ADR in legal education: Learning by doing

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Practice-based courses have grown in Australian law school curricula, along with the idea that law schools must provide the forum for students to learn what lawyers actually do. Teaching and learning in a theoretical framework on its own results in deficiencies in legal education. In 2005, La Trobe University Law School introduced Dispute Resolution as a compulsory first-year stand-alone law subject. In addition to the traditional method of a lecture or seminar-discussion session, a simulation exercise is used to teach the mediation process. This article explores the mediation role-play assessment exercise which is the culmination of skills teaching and learning in the subject.

INTRODUCTION

The Australian academy, drawing on primarily North American literature, has, for several years, engaged in and contributed to the discourse which promotes teaching and learning of alternative/appropriate dispute resolution (ADR) subjects in legal education.¹ The narrative is devoid of controversy in its acceptance of the need to teach law students about ADR. This acceptance is premised on several core concepts. The first underpinning notion is that ADR has become institutionalised throughout the Australian justice system and therefore is an integral part of contemporary legal practice. Because of this reality, understanding of and familiarity with ADR theory and practice form part of the essential skill set for law graduates. Consequently, it is expected that law schools teach “best practice” that includes competency in dispute resolution processes.

Secondly, but derivative of point one, is the teaching and learning theory that endorses a clinical education model. Current theory makes a distinction between declarative knowledge, or “knowing what”, and functioning (or professional) knowledge.² Declarative knowledge refers to the content knowledge that can be declared by lecturers in class and tested on exams by students’ declarations in return. Functioning knowledge is more about performance, and it is this aspect that is sometimes missing from university education and to which clinical education should be tuned.

This teaching and learning paradigm is one that is applied in most professional schools, both law schools and vocational schools, and in other disciplines throughout the western world. There is growing appreciation and acknowledgement that clinical skills are not only important, but that they are best learnt and taught in a “hands on” environment.³ Whilst the importance of teaching and learning in “black letter” law and theoretical frameworks has not been undermined, “learning by doing” in a situated learning⁴ environment adds depth to students’ learning and arguably prepares them for professional practice, should they wish to pursue that path. This teaching and learning philosophy seeks to bridge the disconnection between what is learnt at university and key skills for professional practice.

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Situated cognition, the idea that learning takes place within a context, has been central to educational theory since the work of Brown et al in the late 1980s. This theory argues that learning is situated rather than abstracted from its context; therefore, we should ensure that learners are provided with rich, active learning environments instead of dull, inert lecture halls and tutorial rooms.

Building on this important work, the educational technology literature has repeatedly argued that learners should be given authentic learning opportunities that require them to engage with real world scenarios. Thus Jonassen et al argued that learning environments should “provide contextually-based environments that are meaningful to the learners”. Herrington and Oliver contended that “situated learning environments” give students a context that closely relates to the way they will make use of knowledge in their future work. Following this reasoning, we describe the particular educational technology developed as an innovative approach to “learning by doing” with mediation when discussing the development of a DVD film entitled The Scholarship Dispute below.

Thirdly, but also inextricably linked to the first point, is the commitment by Australian governments, policy-makers and judges to enshrine ADR practices into the way civil litigation is conducted in Australia.

Another key perception that drives the promotion of ADR in legal education is that law students learning the micro and macro skills associated with ADR processes such as negotiation and mediation paves the way for a collaborative problem-solving approach to disputing, rather than the traditional, gladiatorial model associated with the adversarial lawyering paradigm. The change in mindset has the potential to spearhead a new pathway for both legal practice and justice that might result not only in effective case management, but also reduce the stress and anxieties associated with conflict resolution, thereby enhancing stakeholder well-being. This last point has gained traction, particularly in the context of apprehensions about the social and mental health issues experienced by legal practitioners associated with continued exposure to the litigation process even though no empirical data to date has linked legal practice in non-determinative processes to improved lawyer well-being. Concerns about the nexus between the culture of adversarialism and lawyer health overlap with commonly held negative views about lawyers which bring the legal profession into disrepute, thereby undermining community confidence in the administration of justice.

La Trobe University Law School, drawing on the propositions raised above, was the first Australian law school to incorporate a compulsory dispute resolution subject into its law curriculum. This article examines teaching and learning issues associated with the subject and discusses an empirical study conducted by La Trobe Law School researchers relating to law students’ attitudes about disputing. The article details the need for a film of the co-mediation model to enhance student learning in the subject. The article also considers future directions for research in the area.

**Dispute Resolution at La Trobe University Law School**

Since 2005, all law students in La Trobe’s LLB program are required to enrol in *Dispute Resolution*, which provides a general introduction to the theoretical and practical aspects of conflict and dispute resolution, including litigation. In addition, the processes of arbitration, conciliation, mediation and

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11 Elective subjects (Mediation Skills and Theory and Negotiation) are also offered to students in the LLB program.
negotiation are described and evaluated. Guest lecturers, who are experienced practitioners in their field, detail how these processes are used in a variety of areas including family law, and disputes involving Indigenous Australians. Developments in a range of non-determinative initiatives are examined. Current issues in the practice of dispute resolution such as accreditation, ethics and lawyers acting as mediators are analysed. Skills-based training in negotiation and mediation is a major and compulsory component of the subject.  

