curriculum seeks to develop knowledge, understanding, skills and values: knowledge of the law; understanding of legal principle and of the context within which legal issues arise; skills of research, analysis, reasoning, problem-solving, and communication; and the values of ethical legal practice, professional responsibility, and community service: CALD The CALD Standards for Australian Law Schools (2009), 3 http://www.cald.asn.au/docs/CALD%20standards%20project%20final%20adopted%20November%202009.pdf at 3 January 2012.

10 Ibid 4.

of ‘the wider social context’ of any ethical dilemma.\textsuperscript{12} Under TLO 2 dealing with ethics, students need to develop an understanding of the lawyers’ ethical duty to promote justice, ‘fairness, legitimacy, efficacy and equity in the legal system.’\textsuperscript{13}

With the likely rise of the liberalism discourse in legal education due to these recently introduced standards, ADR stands to gain more credibility. ADR accords with liberal philosophies in that it provides improved access to justice for potential litigants who cannot afford to take their matter to court.\textsuperscript{14} Negotiation and mediation address the liberalist values of party empowerment and individual choice.\textsuperscript{15} However, as discussed in chapter one there are significant likely criticisms of ADR from a liberalist perspective. For example, critics have expressed concerns regarding the movement of justice from the courtroom to the mediation room through the increased use of ADR practices such as mediation. As private practices, parties in negotiation and, particularly, mediation run the risk of entering into agreements that are not reviewed by a court and may be deemed unfair in comparison to a legally sanctioned agreement.\textsuperscript{16} Additionally, critics concerned about feminist and cultural values have questioned power imbalances in ADR suggesting that parties may not be able to bargain on equal terms.\textsuperscript{17} In terms of ethics, there are tensions relating to the role of the lawyer in ADR, particularly in regard to advocating for settlement where it may be appropriate for a client to litigate.\textsuperscript{18} This issue has been raised in the context of collaborative law where lawyers commit to a collaborative process, usually with

\textsuperscript{12} Ibid 13.
\textsuperscript{13} Ibid 15.
\textsuperscript{15} Ibid 139-165.
significant disclosure, and agree beforehand not to litigate.\textsuperscript{19} The interdisciplinary nature of negotiation and mediation fits with a liberalist agenda. Importantly, the discourse of liberalism may overlap with the discourse of vocationalism.\textsuperscript{20} ADR may benefit from the intersection of these two discourses where vocationalism is framed as dealing with more than the technical skills of the lawyers’ role, to include issues of social justice and law reform. In my study there was evidence of liberalism from the content analysis of the course guides provided by the ADR teachers as part of the research. Objectives relating to appropriate processes in dispute resolution and choice of the correct process articulate the need for a fair process for disputants. Each of the ADR stand-alone courses in this study indicated an objective of this kind in their course guide (see Appendix G). This objective was also evident in one of the combined ADR and civil procedure courses. For example, the section of the course guide dealing with ADR in this combined course is extracted below:

On completion of this subject, students should be able to:

- understand and critique dispute resolution processes and theories of disputing behaviour
- select and use appropriate dispute resolution methods
- apply their learning to analyse case studies and to propose and critique law reform initiatives

In the interviews, participants broadly evinced a desire to provide students with an understanding of ADR because it provided the opportunity for a ‘fairer’ engagement with conflict. This is in contrast to the litigation process that teachers generally perceived as beset with problems in providing access to justice. This view of courts might also be said to link with the non-adversarial client-centred approach of many of the teachers in this study, discussed in chapter five. The dominant integrative/facilitative models of negotiation and mediation, which were the most frequently taught models, could be said to accord with liberal ideals. These first generation practice approaches emphasise individual needs, rational decision-making and settlement of disputes. In contrast, as discussed in chapter three, the

\textsuperscript{19} Maxine Evers, ‘The Ethics of Collaborative Practice’ (2008) 19 \textit{Australasian Dispute Resolution Journal} 179.

\textsuperscript{20} James, above n 3, 178.
transformative and narrative models would not be categorised under the liberal philosophy. These models shift away from individual interests and rational problem solving in favour of interventions that focus upon a relational world-view and aim to assist transformation of relationships; goals that would generally be considered secondary according to a liberalist discourse.

All the teachers in ADR stand-alone courses in this study favoured the inclusion of interdisciplinary material in their subjects. One notable area of interdisciplinary study that they suggested was emotion and the psychological impact of conflict. Importantly, although liberalism generally favours rational decision-making, this discourse can address issues such as emotion through openness to understandings from other disciplines. In particular emotion is a concern of psychology and the links between law and psychology are well established.21 Understanding emotion can also be seen to be part of the vocational discourse as evolving constructions of the lawyers’ role, discussed in chapters five and six, include issues such as emotional intelligence in law students and lawyers. The question of whether emotion was part of the curriculum was posed in all the interviews. Where ADR was taught in a stand-alone course all the interviewees described emotion as an important topic in their courses. Where ADR was combined with civil procedure only one of the three course coordinators reported that emotion was part of the course. Despite the reports from the teachers about its inclusion, content analysis of course guides demonstrated that emotion is not explicitly included in the objectives of the courses they teach, except for one course in Queensland. This course referred to the psychological dimensions of conflict (see Appendix G). One participant argued that inclusion of emotion should be standard in any ADR course:

Yeah. I think naturally and in terms of…is this matter an appropriate matter for mediation, or how do you deal with different levels of emotion, what sort of analysis would you do? Is this related to a cultural or a personal difference? Is this evidence of some sort of high conflict behaviour which might suggest another type of intervention?

21 For instance there are a number of academic interdisciplinary journals in the area of psychology and the law. See for example: Psychiatry, Psychology and the Law http://www.tandf.co.uk/journals/tPPL at 3 January 2012.
So that sort of conversation would be fairly standard I think (Q 1 (c) p 7).

The primacy of emotion in conflict being taught in the ADR stand-alone courses was consistent across the two states. For example, a Victorian participant noted that it was necessary to discuss emotion not only for students’ professional development but also for their personal development:

…to reflect on how they deal with emotions in their personal lives, because in order to understand how they’ll deal with it as a mediator, they deal with it in their personal lives, and how it was a very confronting question. I bring that up, just to try to make a connection between emotion, you know, who you are as a person, and what you do as a mediator. Always confronting, I find, with students. People like to draw a line between what they would do in their personal life emotionally, and what they would do as a mediator. So I think the nice thing about that is that it gets them to make a connection. But I don’t…have literature from psychology that talks about emotion (V 5 (b) p 7).

Another participant referred to the enjoyment that students expressed in discussing emotion in her class, unlike other law classes, and the importance of student engagement with this concern when teaching in this discipline area:

And it seems to me that if you’re going to teach people mediation skills, you have to talk about emotion. And you have to talk about the capacity to handle emotion and you have to give people some skills in that area so that’s where I put that focus (N 1 (a) p 6).

For another teacher, addressing emotion was important for both lawyers and mediators:

I think the role of emotion in conflict is crucial. I think lawyers’ understanding of it is crucial, particularly if you choose jurisdictions like the family jurisdiction…but also emotion just plays such an important element in how
conflict has transacted, lawyers need to know, be aware of it and be, if they are going to be effective mediators, know how to manage it (V 3 (b) p 15).

In the interviews, few teachers said that they included literature relating to emotion in their teaching. A notable exception was a lecturer in Queensland who used literature relating to emotion and the brain.\textsuperscript{22}

So, but with emotion, we actually spend a lot of time...bringing in ideas from neuroscience as well (Q 1 (a) p 16).

The majority of other teachers, although they recognised emotion in conflict as important, provided less specific learning and teaching strategies or literature and lacked a thoughtful learning and teaching design. Emotion was said to come up in class discussion, whilst learning about communication skills and when debriefing of role-plays, but there was little planned discussion:

Yes, that comes out more, if you like, in the seminars so where you're actually working with people and they're role-playing and they then realise the kind of links between people's sensibilities and their way of giving expression to those (V 2 (d) p 6).

Yeah I think we talked about it [emotion] a lot, again it's not like it was a specific, 'this class is on emotion,' but we did deal with that quite a lot (Q 1 (b) p 5).

How much attention do we give emotion? It figures directly as the subject of discussion, when we look at what kinds of challenges arise in the relationship element and that need directly addressing in the relationship element. And so that’s about 45 minutes worth of discussion on the second day of the course. After that, it’s coming from whenever people raise it, as a question (V 1 (c) p 17).

Thus most teachers in the study addressed emotion through debriefing role-plays in

small group work. This accords with a first generation approach to practice and pedagogy where the topic is identified but not explored from a theoretical perspective. Although emotion is acknowledged as important, the primacy of the individualistic, rational approach of the integrative/facilitative models dominated the pedagogy used by ADR stand-alone teachers in this study. Emotional concerns arose in debriefing because the stories of conflict so often included emotional reactions. Teachers in the study, with the exception of three participants, did not consider postmodern understandings of emotion. Their theoretical construct for emotion was psychological. It is important to improve the teaching of emotional concerns in ADR because emotion is such an integral part of conflict. As discussed in chapter three, proponents of the therapeutic jurisprudence movement argue that emotion needs to receive more attention in legal education. ADR is a prime site for a focus on teaching about emotion as ADR teachers are routinely dealing with emotion in their teaching. Emotion is part of many legal disputes and clients’ needs are best met where both legal and emotional concerns in a legal dispute are addressed. Lawyers’ own emotional reactions to conflict are important to understand as emotional transference can be an issue in legal practice.

Culture is increasingly recognised as central to the practice of negotiation and mediation and it is also now a concern in teaching ADR.23 Earlier in this thesis I referred to the focus on culture as one of the major initiatives of second generation practice and pedagogy. As noted in chapter one, the use of the Harvard integrative approach has spread from the United States to countries whose cultures are based on collectivist notions of conflict engagement. Researchers have condemned the imposition of Western constructs of conflict resolution on these cultures. Pedagogy in negotiation and mediation has also been criticised for being ‘Western-centric’24 and

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failing to meet the needs of students from diverse cultural groups. For example, the use of role-plays is common in ADR pedagogy, but taking on the role of another’s identity may be disrespectful in some cultures and there seems to be little awareness that this approach may alienate some students.

In the data there was significant support for the inclusion of the concern of culture in the curriculum of ADR. In the content analysis of the guides, five out of thirteen main course guides explicitly included cultural awareness as an objective in the course or as a topic. All the participants in the interviews and surveys were asked directly about the teaching of culture and all except two of the teachers in stand-alone course stated that they taught about culture and generally framed teaching around specific ethnic and Indigenous issues. A minority of teachers included cultural concerns in role-plays. Like emotion, the degree of focus on culture was dependent on the teacher and their interests. Some teachers stated that they would integrate culture and similar issues throughout their course. For example one teacher had a postmodernist perspective in her teaching that included culture:

I try to incorporate all of those issues consistently throughout the course. But I have classes that focus particularly on gender, on culture, on indigenous issues, on power and on neutrality (N 1 p 6).

Another teacher took the view that culture was part of the social construction of world-views:

…there's that historical link with, be it Aboriginal communities or tribal communities, but more specific to that, that you're dealing with different groups with different ways of seeing the world and different belief systems, world views, and how we understand that and that’s essential as a mediator to be able to be aware of that (V 2 (c) p 4).

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Another participant expressed a modernist view, seeing culture as essential to various ethnic groups that might use mediation:

I mean you’ve got to touch on cultural issues. You can’t do anything other, I mean particularly I think when you start to talk about co-mediation models and about variation in model use, then you naturally have to touch on cultural issues. You touch on cultural issues, you sort of weave it through when you have your conversation about negotiation and communication skills (Q 1 (c) p 5).

Other teachers in the study indicated that they included culture, but not in any depth:

So some of the more theoretical articles on culture for example, there are some articles that we’ve had on that kind of cultural differences, I’ve got rid of, because I have found that highly theoretical articles students don’t like and don’t engage with. And on one level we’re not teaching them in that way and it’s not a kind of a comparative legal theory type course. I want them to be aware of the issues and to understand them, but we’re not taking them to the highest level … (V 5 (a) pp 32-33).

[I teach] about cultural misunderstanding, cultural miscommunication and we talk a little bit about Aboriginal conflict resolution processes, but it was still more like illustrations of contextual issues, so not a great deal (Q 1 (b) p 4).

From the data in this study it is clear that culture is discussed in the majority of ADR stand-alone classes. However, the degree of attention given to culture varies. Four teachers expressed a postmodernist understanding of culture and the rest of the teachers saw culture largely in modernist terms as essential to particular ethnic or Indigenous groups. The nuanced understanding of culture in second generation practice and pedagogy was therefore not strongly represented. Like the teaching of emotion, it would appear that many of the teachers who dealt with this issue used an approach to culture that accorded with the liberal discourse. Arguably, ADR teachers who operate from a liberal frame of ADR may be less concerned with challenging and resisting the law in the way than those who operate from postmodern and social
constructionist discourses. Modernist models of negotiation and mediation, such as the integrative/facilitative models of first generation practice, may be said to fail to engage critically with a view that the law always operates coherently and objectively. Cultural concerns are valuable for legal practitioners to understand so that they may engage with the fluid nature of this issue of identity. It allows practitioners to avoid stereotypes in their judgements and fully listen to a client’s needs and expectations. It also encourages practitioners to have insight into their own possible cultural biases. As discussed in chapter three much of the law fails to engage with cultural concerns. This issue is further explored in section 7.2.3 in relation to the radical discourse and ADR.

7.2.2 PEDAGOGICALISM
Pedagogicalism privileges ‘effective teaching and learning and insist[s] that law be taught in a manner consistent with orthodox education scholarship.’27 James notes that pedagogicalism emphasises the concepts of ‘deep’ and ‘surface’ approaches to learning.28 In educational literature29 these approaches are seen as important, as students who study with a deep approach will generally learn more than students who employ a surface approach. A deep approach allows the student to engage with a learning task and reflect on meaning whilst a surface approach means that a student does not engage with a task in any depth, and may simply learn a rule or theory about a topic without exploring its application.30 It can be argued that ADR provides the opportunity for deep learning, due to the common focus on experiential learning and particularly as role-plays are a routine learning and teaching strategy.31 Role-plays help students develop skills in negotiation and mediation and are usually followed by

27 James, above n 1, 392.
30 James, above n 28, 150.
a debriefing session to integrate theory and practice. Simulations such as negotiation and mediation role-plays engage students in constructing knowledge, drawing from their experiences, and offering opportunities for reflection. Role-plays are seen as part of adult learning pedagogy and are the most widespread option in negotiation/mediation training and education, although this approach is also used by many other disciplines. ADR role-plays provide the opportunity for active, experiential learning in legal pedagogy in contrast to the heavy dependence on large lectures that is the dominant teaching strategy in law teaching. There is a need for more active learning in law schools to improve legal education. Role-plays provide the opportunity for active learning and ADR, with its history of experiential learning, thus makes an important contribution to legal education. Role-plays are one way to incorporate authentic learning into the classroom as they can draw from ‘real world’ scenarios based on realistic disputes. Including authentic learning in law helps to situate student learning in their future profession and teachers can assess professional knowledge and skills. Interestingly, Daniel Druckman and Noam Ebner have traced the history of role-plays and the use of experiential learning to master negotiation heuristics, and found role-plays did not provide superior benefits.

34 Noam Ebner and Kimberlee Kovach, ‘Simulation 2.0: The Resurrection’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 245-246.
37 Anthony Herrington and Jan Herrington ‘What is an Authentic Learning Environment?’ in Anthony Herrington and Jan Herrington (eds), Authentic Learning Environments in Higher Education (Ideal Group, 2006).
than other learning and teaching strategies such as lecture/seminar delivery. However, involvement in role-plays does provide benefits both in terms of student retention of material in relation to negotiation theory, and in student motivation to learn. In research conducted in Australia and Israel, Druckman and Ebner compared the benefits of students designing role-plays as opposed to playing a role in a role-play. They found that the design process increases understanding of the way that concepts in negotiation relate to each other, and also further increases motivation for students. In a later reflection on their research, Druckman and Ebner argue that role-plays as an established learning and teaching strategy in negotiation/mediation should be retained because of their long history in the field. However, in their view role-play pedagogy needs improvement to ensure student learning. They suggest supplementing role-plays with student design of simulations that can be done individually or in pairs on topics of their choosing.

Similarly, other writers argue that role-plays and simulations may need to be extended or reconsidered to increase their learning impact. In their consideration of second generation pedagogy, two prominent teachers of ADR, Nadja Alexander and Michele LeBaron, have recently criticised the over-use of role-plays in the teaching of negotiation and mediation. They argue that students do not necessarily value repetitive engagement with role-plays. They also sound the cultural warning that for some students it may be disrespectful to take on the role of another. Another potential danger is that students revert to stereotypes when in role and this strategy may not lead to change in a students’ behaviour. Alexander and LeBaron advocate more variety in second generation teaching including experimental teaching such as through adventure learning (negotiating in real world contexts), designing as well as playing out role-plays and improvisation or other similar creative techniques. Noam Ebner

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40 Ibid 466-467.
41 Druckman and Ebner, above n 32, 283-284
42 Alexander and LeBaron, above n 26.
43 Ibid 182-185.
44 The authors have a number of recommendations: Ibid, 192-194.
and Kimberlee Kovach state that role-plays are widely used in teaching ADR and are part of first generation pedagogy that has become orthodox teaching practice. They acknowledge Alexander and LeBaron’s criticisms of the overuse of role-play, but argue that it is possible to ‘resurrect’ this learning and teaching design as part of second generation pedagogy. Like Alexander and LeBaron, they advocate changes to the ways that teachers use role-plays, including the imperative to meet the needs of diverse cultural groups. They also argue that learning designs can improve student experience through adjusting the ways role-plays are used in class, such as by ensuring scenarios are authentic and relevant and the use of social media, such as Facebook, in role-plays.

The use of various communication media, particularly online role-plays, can be seen to be a part of second generation pedagogy. Online simulations began with negotiations using email exchanges. This kind of learning, which replicates the rise in online commercial negotiations due to the global economy, creates new learning opportunities through the opportunity to asynchronously negotiate, view transcripts of negotiations and have more time to reflect on interventions during the course of an online simulation. Such pedagogy now adopts new communication media, often referred to as Web 2.0: wikis (shared online sites used for collaborative work), blogs (online diaries) and annotated video. These approaches are still developing and provide opportunities to vary the ways that students engage in role-plays. They are

45 Ebner and Kovach, above n 34, 245-249.
46 Ibid. 250.
48 Noam Ebner, A Bappu J Brown, KK Kovach and A Kupfer-Schnieder ‘You’ve got Agreement: Negoti@tion via Email’ in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), Rethinking Negotiation Teaching: Innovations for Context and Culture (DRI Press, 2009) 89.
arguably best used in tandem with face-to-face role-plays rather than replacing classroom interaction. Another aspect of emerging second generation pedagogy is the need to address emotion in negotiation and mediation learning. This issue has been addressed in the previous section of this chapter. In this study the most used approach to pedagogy was the use of experiential learning through role-plays. All teachers in stand-alone ADR courses and one teacher in the ADR combined with civil procedure course used role-plays. In addition to role-plays there was little variety in the learning and teaching strategies used in the teaching of ADR. The dominance of role-play pedagogy accords with first generation teaching practices in the United States. Teachers in this study placed a high value on this approach. For example, one participant noted:

…in all the feedback that I've ever received, even from students that don't particularly like doing role-plays, they've talked about their usefulness and I can't stress the importance of good role-plays in teaching (V 2 (c) p 13).

Two of the three courses that combined ADR and civil procedure omitted experiential learning and focused more on traditional legal problem solving. These teachers relied mostly on the lecture/tutorial format although one teacher included an arbitration simulation as part of the course. This teacher considered that mediation was not a useful approach in litigation. He was therefore disinclined to include negotiation and mediation role-plays in his teaching, even though the course title included ADR as well as civil procedure. In the two courses where experiential learning was not included there were opportunities for this kind of learning in another academic subject or in a separate skills course. The lack of experiential learning in these courses is at odds with the pedagogy adopted by the majority of teachers in this study. Ronald


52 For example: Melissa Nelken, Andrea Kupfer Schnieder and Jamil Mahuad, ‘If I’d Wanted to Teach About Feelings, I Wouldn’t Have Become a Law Professor’ in Christopher Honeyman and James Coben (eds), Venturing Beyond the Classroom (DRI Press, 2010) 357.
Pipkin, in his United States research on the various ways that ADR is taught in selected universities, suggests that learning about alternative processes can occur through lecture material. However, mastery of skills through engagement with simulations of ADR processes, such as negotiation and mediation, seems unlikely to occur where students are taught through lectures alone. In the third course combining ADR with civil procedure that was a part of this study, ADR material was taught through a mixture of seminar and experiential learning. Yet, as only approximately 30% of the course was devoted to ADR, this course did not deal with ADR in the same depth as ADR stand-alone courses.

Other strategies used by ADR stand-alone teachers in their courses were small group work, videos/movies, and modelling of practice through a fishbowl approach. In her interview, one teacher stated that she included adventure learning in her pedagogical approaches. In this strategy students learn from negotiating ‘real’ agreements and reflection after the event in the classroom. As noted above, this approach is finding adherents in the United States, but at the time of this study it was not yet adopted widely by the participants. The use of interactive online learning was also rare. In the analysis of the interviews I found that only two teachers of the cohort included online role-plays in their teaching design. Drawing on the content analysis of the guides, two other law teachers in ADR stand-alone courses included other kinds of online learning such as the use of discussion boards (see Appendix G). One teacher who taught a subject dealing with restorative justice in social science also taught a significant amount of her course through discussion boards. Although apparently little used amongst the teachers in this study, there is growing use of online learning including role-plays in negotiation teaching in the United States, both in law and other discipline areas that include a focus on this area such as management and international studies. Another notable innovation in pedagogy in ADR is the use of improvisation. In this study a minority of teachers, two in number, used improvisation in their teaching to either enhance teamwork or deal with emotion. Notably, in all the

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ADR stand-alone courses there was a focus upon rich debriefing and skills development in role-plays.

ADR teachers in this study all expressed strong support for relatively low numbers in tutorial groups, such as between 15-25, to assist with the organisation of the role-plays, and to promote student-teacher dialogue and reflection in the debriefing after the role-play: “So the approach that I use is good when you’ve got a small group, like a tutorial group, and what I’ve done is approach it in a very similar fashion to the DSCV...I have 12 three hour sessions with this small group (V 4 (c) p 2).”

However, as noted in chapter six, due to the higher cost of smaller groups and the impact of corporatism in law schools, small group teaching is often threatened. In the previous chapter, a participant reported that her teaching arrangements had to be changed due to cost concerns. She described how the high level of student skill assessment through the use of outside coaches that she had previously included in the course was curtailed. Two other participants described how they were told to re-structure their ADR course, and to reduce or delete role-plays and other experiential learning from the curriculum to accommodate larger numbers. Nearly all those teachers who taught ADR as a stand-alone course in undergraduate legal education and included experiential learning through role-plays, commented upon the pressure of cost constraints in the law school, requiring them to justify or change their teaching practices. The exceptions were one undergraduate course in Queensland that was full-fee paying and routinely had small tutorial classes in all their law offerings and those universities in Victoria that provided a Juris Doctor program and offered ADR subjects within that program. This study shows the impact of inadequate Commonwealth funding for law programs at a level that enables experiential learning in small groups. If non-adversarial approaches to law are valued by government, as evidenced by the recent reports calling for changes to legal education to promote this kind of practice, adequate funding of law programs is critical. As discussed in chapter

54 Debriefing allows students to have a purposeful discussion about the role-play that can connect their experience with theory. It is also the opportunity to receive feedback: Linda Lederman, ‘Debriefing: Towards a Systematic Assessment of Theory and Practice’ (1992) 23 Simulation and Gaming 146.

five, experiential learning through role-plays is the signature pedagogy of the teaching of negotiation and mediation and must be funded appropriately to engender skills, and support theoretical understanding of non-adversarial practices.

Although there was some level of diversity evident in the strategies employed by the teachers, the dominant approach was the use of role-plays. In particular teachers favoured integrative bargaining in the negotiation role-plays, and the facilitative model of mediation in mediation role-plays. The focus of these models indicates most teachers were restricted to first generation practice in ADR. Teachers role-play design largely aligned with first generation pedagogy, that is, most teachers did not significantly vary their practice in terms of adapting the design for different cultural groups, such as asking students to engage in role-plays that draw from cultural groups in the classroom or by asking students to design role-plays that required them to research other cultures. Although there were instances of teachers using exercises where students designed their roles, as well as playing them out, they were in the minority.

Clinical work is one method of teaching ADR that has great potential in promoting non-adversarial practice in students. Clinical education is supported by proponents of therapeutic jurisprudence due to the opportunity for authentic learning presented by this option. One course in this study was taught as a clinical course and one course provided the option of a placement with a legal and justice agency. The ADR clinic course was taught in Queensland where ADR skills were integrated into the

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56 Some discipline areas develop signature pedagogies that are ‘types of teaching that organise the fundamental ways in which future practitioners are educated for their new professions’: Lee Shulman ‘Signature Pedagogies in the Professions’ (2005) 134 Daedalus 52, 52. See also the discussion of the signature pedagogy in law, case-dialogue: Sullivan et al, above n 33, 23.

curriculum and the ADR clinic course was offered as a later year elective. This clinic took the form of a series of seminar classes held at the university and a subsequent student placement with an ADR agency, or observation of clinical practice. The teacher regarded the course as important due to the opportunity for students to observe, although not to practice, mediation skills. The course was capped in numbers and thus only a dozen students were able to study this course at the one time. This elective built on the skills gained in the integrated ADR skills program in the substantive law subjects. This teacher commented:

I like the involvement of the clinic and the fusion of these insights across other courses, I think they’re the important parts (Q 3 (a) p 19).

Another teacher in the study noted the benefits of this approach, but also lamented the lack of opportunities for this kind of learning and teaching strategy at her university:

I wish universities had more opportunities for the ADR students to do placements and have clinical practice as well as theoretical information (Q 2 (b) survey p 6).

Only a small number of law schools in this sample provided this approach to learning and teaching strategies in ADR courses. The other instance of a clinical opportunity was in Victoria. An ADR course that combined with non-adversarial justice provided the option of a placement in various legal and justice agencies including ADR agencies. This was an option in the assessment, and the teachers of the course noted the significant amount of time that was required to organise these placements. Such placements require a good relationship with an ADR agency. Each agency normally allowed only a relatively small number of students to participate. Another option would be an ADR clinic funded by a university. Such a clinic would have the benefits of allowing students to engage in observations, participate in mediations, usually under a co-mediation model and be immersed in the field. This option would require a significant investment of resources for a law school. The cost is likely to be much greater than the cost of small-group pedagogy to facilitate role-plays and debriefing, although there would be a wide range of other benefits and challenges. Therefore it is likely that such an approach would only be available as an elective in most undergraduate programs. In contrast Juris Doctor or full fee programs may be able to
implement such an option as a compulsory course due to the higher funding of their programs. Overall, clinical options of this nature, although valuable in providing authentic learning, may be prohibitive in terms of resources to set up and run for most law schools in Australia. Research has established that clinical teaching in Australia is expensive to provide and time consuming for staff to supervise.58

The discourse of pedagogicalism is highly valued by the majority of teachers in this study. Uniformly, teachers of ADR stand-alone units discussed their learning and teaching strategies with an understanding of ‘deep’ learning and the benefits of authentic, experiential simulations through role-plays. This was not the case in two out of the three courses where ADR was combined with civil procedure. However, it is possible to provide students with a learning and teaching experience that includes experiential learning as shown by the third ADR course combined with civil procedure which demonstrated this kind of learning design. The intersection of pedagogicalism with the corporatism discourse showed that learning and teaching strategies can be limited by funding constraints, although this was less evident where the program was full-fee paying.

7.2.3 RADICALISM
Radicalism exposes and questions the ‘undisclosed, political positions, gender biases, cultural biases and/or power relations within legal education and within law.’59 This approach critiques positivist representations of the law as an objective, rational and coherent body of rules. Radical discourse engages with power and the law and seeks to consider the experiences of marginalised groups in society.60 However, critical theory courses are declining in popularity in law schools as these subjects are not seen to contribute to employment opportunities and may disrupt the dominance of doctrine in legal education.61

Radicalism may be said to co-operate with pedagogicalism as new learning and

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59 James, above n 1, 398.
60 Ibid 400.
61 Thornton, above n 8, 495.
teaching strategies resist conventional approaches to learning in law schools. The social sciences have much to offer legal education in providing the opportunity to help students understand the social impact of the law (and the operation of power) and question the role of law in society and the role of the legal profession itself.

Proponents of second generation practice and pedagogy adopt critical theory, seeing such a theoretical basis as important in the evolution of practice and teaching.

In this study of ADR teachers, each survey respondent and interviewee was asked if they included postmodernist and social constructionist perspectives drawn from the social sciences in their ADR teaching. All but three of those interviewed or surveyed indicated that they did not draw from these perspectives in their ADR offerings. Reasons given for the omission were varied and included for some a belief that such social science discourse was not relevant to a law course offering; that students would not find such material ‘easy’ to understand as they generally dealt with legal doctrine; or that they did not themselves understand the theory behind these discourses. This lack of social science theory was evident in the analysis of the course guides where the area of ‘power’ was analysed. In the content analysis of whether power appeared in the objectives or content in terms of topics, of the courses, five guides showed a consideration of power (see Appendix G). However, power can be seen in modernist terms and the interview data demonstrated that only three of the five addressed power as a postmodernist construct. None of the guides in the law courses referred to social science. Some teachers in their interviews referred to postgraduate offerings in ADR that were part of the Masters of Law programs that did deal with some critical theory and power. They argued that undergraduates needed grounding in integrative/facilitative approaches. In contrast, it seemed they believed that postgraduate students were able to meet the intellectual challenges of postmodernist concerns. Teachers’ who had undergraduate advanced electives in ADR in their law

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degrees also saw the need for a preparatory grounding in the integrative/facilitative approach. These teachers stated that law students needed to understand first generation practice before engaging with theory from the social sciences in advanced elective courses.

A key question of this research was whether ADR teachers included diverse models of negotiation and mediation in their courses. Each participant was asked about the models that they taught in their subjects. As discussed previously in this thesis the transformative, narrative and restorative justice models draw from social science theory. Two of the teachers in the combined ADR and civil procedure courses did not teach any specific model of mediation. These two teachers did not differentiate between models and referred to mediation as if there were only one model. In the third course with a combined approach to ADR and civil procedure, the teacher indicated some exploration of the range of models, and the specific choice of model for the role-plays was the integrative/facilitative model. In every interview with participants who taught ADR as a stand-alone subject, teachers stated that they primarily taught the integrative/facilitative model. Although they may refer to other models, such as the narrative or transformative approaches, the focus on learning was clearly on the integrative/facilitative model. One participant linked this use of the integrative/facilitative models to legal practice:

Because we’re looking at the lawyer’s role, we’re really focused on the facilitative model because that’s where the lawyers will find themselves and I suppose we talk a bit about settlement models too. We certainly provide the backdrop of all the other models but our focus in terms of the discussion [is] mainly on the facilitative (Q 2 (a) p 9).

Another participant stated that the facilitative model was the basis from which other models could be compared, and noted that the evaluative model was included and described as conciliation:

I’d refer to that, and I probably would call it conciliation, but [I would make a] reference [to] it as well to say that sometimes it’s called
evaluative mediation and talk about the insertion of an advisory view (Q 1 (c) p 4).

In terms of models drawing from the social sciences this participant noted that such models might be discussed in postgraduate law courses:

Narrative, less so, I mean in the postgraduate level when I’m teaching, that’s an area where students will often do some research work, but in the undergraduate area probably less so (Q 1 (c) p 5).

This focus on the facilitative model is evident in the course guides analysed in this study. Models such as the transformative and narrative models appeared in only two guides. In relation to the transformative model, participants spoke of mentioning its existence and they noted that it informed some of the dialogue in class, but that it was not given significant time in the curriculum. One teacher, the exception to most in the study, stated that although she did not teach transformative and narrative mediation as a skill process she did include readings to allow students to engage with the theory in a systematic way:

I teach them the skills of facilitative mediation. We do talk about transformative mediation and I give them readings…I also teach about narrative mediation and we talk about the essentials of that as a school of mediation and critique it (N 1 p 8).

Participants had a range of reasons for their lack of inclusion of the transformative and narrative models. One participant stated that he did not think that the other models had been fully thought through, and that the facilitative model offered a better basic introduction for the students:

I have a problem with narrative mediation per se if you are purist. Now I think it’s okay if you are sitting out there in a family therapy centre somewhere and you now call yourself a mediator, instead of a therapist, because that’s a better way to aim yourself, people are less threatened by that. That’s fine if you want to do that and you basically counsel under the guise of mediation…(V 3 (a) p 11).

Another participant argued that it was hard enough for students to come to terms with
the facilitative model, let alone engage with the more complex models such as the transformative model:

If I went straight into transformative mediation, for example, they'd be like what?...Because they've had a pretty black letter legal education. These are usually fourth or fifth year students and they're so used to standard lecture/tutorial black letter law type of class that they come to mine and some of them love it, some of them can't stand it because they’re not comfortable and I make them do things and they have to think, they have to actually participate. Some of them are quite resistant to the ‘warm fuzzy’ stuff but usually they come around, there’s always one that doesn’t, but mostly by the end of it they realise that it’s actually worthwhile. But I think if I started off going into something like transformative they’d rebel—it could be just my perception (Q 1 (b) p 8).

Another participant said that although she would discuss a range of models, the facilitative model was the focus in a week-long intensive dealing with developing skills through role-plays:

There’d be quite a bit of discussion around how the models are different and what the mediator’s role is and what the lawyer’s role might be and the different models…The model that they teach, the practice, is the facilitative (Q 2 (a) pp 9-10).

Similarly, another participant, cited time constraints as a barrier for dealing with more than the facilitative model, but said that the transformative model would be briefly discussed in their intensive course:

…no, we don’t teach transformative mediation in either of the two foundational level courses. We certainly tell people about its existence, and talk briefly about what it is (V 1 (c) p 22)

In another course, the participant cited time constraints as the concern for not addressing theoretical models in depth. In that course, transformative mediation would be mentioned briefly. This course focused on a range of non-adversarial
practices, other than ADR, and thus had a broad curriculum. The course includes:

…facilitation, mediation—including transformative, conciliation, arbitration… just because in three hours, which includes an exercise, it’s impossible to do that [all of the models], but what we do is we give them references (V 1 (a) p 22).

Some participants in the study stated that it would be even harder to address a transformative model in the teaching of ADR, as students are already challenged by the demands of the facilitative model with its focus on interest-based negotiation and mutual gains. The move from the adversarial approach to negotiation to non-adversarial practice was challenging enough for some students. Commonly courses focused on communication skills, such as active listening, summarising, reframing and creative brainstorming and it was considered these were enough of a ‘leap’ for students. One participant noted that this difficulty would be even more pronounced with the transformative model.

One ADR topic area that was taught in large number of the courses was the restorative justice model, which was taught by nearly half of the participants (see Appendix G). This model appeared as part of many course objectives and teachers noted that they spent a section of their time on this area. One social science elective at one university was devoted entirely to restorative justice, and law students from that university could choose this elective. Two of the courses that combined ADR and civil procedure did not deal with restorative justice. One combined civil procedure and ADR course included a reading that dealt with restorative justice and this reading was discussed in class, but the topic was not discussed in depth.

In summary it would appear that what I will describe as ‘radical’ theory-based models in mediation are not taught in any depth in nearly all of the foundation courses dealing with ADR in Victoria and Queensland. They are largely neglected in the ADR courses that are combined with civil procedure. One undergraduate program offered an elective devoted to transformative mediation. Some teachers said that transformative and narrative mediation were dealt with in more detail in advanced courses in Masters degree programs. The exception to this trend was the restorative justice model, which was taught in a significant number of the courses in this study.
There were four main reasons given for the lack of inclusion of what I would describe as second generation or radical theory-based models in the courses. Teachers said that time constraints did not allow them to deal with the range of models, other than to mention them briefly. Some teachers also asserted that the various radical theory-based models were still to be tested as providing the benefits claimed. Thirdly, it was argued that students themselves would be unlikely to cope with these models in introductory courses, as the facilitative model was already challenging to students. Fourthly, a common view was that the course was a law course and as such needed to deal with models commonly used in legal circles, and this did not include the transformative and narrative models. As noted, the one model other than the facilitative model that was widely taught was the restorative justice model. However, only two of the participants described using this approach in role-playing, as well as the dominant integrative/facilitative models. Restorative justice was largely taught through lecture material, readings and class discussion and was not generally presented as a practice option in civil law.

The integrative/facilitative model is the privileged model in the teaching of ADR courses in law programs that were a part of this study. However, according to recent studies it is not the most widely used model in court-connected practice as evaluative mediation dominates such practice. The integrative/facilitative model does not resist and challenge the law in the way that a radical discourse would do, and thus does not consider emotion, culture and power from the perspectives of postmodernism and social constructionism. Emotion is sometimes taught as part of the integrative and facilitative approaches, but largely from a modernist perspective and through the psychological literature. It represents a first generation approach to ADR and an individualistic, rationalist approach to conflict resolution. In terms of Margaret Thornton’s criticism of law school education, as discussed throughout this thesis,

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first generation practice can be said largely not to disrupt a positivist view of law, although it does challenge the traditional adversarial framework of legal practice.

The theory of restorative justice is less challenging to the law than radical discourse. The ideas of rehabilitation and community inherent in this model, described and discussed in chapter three, are not as challenging to the dominant legal paradigms as radical discourses. Additionally, restorative justice is still mainly associated with the criminal jurisdiction, although there is some growth in its use in schools and workplaces and as part of diversion or sentencing processes. As such this approach to conflict arguably does not undermine traditional civil legal processes. In contrast, transformative and narrative approaches are at odds with the current legal philosophy as these models reject the underlying philosophy of the law based on individualistic, rational approaches to conflict that provide for resolution of disputes. These models have a relational world-view and are not primarily concerned with problem-resolution. First generation practice is thus more acceptable to law teachers and/or the legal culture in which they are embedded, because this approach accords with the current legal philosophy.

7.3 CONCLUSIONS
This study suggests that there is a remarkable uniformity in the teaching of ADR. Where ADR is a stand-alone course, the dominant model is the first generation integrative/facilitative approach, both in terms of theory and in its application in role-plays to learn practical skills. This approach to content and pedagogy accords with a liberal world-view and includes interdisciplinary theory such as emotion, drawn from psychology. Although the first generation integrative/facilitative approach challenges the adversarial frame of legal practice, due to the emphasis on collaborative problem-solving, it could be argued that it does not provide a strong framework to critique the law from a radical perspective.

The transformative and narrative models do critique the positivist frame of much of legal practice and ADR because they adopt a relational world-view that rejects the individualistic, rational frame of first generation practice. However, my findings show that these models are not taught in any depth in most of the courses that were studied in this research. These models are briefly dealt with in general discussion in nearly all ADR stand-alone courses, but few teachers explicitly include these models in their
courses. In courses that combine ADR and civil procedure there is either no recognition that models of negotiation and mediation exist or the integrative/facilitative model is used. In some courses, restorative justice is taught, but this model could be seen as not challenging the dominant legal discourses relating to civil ADR practice as the context in which it is taught in the courses studied is largely confined to the criminal jurisdictions.

Similarly, in learning and teaching there is remarkable uniformity. Where ADR is taught as a stand-alone course, role-plays are the signature pedagogy. Role-plays are mainly used for skill development. In all cases, both law teachers in this study and those who taught ADR in non-law contexts where law students could take the subject as an elective, used the integrative/facilitative model in role-plays. The pedagogical approach taken by the majority of teachers in this study aligned with well-established first generation teaching practices regarding role-plays.

Role-plays were omitted in ADR and civil procedure courses except in one case. The teachers in this study who taught at undergraduate level in courses reliant on Commonwealth funding indicated that cost was increasingly an issue in adopting experiential learning approaches in the teaching of ADR. Where a law program was funded through full fees from students, in one undergraduate degree and Juris Doctor programs in this study, cost of the role-plays and small group work to debrief the role-plays was not seen as an issue. With the increase in calls for law programs to provide ADR skills and non-adversarial frames of practice it is a concern that the high costs of experiential learning and teaching strategies may mean that law schools will not be able to provide high quality teaching in this area. Although the overall reliance of ADR teachers on integrative/facilitative model role-plays evident in this study has been critiqued, this type of learning and teaching has been successful in ADR teaching for some time.

This study suggests that ADR teachers are relatively conservative in their approaches to the content and pedagogy of their discipline area. Their frame is first generation practice and pedagogy. At the same time due to the fact that much of present day legal pedagogy is case-based, the ADR subjects represent an alternative pedagogy in comparison to many other law school offerings. In chapter five I argued that the focus upon non-adversarial practice through the integrative/facilitative approaches in the
teaching of ADR challenges the adversarial culture of lawyers. In this chapter the finding that learning and teaching in ADR adopts experiential approaches challenges the dominant approach of many law courses taught mainly through lecturing to large student audiences. As this study shows, that approach is under threat due to cost concerns. Notably, where ADR is combined with civil procedure the content and pedagogy of civil procedure, largely adversarial in nature, appears to dominate unless there is a thoughtful learning and teaching design. Two of the three courses that combined ADR with civil procedure did not include discussion of any models, viewed mediation as restricted to one model without any theory informing practice, and failed to include role-plays. This finding suggests the need for caution in combining these two areas unless careful curriculum design is undertaken. One of three courses that combined ADR with civil procedure included the integrative/facilitative approach, mentioned restorative justice and included role-plays. Thus a thoughtful design in a combined course can include ADR in a manner that covers many of the objectives of stand-alone ADR courses. Importantly, the combination of the two discipline areas usually does not allow sufficient time to delve into diverse models of theory and address second generation practice.

Significantly, although second generation models were mentioned in many ADR stand-alone courses, the marginalisation of radical critique is evident in this research. Models of mediation that resist and challenge dominant positivist discourses in law are not taught in any depth in most courses that were part of this study. There was evidence that some law schools include a broader and more radical approach in their postgraduate offerings or advanced undergraduate electives.

The liberal discourse appears to be the favoured discourse in ADR teaching at undergraduate or Juris Doctor level. There are benefits to this approach as the models adopted do at least challenge traditional notions of adversarial legal practice. The teachers also regularly dealt with the interdisciplinary area of emotion in their courses, although the learning and teaching strategies adopted were largely ‘ad hoc’ and require curriculum review to engage with theory regarding emotion. Similarly, culture as an issue in ADR was widely addressed by teachers in this study. However, the ways that emotion and culture were taught largely drew on the liberal discourse. The approach was most often essentialist and the nuances of understanding of
emotion and culture informed by post-modernist and social constructionist perspectives was evident in the teaching of only a few teachers. Thus radical theory and models operate on the edges of contemporary Australian ADR learning and teaching in law schools. In the final chapter of this thesis I consider options for change in the content and pedagogy of ADR.
CHAPTER 8  CONCLUSIONS

8.1 INTRODUCTION

This thesis has explored a key research question about the content and pedagogy of ADR courses in law schools in Australia. This study is unique in Australia in that it has used a methodology based primarily on qualitative data. In my research, I gathered the stories of ADR teachers’ choices concerning curriculum, their learning and teaching practices, as well as reflections on their experience of teaching ADR in a law school setting. I also collected course guides either from these teachers or from their university website. The content analysis of these guides supported the investigation of the qualitative data, providing detail regarding content and pedagogy. I used relevant literature as a lens to analyse the data for this study. In particular I explored the literature on non-adversarialism, considering especially the work of Julie Macfarlane, to understand the frame of legal practice being taught by ADR teachers in this study. I also considered the work of Australian academic Nickolas James’ and his analysis of the discourses of legal education to understand the forces affecting law schools and the consequent impact on the teaching of ADR. As a result of these investigations, I have theorised about the competing and sometimes collaborating forces that influence the teaching of ADR in legal education, affecting both the content and pedagogy of this important area of study. The findings from this data collection document and analyse ADR curriculum and teaching practice in two states, Victoria and Queensland, and these findings can be generalised throughout Australia due to the representative nature of the sample. My research has captured and analysed the variety of ways that ADR can be taught in a law program. My goal is that it may foster greater awareness of teaching efforts in this community of practice and encourage change in the teaching of ADR in law schools.

One of the most significant findings from my research is that ADR law teachers are committed to developing non-adversarial practice in their students. They resist and challenge traditional adversarial frames of practice in law through their use of first generation practice. I identified that the Harvard integrative approach to negotiation and the facilitative model of mediation, based on the integrative bargaining philosophy, is the basis for the majority of ADR courses. The framing of ADR courses through the norms of first generation practice, in both content and pedagogy,
provides law students with the opportunity to experience a course predicated on non-adversarial paradigms. This may assist them to understand the changing dynamics of legal practice, where ADR is now often prioritised. As such, ADR is an area of study that tempers the litigious constructs of much of the rest of legal education. However, the experience of law teachers in this area demonstrates that most law schools currently fail to recognise the important contribution of ADR to a law program.

The majority of ADR teachers in this study expressed concerns about the marginalisation of their discipline in law schools due to dominance of the discourse of doctrinalism. Their experience is that ADR, due to its low emphasis on black letter law and its interdisciplinary focus, is not as highly valued by some law colleagues and students as most other areas in the legal curriculum. My research also shows the strong influence of the discourse of vocationalism on the majority of teachers in this study. These teachers frame their course around readying students for non-adversarial legal practice and the development of ADR skills. Unlike many of their non-ADR colleagues, they adopt active learning and teaching strategies primarily through the use of role-plays, showing the influence of pedagogicalism on their teaching. However, I also found that the rise of corporatism in legal education and the consequent tight budgetary conditions, impose constraints on their teaching efforts in some law schools, and can threaten the use of role-plays. On a philosophical level, I found that the majority of teachers in this study adopted the philosophy of liberalism as the underlying premise of their choices in content and pedagogy. This approach meant that teaching in regards to the areas of emotion, culture and power were largely modernist in perspective. The discourse of radicalism was not a strong influence on the teaching of ADR in the courses in this study. Only a few teachers included significant engagement with second generation practice and pedagogy. The majority did not consider emotion, culture and power from postmodernist and social constructionist perspectives. Most teachers did not include new models of mediation, such as the narrative and transformative models at any length. In this chapter I argue that encouraging ADR teachers to explore the benefits of new perspectives and models that are part of the second generation practice and pedagogy in ADR may lead to more nuanced understanding, and willingness to address emotions, power and culture in ADR and in general legal practice for lawyers. This chapter draws together my findings and considers the central and associated research questions in detail. I
discuss options for changes to the teaching of ADR in legal education and suggest strategies to achieve those changes.

8.2 PROMOTING NON-ADVERSARIAL PRACTICE

When considering the content and pedagogy of ADR teaching in Australian law schools, one of my key questions was whether non-adversarial practices were being taught in ADR. As indicated, my findings\(^1\) demonstrate that non-adversarial practice was promoted by the all of the ADR teachers in this study. Regardless of how ADR was located in the curriculum, each participant in this study showed a commitment to the use of alternative processes in the law. All of them recognised the changing nature of the Australian legal system and the increasing importance of ADR, particularly the options of negotiation and mediation, in our courts. The majority of teachers privileged ADR over traditional adversarial orientations in law. Most teachers had a strong commitment to integrative/facilitative models as opposed to distributive/evaluative models in negotiation and mediation. In short, first generation practice is the dominant approach in the teaching of ADR in the law schools in Victoria and Queensland.

Adherence to the integrative/facilitative models of negotiation and mediation resists and challenges traditional adversarial constructs in the law. Resistance is evident in the choices of content made by the majority of teachers in this study and through their critique of the distributive/evaluative models. Although some teachers supported the distributive/evaluative models in certain circumstances, the majority presented these models to their students as poor practice in dispute resolution. These models were criticised as mirroring litigious processes in the courts. Teachers promoted the integrative/facilitative approach and expressed the common aim of shaping law students for legal practice that engages in integrative bargaining.

In contrast to the majority, two teachers who combined ADR with civil procedure did not distinguish between models and saw ADR options as homogenous. This suggested that these teachers were unfamiliar with the theory and practice of ADR. This finding highlights the risks of combining ADR and civil procedure. In my analysis of the content and pedagogy of two of three courses that combined ADR and civil

\(^1\) See chapter five of this thesis.
procedure, it became clear that in these courses ADR was merely ‘tacked on’ to a course framed by adversarial/litigation paradigms. ADR was given minimal time in these courses and the various models of ADR were not discussed. Only one ADR combined course devoted a significant part of the course curriculum to this area and considered ADR in an informed manner, engaging with first generation practice and restorative justice. This suggests that it is possible for teachers to successfully combine these two areas to promote non-adversarial practice, but only where the teacher understands and values the ADR discipline. Whether combined courses can promote second generation practice is addressed in section 8.7 below.

A further important finding is that ADR stand-alone teachers often feel marginalised in law schools. The resistance to traditional, adversarial norms in law coupled with a lack of doctrinal content in teachers’ courses meant that other law teachers were often derisive of ADR. Many teachers reported feeling less valued in their efforts than colleagues who taught substantive law courses. Some participants felt this view was mirrored by a small percentage of students. It would appear that ADR currently lacks the high status of much of the rest of legal education. Law holds a privileged position in our society, based upon specialised knowledge and adversarial norms. A course that undermines the adversarial norms of legal education can be seen to be subversive of lawyers’ privileged position. The high status of black letter law as part of the discourse of doctrinalism can marginalise the learning and teaching approaches of ADR with its focus on communication skills and negotiation/mediation heuristics. The interdisciplinary nature of ADR courses means that this discipline area lacks prestige due to the reification of doctrine in most law schools.

While law schools may not sufficiently value ADR as a discipline area in the legal curriculum, government policy and court initiatives in support of alternative processes are gaining critical momentum in Australia. Government and courts increasingly promote both ADR and non-adversarial practices, and legal education is seen as an important vehicle to prepare lawyers to engage in these practices. State governments are now recommending the teaching of ADR to law students. Thus the discourse of vocationalism leads to a perception of the increasing value of ADR as part of the changing professional identify of lawyers. In response to these changing professional norms, my research shows that ADR teachers are active in promoting evolving
constructions of legal practice. In their work, the majority of teachers privileged the paradigm of non-adversarial practice and aimed to help students understand the changing norms of what it means to be a lawyer. This is one of the most important findings of this study as it indicates the crucial contribution that ADR teachers can make in shaping lawyers of the future. These teachers do not merely teach students the skills of negotiation and mediation, they are teaching students to understand their new role in the legal system where ADR is prioritised and holistic problem solving is encouraged. This approach is in accord with the therapeutic jurisprudence movement. Whilst government and courts increasingly value ADR, this phenomenon is not universal as there is still resistance from some lawyers to alternative processes. The colonisation of mediation through the widespread use of evaluative mediation shows that those who promote ADR, in courts and in government cannot be complacent about the increasing use of alternative processes. ADR in legal education can contribute to the development of this area by resisting models such as evaluative mediation that neglect the major benefits of mediation, including party self-determination and procedural justice.

8.3 THE PLACE OF ADR IN THE LEGAL CURRICULUM

Another question in this research related to the place of ADR in legal curriculum. This question is important as ‘where’ the content and pedagogy of ADR is located in the course influences ‘what’ this discipline area can achieve in legal education. This study maps the place of ADR in the various law school programs in Victoria and Queensland through the interviews, surveys and the content analysis of the course guides. My findings show that ADR is represented in each of the twelve law schools in the two states (and one school in New South Wales) that are the focus of this thesis. ADR appears in a number of ways in the legal curriculum in the law schools investigated: as a compulsory stand-alone course, or combined with civil procedure or non-adversarial justice. In some cases the discipline was integrated into substantive law courses across the curriculum, with a later year stand-alone ADR elective available. My findings point to the current lack of stability in the place of ADR in the

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3 See chapters six and seven of this thesis.
law programs studied. This lack of stability is likely to be replicated in other law schools around the country. Although each of the programs in the study included ADR in their curriculum, my analysis suggests that the place of ADR is sometimes uncertain. As ADR is not currently one of the compulsory knowledge areas for accreditation as an Australian lawyer, law schools are free to exclude this discipline area from their core offerings and law schools are not mandated to provide ADR as an elective. Some teachers in this study spoke of program reviews where it was necessary to lobby vigorously for the introduction, or even the continued inclusion, of ADR in the law curriculum.

Another important finding is that ADR can be incorporated in the legal curriculum in a manner that does not adequately address the theory and practice of this area. This is a concern especially as the discourse of vocationalism increasingly calls for the inclusion of ADR in law degrees, yet the way that ADR is included may be so minimal that the contribution to students’ learning is negligible. For example, one strategy identified in this study is to combine ADR with the compulsory knowledge area of civil procedure, an option found in three law schools. This approach to the teaching of ADR in the legal curriculum can marginalise ADR. In two out of three instances where ADR was combined with civil procedure, the teachers of these courses reported paying only limited attention to ADR and, as noted, they did not distinguish between different models of negotiation and mediation. In these classes there was no experiential learning through role-plays, instead these courses focused upon litigation. This was the case even though the term ADR, or a similar term, was included in the title of the combined subjects together with the term ‘Civil Procedure’ suggesting equivalent treatment of each knowledge area. In the third university to combine ADR with civil procedure, negotiation and mediation were addressed in both content and pedagogy although the ADR content was still less than half of the overall course. Another strategy is to integrate ADR as a module in another compulsory knowledge area such as contract or property law. Some teachers in the interviews expressed doubts about the effectiveness of integrating ADR into substantive law courses, even though it may then become part of a compulsory course. It was their view that where ADR was integrated with substantive law subjects, time constraints meant that the theory of ADR was generally neglected or cursorily addressed, although experiential learning through role-plays may have been included. The model
taught in this context was generally the basics of first generation practice through the integrative/facilitative models. The teachers also commented on the experience of teaching an ADR module in a substantive law course. In their view, these teachers would often lack the expertise in ADR of teachers who taught ADR as a stand-alone course, although some law schools provided appropriate training. The concern about lack of expertise is also relevant for the teachers of combined ADR and civil procedure courses. In this study two of the three teachers who combined ADR with civil procedure had limited experience of ADR, but claimed extensive experience in litigation.

In chapter four I analysed recent law standards commissioned by the Australian Learning and Teaching Council (ALTC) and explored the potential through the threshold learning outcomes (TLOs) for ADR to become a requirement in the law curriculum. These TLOs in law include topics relevant to the discipline area of ADR in a number of ways including knowledge, communication and self-management. This initiative represents a significant increase in the status of ADR with many law schools likely to be influenced to include ADR in the compulsory curriculum, in some form, due to the TLOs. Despite the potential for TLOs to encourage a deeper focus on ADR, law schools may meet these new requirements but still not offer students a quality experience of ADR theory and practice. Students may receive a superficial exposure to ADR that gives them little other than some of the basics of first generation practice. They may experience ADR where it is combined with civil procedure with a litigation frame dominant in the subject, and a cursory treatment of ADR in the learning and teaching design. If a law school takes an integrated approach to ADR it may mean that ADR is taught as a module that fails to address theoretical concerns in depth, and instead concentrates on the basics of first generation practice. In both approaches, students are unlikely to be taught by an ADR ‘expert’ and this may diminish the effectiveness of the learning and teaching design.

The findings in this research indicate that ADR is best taught as a compulsory stand-alone course that gives sufficient course time to the content and pedagogy of this area. ADR stand alone teachers in this study consistently indicated that they felt marginalised and less valued than those teachers whose courses were compulsory. The advent of the TLOs seems to make this development more likely. Sufficient space
in the course curriculum to address ADR theory and practice effectively is essential. When offered as a stand-alone course, it will also most likely be taught by teachers with ADR expertise, ensuring that students experience the best quality teaching in this area. The literature on teaching ADR and the discussion of the teachers in this study suggests that a stand-alone compulsory course is best placed in the first year of a law program in order to combat the adversarial paradigms of much of the rest of the legal curriculum. However, even with a generous approach to the location and teaching of ADR in the law curriculum, corporatist concerns and budgetary restraint may impact on teaching of ADR theory and practice. The fear of high costs may mean students will not be given the small group learning and debriefing that is essential to role-play pedagogy.

**8.4 ADR LEARNING AND TEACHING STRATEGIES**

The research question regarding the types of learning and teaching strategies adopted by ADR teachers is integral to this study as teaching strategies impact on student learning. The literature about ADR and pedagogy suggests that active learning through role-plays is common.\(^4\) The literature suggests that ADR pedagogy has the potential to contribute to the improvement of legal education generally as much of legal pedagogy is passive in delivery. For instance, the Carnegie Report\(^5\) in the United States identified the area of ADR and the use of simulations as an important opportunity to improve learning in law. The ‘new’ lawyer, described by Julie Macfarlane,\(^6\) will learn the approach of non-adversarial practice through a number of learning and teaching strategies, and most importantly through the use of role-plays. The movement of therapeutic jurisprudence promotes simulations and clinics to

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develop the holistic legal practitioner of the future. My study shows that role-plays were the most common learning and teaching strategy used in ADR stand-alone courses in Australia. Although teachers used a variety of innovative learning and teaching strategies, such as the use of DVD, online learning and improvisation, the staple of the courses in this study was the role-play. This learning and teaching strategy can be described as the ‘signature’ pedagogy of the area. Role-plays provide the opportunity for ‘deep’ learning through active, authentic experiences that simulate ‘real world’ contexts. Jill Howieson’s recent research at the University of Western Australia shows that the interactive pedagogy of ADR contributes to student engagement with their studies and had a positive impact on their mental health. Teachers of stand-alone ADR courses in my study regarded students’ mastery of ADR skills through the role-plays as essential, but also stressed the importance of integrating theory and practice through the role experience and subsequent debriefing. The model used in the role-plays was overwhelmingly the integrative/facilitative model.

The teachers of stand-alone ADR courses in this research believed that offering small classes or tutorials, in addition to lectures, was crucial for successful pedagogy in order to effectively debrief role-plays. Teachers in the study who taught ADR in large classes expressed frustration with the rise of the corporatist discourse in their universities and law schools that required a reduction in the cost of teaching ADR. This cost issue was not a concern where classes were full fee paying or where elective ADR courses set capped numbers. Two of the teachers who taught combined ADR and civil procedure courses did not see cost as a concern as they did not engage in role-plays. In this study, some teachers expressed concerns about the cost of ADR

8 See chapter seven of this thesis.
9 Lee Shulman ‘Signature Pedagogies in the Professions’ (2005) 134 Daedalus 52, 52.
clinic or placement options; a key pedagogy of the therapeutic jurisprudence movement. Clinical opportunities in ADR, and in law generally, are constrained by the high cost of administration or in the case of placements the cost of finding and supervising positions in industry. In the likely absence of clinical placement opportunities, role-plays provide the opportunity for active learning as well as an avenue to engage with the topic of emotion in conflict. For this reason, it is important that law schools adequately fund the teaching of ADR to enable the use of role-plays. It is also desirable for law schools to find funding for clinic and placement opportunities in ADR.

8.5 EMOTION IN ADR LEGAL EDUCATION

In this study I researched the question of the degree to which the role of emotion in conflict was taught in ADR courses. Emotion is increasingly recognised as a central concern in legal practice. In this thesis I have argued that lawyers need to adopt non-adversarial practices, and also to have an understanding of the wider emotional dimensions of disputes. I have argued, drawing particularly on the literature from the therapeutic jurisprudence movement, that emotion is important in conflict, and lawyers should be better prepared to deal with emotional concerns in disputes through their legal education. My findings show that the majority of ADR teachers in this research routinely engaged with students about emotional concerns in conflict. Their teaching about emotional issues was largely achieved through the debriefing of role-plays. Although emotion was not often expressed as a learning objective in the courses in this study, it was clear that teachers and students regularly discussed the emotional dimensions of conflict, and explored strategies for dealing with difficult emotions. The approach adopted to teach about emotion drew from first generation integrative/facilitative models, in that emotion was discussed in the aftermath of students playing out role-plays using this model. In only a few instances teachers drew from the literature relating to emotion and provided readings to students on this topic. The debriefing of emotional concerns after simulations did not generally include psychological, or postmodernist and social constructionist perspectives. The

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13 See chapter seven of this thesis.
discourse of liberalism was evident in the teaching of emotion in ADR courses. Liberalism values an interdisciplinary approach to law. Most teachers considered emotion to be a significant topic drawn from the discipline of psychology to include in their ADR teaching. However, the teachers were relatively unsophisticated in their approach to interdisciplinary engagement as they failed to refer to the literature relating to emotion from psychology and other disciplines. To teach about areas such as emotion more effectively, and to link this approach to emerging paradigms of legal practice, ADR teachers need to integrate more theory with practice, and engage with the literature relating to emotion. The ways that second generation models of practice and pedagogy engage with emotion are discussed in section 8.7 below.

The impetus for teaching about emotion in law schools has become more important with research showing high levels of depression in law students who study in Australia and the United States. In part, the high levels of depression are ascribed to the competitive environment in law schools, the adversarial nature of law and legal pedagogy, and the lack of moral engagement in legal issues and case studies. To combat these problems in legal education, students can be taught about approaches such as emotional intelligence and this awareness may contribute to their mental wellbeing. Howieson has pointed to the potential that ADR courses have to positively impact on student mental wellbeing and she particularly emphasises the interaction of role-plays as the vehicle to help students’ mental health. Although this is not the only way that students can engage in strategies to improve mental health, and there are other areas of law such as criminal law that deal with emotion, ADR teachers have a significant role to play in this area. My research shows that some ADR teachers are


highly experienced in teaching about emotion and thus may contribute to legal pedagogy addressing emotional concerns in conflict. Since ADR teachers routinely use role-plays, particularly the debriefing after role-plays, to teach law students about emotion, this is another argument for the provision of sufficient funding to include role-plays in ADR classes.

8.6 CULTURE AND POWER IN ADR LEGAL EDUCATION

A key research question in my thesis was the issue of culture in ADR teaching. When addressing culture, teachers have the option of framing this concern in stereotypical and essentialist terms in ADR, or alternatively culture can be constructed as an aspect of identity.\(^\text{16}\) My analysis of the data\(^\text{17}\) revealed that, like the topic of emotion, culture in ADR was commonly taught by the participants in this study. In contrast to the teaching of emotion, the topic of culture was explicitly referred to as either a course learning objective or a topic in the majority of ADR courses. These teachers usually included literature about culture usually around ethnic or Indigenous issues in their teaching.\(^\text{18}\) Culture did not figure as prominently as an issue in role-plays, but some teachers did include cultural concerns in this learning and teaching strategy. The approaches to culture used by the ADR teachers in this study rarely drew from postmodernist or social constructionist perspectives. A first generation approach that accorded with the dominant positivist discourses of the law was evident in the teaching practices of nearly all the participants. Only a small minority saw culture as other than essentialist and unchanging.

Another central concern in the research was investigation of the teaching of power in ADR courses. I found\(^\text{19}\) that the majority of teachers of ADR stand-alone courses took a modernist approach to the concern of power with power imbalances a key concern for all teachers. Many emphasised gender power imbalances, particularly in relation to family violence, but few saw power in postmodernist terms. The majority of

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\(^{17}\) See chapter seven of this thesis.

\(^{18}\) Thalia Anthony, ‘Embedding Specific Graduate Attributes: Cultural Awareness and Indigenous Perspectives’ in Sally Kift, Michelle Sanson, Jill Cowley and Penelope Watson, Excellence and Innovation in Legal Education (LexisNexis Butterwroths, 2011) 137.

\(^{19}\) See chapter seven of this thesis.
teachers saw power as something that was held by the ‘dominant’ party in negotiation and mediation. Their view of power was that it could be used oppressively creating an imbalance in the process. They did not describe power as circulating in the process and failed to recognise that both parties had agency. This latter approach is in line with much of second generation practice.

8.7 TOWARDS SECOND GENERATION PRACTICE IN ADR LEGAL EDUCATION?

When considering the content and pedagogy of ADR in legal education in this research I wanted to ascertain whether emergent models of practice were included in ADR courses. This is because second generation practice differs from first generation paradigms in negotiation and mediation as it is interactional rather than transactional and instrumental, relational rather than individualistic and does not privilege the rational over emotional concerns in conflict. This approach has practice benefits specifically in relation to issues such as emotion, culture and power in conflict engagement.20 A significant finding of my study21 is that second generation practice, in the form of emergent models of negotiation and mediation, such as the transformative and narrative models of mediation, are largely absent from the ADR curriculum. The dominant models taught in ADR in the law schools in Victoria and Queensland are the integrative/facilitative models of first generation practice. This reflects the history of the rise of ADR in both the community and the courts where the initial focus has been on Western constructs of conflict and dispute resolution. The majority of teachers in this study taught first generation models and included one other approach, the restorative justice conferencing/victim offender model. In addition to first generation approaches, a small number of ADR stand-alone teachers also taught second generation models and dealt with critical theory. Second generation models of negotiation and mediation, such as narrative and transformative approaches, were not taught in most of the courses studied in this sample. Indeed radical theory such as postmodernist and social constructionist theory is generally not taught in the ADR curricula. Postmodernism and social constructionist theories are not addressed in any depth as part of a discussion of models, or included as modules in their own right. The privileging of the model of integrative/facilitative approaches

20 See chapter three of this thesis.

21 See chapter seven of this thesis.
accords with practices in the United States. Second generation practice is restricted to the fringes of teaching in negotiation and mediation. In this study some teachers reported that second generation practice was taught in some postgraduate courses and in some few advanced undergraduate electives, but these courses will reach only a small number of students.

Teachers in this study offered a variety of reasons for omitting second generation practice. Many argued that attention to diverse models is impossible in an already crowded curriculum. Some teachers stated that emergent models of second generation practice are not widely adopted and do not reflect the kinds of approaches that law students will engage in when practising law. Another explanation for the failure to include second generation practice in most of the courses in this study is the individualist, positivist nature of first generation practice that largely accords with liberal notions of the practice of law. Many ADR teachers aligned philosophically with the discourse of liberalism. Second generation practice that draws from postmodernist and social constructionist perspectives was simply not valued to the same extent. The majority of teachers failed to adopt or consider critical theory in the content and pedagogy of ADR primarily because such approaches are at odds with the predominantly positivist constructions of law.

Additionally, the integrative/facilitative models of first generation practice draw from the discourses of business and focus heavily on resolution of disputes. In contrast the transformative and narrative models focus on a relational world-view, where agreements may occur, but are not the primary aim of the approach to conflict engagement. Teaching first generation models might be said to reflect a technocratic approach to the education of lawyers. Legal education is affected by business discourses that emphasise educating students in a manner that adds economic value to the practice of law. This construction of legal education can be traced to the effects of neoliberal policies in higher education in Australia. This development has meant

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that the discourse of corporatism is presently dominant in many law schools in this country. The integrative/facilitative models of first generation practice draw from the business world of negotiation theory and as such are more acceptable to the legal culture than second generation practice drawn from the social sciences. Business discourse provides a level of legitimacy for these models that second generation models of ADR have yet to reach. Second generation practice is presently far removed from the legitimising frame of business and is seen to be irrelevant to legal practice. The exception may be those areas of legal practice, such as family law, that privilege relationship concerns in practice. Overall, as critical theory has been progressively marginalised in legal education, the likelihood of second generation practice being taught in law schools becomes smaller.

The inclusion of victim offender mediation/restorative justice conferencing in many courses in this study can be explained due to the area of practice where this model is used. Restorative justice is mostly used in the criminal area of practice, which (like the jurisdiction of family law) involves interpersonal issues between victims and offenders. The recognition that there are psychological repercussions to crimes means that this model has value in dealing with the aftermath of offending. Taught in an ADR subject, it provides a contrast to the use of negotiation and mediation in civil matters, but seems to have been taught more as a ‘curiosity’ than as an approach that may potentially apply in civil litigation. It could be seen to be segregated from the rest of the subject and exploration of alternatives to court adjudication, as it is not focused on civil issues. Only one teacher used role-plays in restorative justice as well as in the integrative/facilitative models. There is evidence in this study that second generation models are being taught in four undergraduate courses in this study, thus indicating optimism for the future. It is evident that there is some resistance to the dominant norms of law and legal education and thus hope that this area of ADR theory and practice will be more widely taught to law students. At present this resistance is minor compared to the number of teachers in this study who rejected the inclusion of second generation practice. Due to the attitudes to second generation practice documented in this research, it is clear that law students generally do not experience models based on a relational world view that address emotion, culture and power from postmodernist and social constructionist perspectives. Restorative justice conferencing/victim offender mediation can be taught with an understanding of critical theory at its base,
but the participants in this study generally did not take this approach. Therefore positivist constructs of individualistic approaches to conflict are the norm in ADR legal education. In this thesis I argue that if second generation practice were to be routinely taught to law students, they would gain a deeper understanding of ADR practice and theory, particularly the relational world view, and would better discern the impact of emotion, culture and power in conflict. The inclusion of second generation models would assist students to see possibilities in conflict engagement other than the dominant first generation norm. This assertion requires testing and I discuss possible further research in next.

It is acknowledged that second generation models of practice are unlikely to be used in a great number of legal disputes. However, the conceptual frames of these approaches are valuable to students because they represent the ‘cutting edge’ of emergent theory in negotiation and mediation. I have argued that second generation practice and pedagogy is also valuable to teach to law students because they will gain an understanding that such practice is interactional and relational. They will understand interventions relating to emotion, culture and power from different critical perspectives including postmodernist and social constructionist perspectives. Further research needs to be conducted in order to establish that law students would benefit from these differing perspectives. Similar to the methods used in the research conducted in Australia by Tom Fisher, Judy Gutman and Erika Martens,24 discussed in chapters one and four, students could be pre-tested about their understandings of conflict, taught second generation practice in ADR, and then post-tested to establish learning about various models and to assess whether this teaching affected their understandings of emotion, culture and power in conflict. Such research would further the development of ADR in legal education, exploring the impact of second generation practice and pedagogy on law students. A crucial initiative for the future is to challenge ADR teachers to consider including these differing approaches in their teaching in order for law to engage with theoretical approaches to conflict.

8.7 FINAL COMMENTS

In this final section I discuss various initiatives for the improvement of ADR learning and teaching in legal education. From this study it is clear that ADR is widely represented in the law curriculum in Victoria and Queensland. The recent release of the TLOs is an important opportunity for teaching ADR in the legal curriculum because it is likely that more law schools will include ADR as a compulsory element in the law program. Yet the way that ADR is included will determine whether this area can contribute to non-adversarial practice or whether adversarial constructs dominate a course. Where ADR is combined with civil procedure there is a danger that an adversarial frame may dominate unless the curriculum is designed to provide equal weight to the two areas. ADR is thus best taught as a stand-alone compulsory course in order to avoid this adversarial emphasis when combined with civil procedure, or integrated into a substantive law course. This approach will also ensure that ADR has sufficient standing in the law curriculum so that teachers of ADR will experience less marginalisation. Recognition of the value of interdisciplinary approaches in ADR content and pedagogy, approaches that do not reify doctrine, is important within law schools. In my view law schools should be encouraged to support the signature pedagogy of ADR and appropriately fund role-plays and small group debriefing, resisting the corporatist discourse that demands low cost learning and teaching design. This study has established the importance to ADR stand-alone teachers of retaining role-plays for teaching the theory and practice of ADR and also in teaching law students about emotion in conflict. This study has also highlighted the lack of clinical and placement opportunities in ADR.

The adoption of ADR as a compulsory course in the law curriculum will not, of itself, ensure that issues of emotion, power and culture are taught from a postmodernist or social constructionist perspective. I believe my finding that first generation practice dominates ADR teaching is important, as it makes clear that ADR in legal education in Australia has largely failed to engage with emerging theory and practice in negotiation and mediation. In order to give the students of ADR the best opportunity to learn about this area, the teachers of ADR must be knowledgeable about ADR and include experiential learning in their classes. If integration of ADR is the strategy adopted by a law school, this approach must ensure that ADR theory and practice is given sufficient space in the curriculum of the substantive law courses to adequately
teach this area and the teacher needs to have sufficient expertise in the ADR.

In this thesis, I have contrasted first generation practice and pedagogy with emerging models of negotiation and mediation, such as narrative and transformative mediation. I have argued that there is value in law students being exposed to the full range of practices in ADR rather than being limited to dominant models of first generation practice. In particular, I have argued that law students may benefit from interdisciplinary knowledge from the social sciences that includes a relational world-view that better deals with concerns of emotion, culture and power. The social science basis of models such as narrative and transformative mediation provide an alternative conceptualisation of the nature of conflict and conflict engagement. This alternative conception is interactional, does not privilege the rational in conflict engagement and provides a distinct range of diverse interventions to address conflict transformation.

Including second generation practice and pedagogy in legal education provides a site for the resistance of positivist constructs in law. Although the integrative/facilitative models challenge adversarial practice in court-connected contexts, these models do not challenge the positivist, individualistic frame of the law. However, this study shows that only a minority of ADR stand-alone courses devoted a significant amount of their course to second generation practice in their teaching. I argue that the domination of vocationalism means that ADR teachers failed to recognise the relevance of more theoretical approaches to ADR as these are not widely practiced in the law. Theory is marginalised in legal education in Australia and although first generation practice draws from other disciplines it still accords with the positivist, individual frame of the law. From my findings, it is clear that there is a need for a culture change amongst ADR teachers in order for them to appreciate the benefits of including second generation practice and pedagogy. ADR teachers would benefit from the opportunity to engage more fully with emergent theory and practice in ADR. First generation practice should still be taught, as this approach is more and more widely accepted, but students should also be taught the value of second generation practice and the possibility of choice in terms of models of ADR processes.25

One way of achieving change in the curriculum of ADR in law schools is to promote

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25 Bush, above n 2, 761-768.
a community of practice of ADR teachers in Australia. As discussed in chapter four, a community of practice can assist in the transformation of identities of practitioners. My research has demonstrated the existence of a group of like-minded experts in ADR, committed to promoting non-adversarial practice in law. This common teaching aim could potentially evolve to include second generation practice through a more formalised community of practice. In such a more formal community teachers could engage with each other to consider ADR content and pedagogy and emergent theory and practice. Dissemination of the findings of my research to such a community of practice would contribute to discussion amongst ADR teachers, debating the benefits of first and second generation practice and pedagogy, and may assist them in course renewal. To promote such a community of practice, forums are required to bring ADR teachers together. Australia should follow the lead of academics and practitioners in the United States who are hosting conferences dealing with both content and pedagogy in negotiation and mediation. Conferences or forums of this kind promote experimentation and critique and provide the opportunity for discussion around the evolution of ADR teaching.

I have planned such a forum in ADR in legal education for February 2012 to be held at RMIT University. The forum aims to formalise the community of practice of ADR teachers and promote the free exchange of ideas that can invigorate practice and pedagogy. This forum is co-convened by Queensland University of Technology academic Rachael Field. The keynote address will be delivered by prominent ADR academic, Professor Tania Sourdin of Monash University. At this forum I will discuss

26 Etienne Wenger, *Communities of Practice: Learning, Meaning and Identity* (Cambridge University Press, 1998).
my findings on first and second generation practice. I will also lobby for the inclusion of ADR as a stand-alone course in first year and the appropriate funding of ADR pedagogy through role-plays. My aim is to promote second generation pedagogy and the inclusion of more diversity in ADR teaching through augmenting role-play pedagogy with approaches such as online learning, improvisation and adventure learning.

One body that may assist with lobbying is the National Alternative Dispute Resolution Advisory Council (NADRAC), discussed in chapter one of this thesis. NADRAC is the body set up to advise the federal government on ADR and is in a position to argue for the improved teaching of ADR in law schools. NADRAC will be part of the 2012 forum through an afternoon panel on ADR and legal education. This forum panel will be chaired by the present chairman of NADRAC Stephen Gormly SC. I have also arranged for a special edition of the Australasian Dispute Resolution Journal to publish papers from this forum in May 2012. The papers will be refereed and the special edition will be co-edited by Rachael Field and myself.

My findings in this research are relevant to all states in Australia as the sample included a diverse range of approaches to the teaching of ADR. Although it is possible that teachers in other states have included innovations not canvassed in this sample it is likely that the study includes most learning and teaching design and content in the area. My study also explored the stories of ADR teachers, and their experiences of teaching this area. It showed that their concerns were not jurisdictionally specific as the same concerns surfaced in both Victoria and Queensland. Thus the findings of this study may inform curriculum change in law schools in other parts of Australia. Indeed, the findings of my research are relevant beyond Australia to law schools in other countries such as Canada, the United States and the United Kingdom. Many Western law schools have similar concerns about the place of ADR in legal education. My findings provide insights into the content and pedagogy of ADR in the legal curriculum. My use of the literature on non-adversarialism, through primarily the work of Macfarlane, and James’s six discourses of legal education to analyse my data provide unique lens through which to consider the role that ADR has to play in shaping lawyers of the future. The findings of this thesis provide law schools with data and analysis with which to re-visit the place of
ADR in the legal curriculum and capitalise on the opportunities this discipline provides to improve legal education.

The research and writing of this thesis was undertaken in a period of significant change for both the practice and teaching of ADR. There has been rapid policy and legislative change in support of ADR and non-adversarial practice. Recently, both Federal and state governments have lobbied law schools to include the teaching of ADR as a compulsory area in the legal curriculum. The TLOs, as part of Federal government initiatives in higher education, have also contributed to the momentum in the teaching of ADR in legal education. My own efforts as both a practitioner and teacher in ADR have been influenced by my research and writing of this topic. For instance, as a mediator I have altered my practice to include aspects of second generation practice, particularly as regards to emotion, culture and power. In my mediation sessions I now seek to use a nuanced approach to the expression of emotion, understanding the different discourses in society that affect the ways we emotionally react to conflict. I try to assist parties to express emotion and also recognise why they feel a particular emotional reaction. In my mediations I have come to see culture as an aspect of identity that is not essentialist, and try to reflexively engage with cultural identities around the mediation table. I also understand the nature of power in mediation better, seeing it as fluid, and encouraging agency in participants as we re-story the conflict narrative that brought the parties to the mediation table. Thus, I try to incorporate aspects of narrative mediation in my work as a mediator as my research has led me to the view that this model best suits the parties and my own needs as a mediator. I have recently given professional development talks to mediator and lawyer audiences that raise issues of emotion, culture and power in mediation in an effort to disseminate my reflections from my research.

My research has also changed my teaching practice. Since I began this thesis, I have gradually changed the ADR courses that I teach to emphasise a relational world view and issues of emotion, culture and power. I now include both first generation and second generation practice in my teaching, and include the narrative, transformative and restorative justice conferencing approaches in the curriculum. I try to give my students the opportunity to understand and engage with diverse models. I engage with
second generation pedagogy by including role-plays of various models, including restorative justice, and vary my learning and teaching strategies with the inclusion of online role-plays, and both improvisation and design, as well as playing out, of simulations. My present ADR course, Negotiation and Dispute Resolution, is a compulsory third year course and in 2010 I contributed to a review of the Juris Doctor at RMIT arguing that ADR be retained as a core course and moved to first year. I was successful in ADR being retained as a core course, and moved to first year. ADR will also be introduced into the RMIT introductory legal course, the first compulsory course in the Juris Doctor. The upcoming forum in February 2012 that has been inspired by my research and analysis provides an opportunity for me to reflect further on my own practice and pedagogy. The forum provides all the ADR teachers in this country with the chance to re-imagine their teaching of ADR and take on the challenges of their role in legal education in shaping lawyers of the future.

ADR has an important role in legal education. ADR, with its non-adversarial orientation, provides lawyers with the knowledge and skills to engage with legal problems in a holistic manner. First generation practice resists and challenges traditional adversarial paradigms in the law. Students who understand and adopt this approach will assist their clients in collaborative problem-solving of disputes and in accordance with the objectives of the therapeutic jurisprudence movement, become more holistic practitioners. Lawyers of the future will need to respond to disputes in ways that better deal with issues of emotion, culture and power and second generation practice can help them engage with these areas more effectively in private processes. Students who understand and adopt second generation practice may adopt a relational world-view, an approach that does not just solve problems but considers the relationship dimensions of disputes. ADR in legal education can assist lawyers of the future to engage with the full potential of private processes and give clients the opportunity of conflict transformation in negotiation and mediation.
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### APPENDIX A

**List of universities and information**

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<tr>
<th>University</th>
<th>Interviewed</th>
<th>Surveyed</th>
<th>Course Guide</th>
<th>Information from Web</th>
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<td>Victoria University</td>
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<td>James Cook University</td>
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APPENDIX B

INTERVIEW PROTOCOL

<table>
<thead>
<tr>
<th>Introductions</th>
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<tr>
<td>* Rapport building</td>
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</table>

<table>
<thead>
<tr>
<th>Overview of the Study</th>
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<tbody>
<tr>
<td>Purpose of Study and approach to interviewing explained</td>
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<tr>
<td>Opportunity for clarifying questions provided</td>
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<td>Signing of Consent form</td>
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<tr>
<td>Query re allowing recording of interview</td>
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</tbody>
</table>

<table>
<thead>
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<th>Collection of participant characteristics</th>
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<tbody>
<tr>
<td>• Current employment at a university.</td>
</tr>
<tr>
<td>• Age, gender, period and experience teaching ADR and experience in ADR practice or similar area.</td>
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</table>

<table>
<thead>
<tr>
<th>Prompt Questions on Topics</th>
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<tr>
<td>• Context of teaching ADR? Title of subject or taught as part of another law subject? How is ADR sequenced in your law program?</td>
</tr>
<tr>
<td>• Use of social science or other perspectives in teaching.</td>
</tr>
<tr>
<td>• Engagement with issues of emotion, culture (including indigenous concerns) and power (including the issue of neutrality) in ADR.</td>
</tr>
<tr>
<td>• Models of ADR used in teaching.</td>
</tr>
<tr>
<td>• Perception of ‘adversarialism’ in law and law students in class. If so how does this affect teaching?</td>
</tr>
<tr>
<td>• General approaches to teaching ADR (both content and pedagogy).</td>
</tr>
<tr>
<td>• Trends in teaching ADR.</td>
</tr>
<tr>
<td>• General reflections upon teaching in the area of ADR in a law school environment.</td>
</tr>
<tr>
<td>• Books used in teaching.</td>
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</table>
APPENDIX C

SURVEY

Survey p 1

Teaching ADR:
Content and Practices in
Australian Law Schools

This survey aims to gain information relating to the teaching methods, both
current and pedagogies, of various teachers of the subject ADR in Australian law
schools.

The data collected will be used in my PhD however, identifying information will
be removed after coding ensuring the privacy of participants. The benefits to
you and the contribution of teachers to this area is a possible increased under-
standing of the content of ADR courses and teaching methodologies. Further-
more, participation is voluntary and if you require further information please contact myself
on 02252510 or kath.developer@unsw.edu.au or my supervisor, Dr Sara
Chan
research on 02252510 or sarac.hetherington@unsw.edu.au

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Teaching ADR: Content and Practices in Australian Law Schools

Please provide only one response to questions unless instructed otherwise and note that there is space for additional comments at the end of this survey.

**PLEASE MARK ‘X’ NEXT TO THE NUMBER AS YOUR RESPONSE**

1. **Are you?**
   1. Female
   2. Male

2. **How old are you?**
   1. Under 20
   2. 20 - 29
   3. 30 - 39
   4. 40 - 49
   5. 50 or over

3. **In what capacity do you work at a university law school?**
   1. Continuing
   2. Contract/Fixed Term
   3. Casual/Sessional

4. **What academic level are you?**
   Please specify…………………………

5. **Are you**
   1. Full time
   2. Part time

6. **What are your qualifications (Please mark an x against all that apply)**
   1. LLB
   2. LLM
   3. PhD
   4. JD
   5. SJD
   6. Other (Please specify………………..)

7. **How long have you taught ADR?**
   (Please mark an x against all that apply)
   Period
   1. 0 - less than 2 years
   2. 2 - to less than 5 years
   3. 5 - to less than 10 years
   4. Other (Please specify …………………..)

8. **What percentage (approximately) of your research activity deals primarily with ADR?**
   1. 0-to less than 10%
   2. 10-to less than 20%
   3. 20-to less than 30%
   4. 30-to less than 40%
   5. 50% or higher
9. Do you have experience practising in ADR? If so please specify how long.

1. Yes continuing
   Period ……………
2. Yes not continuing
   Period……………
3. No

10. If you answered yes to question 9 in what capacity did you, or do you, practice in ADR? (PLEASE MARK AN X AGAINST ALL THAT APPLY)

1. Conciliator
2. Mediator
3. Arbitrator
4. Other (Please specify………………..)

11. How is the ADR subject (please name) sequenced in the law program?

1. Core subject
   (Please specify year………)
2. Elective

(Name of course………………………………)

12. Do you know if ADR content is taught in other subjects in your law school? If so in which subjects?
(Please mark an x against all that apply)

1. International Law
2. Family Law
3. Civil Procedure
4. Industrial Law
5. Other
   (Please specify………………..)

13. What are the objectives of your course in ADR? Please provide these at the end of the survey or provide, if you wish, your guide.

14. What are your areas of content in teaching the subject ADR? Please provide a list at the end of the survey.

15. What value do you place upon teaching of the following areas in the subject ADR? Please rate the importance of teaching the following areas by placing a numerical value after each option.

   Please place 1 as a low value and up to 5 as a high value.

   1. Cultural issues
   2. Indigenous issues
   3. Gender issues
   4. Identity issues
   5. Power issues
   6. Emotion
   7. Neutrality
   8. Ethics

16. Does the course you teach include content/material on the following? (PLEASE MARK AN X AGAINST ALL THAT APPLY)

1. Restorative Justice
2. International Peace Building
3. Collaborative Law
4. Mindful Mediation
5. Environmental Dispute Resolution
6. Other _____________________
17. What models of mediation do you teach?
(Please mark an X against all that apply)
1. Facilitative (interest based)
2. Evaluative (an opinion is offered)
3. Transformative (recognition and empowerment focus)
4. Narrative (storytelling approach)
5. Therapeutic (relationship model that identifies patterns of conflict)
6. Other ____________________

18. Do you use perspectives from the following areas when teaching ADR?
(Please mark an X against all that apply)
1. Psychology
2. Negotiation
3. Social Science/Humanities
4. Communication Studies
5. Management
6. Other ……………………

19. Is your main aim in your teaching
(Please mark an X against all that apply)
1. To acquaint students with the theory of ADR
2. To generally acquaint students with skills in ADR, particularly mediation
3. To provide the skill base for mediation or other ADR practice.
4. Other (Please specify …………..)

20. Do you discuss your teaching with others (ie map graduate attributes)
1. No
2. Yes

21. Do the students you teach mainly indicate a preference for litigation over other dispute resolution options? (Please mark an X against all that apply)
1. Always
2. Almost always
3. On occasion
4. Never

22. Do you teach about the role of the lawyer in ADR?
1. No
2. Yes (Please provide detail)

23. Do you presently explore any of the following approaches when teaching in this area?
(Please mark an X against all that apply)
1. Role plays
2. Fishbowl
3. Small group discussion
4. Guest speakers
5. Video/movies
6. Newspaper/internet
7. Other
(Please specify ……………………………….)
24. When teaching in this area do you utilise any of the following learning strategies?  
(PLEASE MARK AN X AGAINST ALL THAT APPLY)

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<tr>
<td>1</td>
<td>Online learning</td>
</tr>
<tr>
<td>2</td>
<td>Print based materials</td>
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</tbody>
</table>
| 3 | Intensive mode  
   (ie teaching over three days or more rather than weekly classes) |
| 4 | ADR/mediation in clinical settings |
| 5 | Other  
   (Please specify………………………..) |

25. What assessment practices do you utilise when teaching ADR? (PLEASE MARK AN X AGAINST ALL THAT APPLY)

<p>| | |</p>
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</table>
| 1 | Essay  
   (Please specify percentage……………….) |
| 2 | Examination  
   (Please specify percentage……………….) |
| 3 | Journal writing  
   (Please specify percentage……………….) |
| 4 | Role-play assessment of skills  
   (Please specify percentage……………….) |
| 5 | Other  
   (Please specify type and percentage………………………..) |

26. When teaching ADR what evaluation strategies do you utilise? (PLEASE MARK AN X AGAINST ALL THAT APPLY)

<p>| | |</p>
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<tr>
<td>1</td>
<td>Survey evaluation</td>
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<td>2</td>
<td>Interviews with students</td>
</tr>
<tr>
<td>3</td>
<td>Focus groups with students</td>
</tr>
</tbody>
</table>
| 4 | Industry input  
   (Please specify………………………..) |
| 6 | Other  
   (Please specify………………………..) |
Please make any further comments about your general approaches to teaching in this area in both content and pedagogy, including trends in teaching ADR.

General Comments:

What three books on ADR have influenced your ADR teaching and please include your reasons?
Do you have reflections upon teaching ADR in a law school environment? What place does ADR have in a law school programs?

Do you have any reflections regarding the teaching of different models of mediation? (Refer to Q. 17)
APPENDIX D

PARTICIPANT INFORMATION

New South Wales and Queensland

<table>
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<tr>
<th>Participant code*</th>
<th>Gender</th>
<th>Age</th>
<th>Work</th>
<th>F/P**</th>
<th>Qualification</th>
<th>Years of ADR teaching</th>
<th>Research %</th>
<th>Academic level</th>
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<td>10+</td>
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<td>10+</td>
<td>&gt;50</td>
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<td>F</td>
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<td>Cas.</td>
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<td>5-10</td>
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<td>Q 5 (a)</td>
<td>M</td>
<td>&gt;50</td>
<td>Fixed</td>
<td>F</td>
<td>LLB, LLM</td>
<td>0-2</td>
<td>&gt;50</td>
<td>Lecturer</td>
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<tr>
<td>Q 6 (a)</td>
<td>F</td>
<td>&gt;50</td>
<td>Cont.</td>
<td>F</td>
<td>LLB, LLM</td>
<td>5-10</td>
<td>10-20</td>
<td>Lecturer</td>
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</table>

* New South Wales (N), Queensland (Q), Victoria (V) Number (institution) Letter (participant)

** F/P Full (F) or Part time (P)
## Victoria

<table>
<thead>
<tr>
<th>Participant code*</th>
<th>Gender</th>
<th>Age</th>
<th>Work</th>
<th>F/P**</th>
<th>Qualification</th>
<th>Years of ADR teaching</th>
<th>Research %</th>
<th>Academic level</th>
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<tbody>
<tr>
<td>V 1 (a)</td>
<td>F</td>
<td>30-39</td>
<td>Cont.</td>
<td>F</td>
<td>LLB PhD</td>
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<tr>
<td>V 1 (b)</td>
<td>M</td>
<td>40-49</td>
<td>Cont.</td>
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<td>LLB LLM</td>
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<td>Fixed</td>
<td>F</td>
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<td>V 1 (d)</td>
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<td>30-39</td>
<td>Cas.</td>
<td>P</td>
<td>LLB</td>
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<td>0-10</td>
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<tr>
<td>V 2 (b)</td>
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<td>BA MCR</td>
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<td>V 3 (a)</td>
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<td>&gt;50</td>
<td>Cas.</td>
<td>P</td>
<td>LLM</td>
<td>10+</td>
<td>&gt;50</td>
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<td>LLM</td>
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<td>MSc</td>
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<td>LLB LLM</td>
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<td>30-39</td>
<td>Cas.</td>
<td>P</td>
<td>LLB LLM</td>
<td>2-5</td>
<td>&gt;50</td>
<td>N/A</td>
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<td>V 6 (a)</td>
<td>M</td>
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<td>Cont.</td>
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<td>LLB LLM</td>
<td>17 (combined)</td>
<td>&lt;10</td>
<td>Senior Lecturer</td>
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</tbody>
</table>

* New South Wales (N), Queensland (Q), Victoria (V) Number (institution) Letter (participant)

** F/P Full (F) or Part time (P)
## APPENDIX E

### PARTICIPANT QUALIFICATIONS

<table>
<thead>
<tr>
<th>Qualification</th>
<th>Number with qualification</th>
<th>Percentage of Sample (n=29)</th>
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<tr>
<td>Masters degree (Law)</td>
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<tr>
<td>Masters degree (other discipline)</td>
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<td>Law Degree (LLB)</td>
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<tr>
<td>Other bachelor degree (BA and BEd)</td>
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<td>No degree</td>
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## APPENDIX F

### PARTICIPANTS’ NUMBER OF YEARS TEACHING ADR

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<th>Number of years teaching ADR</th>
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<th>Cumulative percentage of sample</th>
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# APPENDIX G

## COURSE INFORMATION

<table>
<thead>
<tr>
<th>Name of University; Title of course Compulsory or elective</th>
<th>Objectives Conflict/ADR range</th>
<th>Objectives Non-adversarial practice/lawyer ethics</th>
<th>Generic Graduate Attributes: critical thinking, communication reflection, and team work</th>
<th>Power</th>
<th>Culture</th>
<th>Emotion</th>
<th>Doctrine/Case Law</th>
<th>Integrative/Facilitative Model</th>
<th>Diverse Models</th>
<th>Learning and Teaching Strategies</th>
<th>Assessment</th>
<th>Prescribed Text</th>
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<tbody>
<tr>
<td>1 Deakin University; Civil Procedure and ADR Compulsory</td>
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<td>√</td>
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<td></td>
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<td></td>
<td></td>
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<td></td>
<td>Stephen Colbran et al (Lexis Nexis) 2005</td>
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<td></td>
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<tr>
<td>2 University of Melbourne Dispute Resolution Compulsory</td>
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<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
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<td>√ (Restorative Justice)</td>
<td>Seminars; Role-plays; Case Studies</td>
<td></td>
<td>Printed Materials online</td>
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<tr>
<td>3 Monash University Negotiation and Mediation Elective</td>
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<td>√</td>
<td>√</td>
<td>√</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Seminars; Role-plays</td>
<td>Participation: 10% Role-play: 30% Open book Exam: 60%</td>
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<td>4 La Trobe University Dispute Resolution (2008) Compulsory</td>
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<td>√</td>
<td>√</td>
<td>√</td>
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<td></td>
<td>√ (Restorative Justice)</td>
<td>Lectures; Workshops; Role-plays</td>
<td>Role-play: 20% Exam: 70% Reflective Journal: 5% Class Participation: 5%</td>
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<table>
<thead>
<tr>
<th>Assessment Method</th>
<th>Percentage</th>
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<tr>
<td>Lectures</td>
<td>Skills assignment (10+20): 30% Exam: 70%</td>
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<td>Skills assignment (10+20): 30% Exam: 70%</td>
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<tr>
<td>Printed Materials online</td>
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<table>
<thead>
<tr>
<th>Assessment Method</th>
<th>Percentage</th>
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</thead>
<tbody>
<tr>
<td>Participation: 10% Role-play: 30% Open book Exam: 60%</td>
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<table>
<thead>
<tr>
<th>Assessment Method</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Lectures; Workshops; Role-plays</td>
<td>Role-play: 20% Exam: 70% Reflective Journal: 5% Class Participation: 5%</td>
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<table>
<thead>
<tr>
<th>Assessment Method</th>
<th>Percentage</th>
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<tr>
<th>Assessment Method</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Printed Materials online</td>
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<table>
<thead>
<tr>
<th>Assessment Method</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Astor, Dispute Resolution in Australia, 2002</td>
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<td></td>
<td>Name of Victorian University; Title of course</td>
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<tr>
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<td>5</td>
<td>RMIT University Negotiation and Dispute Resolution (2008) Compulsory</td>
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<tr>
<td>6</td>
<td>Victoria University Dispute Resolution and Civil Procedure (2008) Compulsory</td>
</tr>
<tr>
<td>Name of Queensland University; name of course</td>
<td>Objectives Conflict/ADR range</td>
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<tr>
<td>---------------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>7 University of Technology</td>
<td>√</td>
</tr>
<tr>
<td>Dispute Resolution and Non-adversarial Practice (2008) Elective</td>
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<tr>
<td>8 University of Queensland ADR Theories and Principles</td>
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<tr>
<td>9 Griffith University Alternative Dispute Resolution Clinic (2008) Elective</td>
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<tr>
<td>Name of University; name of course</td>
<td>Objectives Conflict/ADR range</td>
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<tr>
<td>-----------------------------------</td>
<td>--------------------------------</td>
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<td><strong>11</strong> James Cook University Alternative Dispute Resolution (2009) Elective</td>
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<td><strong>12</strong> University of Southern Queensland Legal Conflict Resolution (2009) Compulsory</td>
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## ADDITIONAL COURSE INFORMATION

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<th>Name of university</th>
<th>Name of course</th>
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<th>Objectives Conflict/ADR range</th>
<th>Objectives Non-adversarial practice/lawyer ethics</th>
<th>Generic Graduate Attributes: critical thinking, communication, and team work</th>
<th>Power</th>
<th>Culture</th>
<th>Emotion</th>
<th>Doctrine/Case Law</th>
<th>Integrative/Facilitative Model</th>
<th>Diverse Models</th>
<th>Learning and Teaching Strategies</th>
<th>Assessment</th>
<th>Prescribed Text</th>
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<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>Lectures; Skills workshop; Videos</td>
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<td>Sourdin Alternative Dispute Resolution (2005)</td>
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<td>Monash</td>
<td>Non Adversarial Justice (2007)</td>
<td>Elective</td>
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<td>Yes</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>(Restorative Justice; Transformative)</td>
<td>Seminars; Field visits; Guest lectures; Exercises</td>
<td>Observation Assignment: 20% Essay: 40%; Take home exam: 40 (or placement: 60% plus exam)</td>
<td>Printed materials</td>
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<td>La Trobe</td>
<td>Mediation Skills and Theory (2007)</td>
<td>Elective</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>(Transformative)</td>
<td>Seminars; Role-plays; Video</td>
<td>Video assessment: 30%; Journal: 50%; Essay: 40%</td>
<td>Bush and Folger Promise of Mediation (2005)</td>
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<tr>
<td>Name of university name of course</td>
<td>compulsory or elective</td>
<td>Objectives</td>
<td>Objectives Non-adversarial practice/lawyer ethics</td>
<td>Generic Graduate Attributes: critical thinking, communication reflection, and team work</td>
<td>Power</td>
<td>Culture</td>
<td>Emotion</td>
<td>Doctrine/Case Law</td>
<td>Integrative/Facilitative Model</td>
<td>Diverse Models</td>
<td>Learning and Teaching Strategies</td>
<td>Assessment</td>
<td>Prescribed Text</td>
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<tr>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓ (Transformative)</td>
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<td>✓</td>
<td>✓</td>
<td>Seminars Role-plays</td>
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<td>Seminars; Online learning (boards)</td>
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## Appendix H

**Victorian Universities Offerings of ADR Courses**

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<thead>
<tr>
<th>University and name of course</th>
<th>ADR compulsory under graduate program (LLB)</th>
<th>ADR elective</th>
<th>ADR compulsory combined with civil procedure</th>
<th>Additional ADR advanced subjects</th>
<th>Skills based complementary program (including ADR)</th>
<th>ADR compulsory or elective Juris Doctor</th>
<th>ADR compulsory combined with civil procedure Juris Doctor</th>
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<tbody>
<tr>
<td>Deakin University of Melbourne</td>
<td>Civil Procedure and Alternative Dispute Resolution</td>
<td>✓ (later year)</td>
<td>✓</td>
<td>✓ (stand-alone approach)</td>
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<td>University of Melbourne</td>
<td>Dispute Resolution</td>
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<td>✓</td>
<td>✓</td>
<td></td>
<td>✓ (first year)</td>
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<tr>
<td>Monash University</td>
<td>Negotiation and Mediation</td>
<td>✓</td>
<td>✓</td>
<td>✓ (elective)</td>
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<tr>
<td>La Trobe University</td>
<td>Dispute Resolution</td>
<td>✓ (first year)</td>
<td>✓</td>
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<tr>
<td>RMIT University</td>
<td>Negotiation and Dispute Resolution</td>
<td>✓ (later year)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Victoria University</td>
<td>ADR and Civil Procedure</td>
<td>✓ (later year)</td>
<td>✓</td>
<td>✓ (offered in Social Science)</td>
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347
<table>
<thead>
<tr>
<th>University and name of course</th>
<th>Compulsory</th>
<th>Elective</th>
<th>Combined with civil procedure</th>
<th>Additional Advanced Subjects</th>
<th>Skills based complementary program</th>
<th>JD</th>
</tr>
</thead>
</table>
| Queensland University of Technology  
Dispute Resolution and Non-adversarial Practice | √          |          | √                            | √                           | (integrated in substantive law courses) |    |
| University of Queensland  
ADR Theories and Principles | √          |          |                               |                             |                                   |    |
| Griffith University  
Alternative Dispute Resolution Clinic | √          |          |                               | √                           | (integrated in substantive law courses) |    |
| Bond University  
Dispute System Design | √          |          | √                            | √                           |                                   |    |
| James Cook University  
Alternative Dispute Resolution | √          |          |                               |                             |                                   | √  |
| University of Southern Queensland  
Legal Conflict Resolution | √          |          |                               |                             |                                   | (later year) |
APPENDIX I

LIST OF PUBLICATIONS RELATING TO THESIS


Kathy Douglas, ‘Mediation as Part of Legal Education: The Need for Diverse Models’ (2005) 24 The Arbitrator and Mediator 1