The intended learning outcomes for students in the subject cover declarative knowledge with aspects such as describing dispute resolution processes, explaining the differences between various approaches to dispute resolution, evaluating the role of their mechanisms within legal systems, and analysing the role of lawyers in these processes. However, they also include a range of outcomes for students’ functioning knowledge, such as active listening, questioning, summary, reflection, reframing, agenda setting, and identifying the interests and needs of parties involved in dispute resolution, as well as the development of written, oral and process skills.

*Dispute Resolution* is a 13-week, semester-long subject, delivered by one weekly lecture (one hour) and one weekly seminar (two hours). Seminar groups comprise 20-25 students, and attendance at seminars is compulsory. There are five assessment tasks in the subject. This first task, submitted mid-semester, is a short essay (20%) focusing on materials covered in lectures and seminars in the first five weeks of semester. The “closed book” end of semester exam (45%) consists of essay type questions and short answer skills-based questions. A class participation mark (10%) is awarded, marked on students’ seminar engagement and input.

The “learning by doing” teaching philosophy behind the seminar program is the central point of teaching and learning in the subject. Whilst theoretical concepts are explored in lectures, and readings on the lecture topics are discussed in the seminars, the seminars enable students to learn and practise fundamental skills, such as communication, negotiation and mediation in a small, intimate and friendly environment. These skills are fundamental to best practice lawyering in the 21st century. The subject provides students with an amalgam – a teaching and learning model based on a rich mix of theoretical perspectives that underlie practical skills training. Furthermore, the teaching and learning model draws on “[a] common thread which unites inquirers, their critics and academics … [namely] what can be done to prepare students for their epistemological engagement with the world-prior, that is, to even an intermediate real-world experience such as an internship.”

The seminar-based learning experience not only enriches and challenges students per se, it prepares them for the role-play assessment which comprises 20% of the marks in the subject. Students submit a “reflective journal” (5%) drawing on the role-play assessment experience a week after their assessment. The teaching philosophy underpinning the journal exercise is to engage students with the notion of reflective practice.

**THE ROLE-PLAY ASSESSMENT**

The “learning by doing” focus of *Dispute Resolution* culminates in the role-play assessment, conducted in seminar time slots during weeks 10 to 12 of the semester. Role-play simulations have long been regarded as a way of “making learning real”, and this assessment builds on a long tradition aimed at motivating and engaging students and fostering critical thinking. Students

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12 Since its inception as a core component of the law curriculum at La Trobe University in 2005, the subject has undergone some change.

13 Macfarlane, n 9.


participate both as mediators and disputants in role-plays that are allocated to them prior to the assessment. Students are assessed on their skills as mediators only.

Students practise a co-mediation facilitative model of mediation adapted from the model used at Dispute Settlement Centre of Victoria. A criteria-referenced assessment grid is applied when marking the role-play. Criteria used to assess students’ skills are: familiarity with the stages of the mediation process, appropriate use of interventions and micro skills for the stage of the mediation process, active listening skills, and teamwork.

Student evaluations of Dispute Resolution have been overwhelmingly positive. In particular, students perceive the role-play assessment as a challenge and also an opportunity for their personal growth and professional skills development. Despite affirmations of the subject, students have expressed the desire to be better prepared for the role-play assessment. Students have stated that a film of the co-mediation facilitative model of mediation used in the subject would enrich their learning. Krain’s research affirms this proposition.

THE SCHOLARSHIP DISPUTE

We decided to respond to our students’ learning needs by filming the mediation of a dispute, using the model taught in the course. The mediators, disputant and the host in the film are “played” by La Trobe University staff, and a La Trobe Law student “plays” a disputant. All stages of the process are shown on the film, except for the first stage, preparation of the scene, and the last stage, mediator debrief. The film has been produced as a DVD of approximately 50 minutes. This enables it to be shown in a lecture or seminar forum. Each stage of the mediation process is demarcated and clearly introduced so that teaching and learning can be segmented and staged. Written materials accompany the film as a teaching and learning aid.

The facts of the conflict filmed in The Scholarship Dispute centre on a dispute between the Dean of the Faculty of Law at Regional University and a law student at the university who is the recipient of a scholarship at Regional University. However, the student has been offered a scholarship by City University and wants to be released from the scholarship agreement at Regional University in order to take up the place at the other University. The Dean wishes to dissuade the student from leaving Regional University Law School.

Importantly, the film communicates a wide variety of elements that could not be easily portrayed using a written case study or through a lecture on its own. For example, the study guide draws attention to the importance of the physical setting, the layout of furniture, the agenda as presented on a white board, and the nuances of the behaviour of each party. The body language and utterances of frustration between the parties are in many ways just as important as the facts of the dispute.

The DVD is a resource that is intended to provide a rich, authentic learning experience by allowing the complex nature of the real world mediation process to be studied. Students are invited to move into a role of observing the interaction at a meta-level, beyond the facts of the dispute and considering the purpose of each stage of mediation, why certain elements are important, and how the parties are feeling. This emphasis on metacognitive processes is an important characteristic of authentic learning tasks.

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18 In 2009, 194 students were enrolled in Dispute Resolution at the Bundoora Campus. Students were surveyed using the La Trobe University SFTU and SFTE, see http://www.latrobe.edu.au/cfe/studentfeedback viewed 22 June 2012. Teaching effectiveness in the subject scored 4.46 out of 5 on the SFTU (response rate 88%) and student feedback of teaching scored 3.77 out of 5 (response rate 36.3%). The scale used for these evaluations is as follows: 5=always, 4=usually, 3=sometimes, 2=rarely, and 1=never. This data is based on students’ responses to questions relating to teaching effectiveness and the amount the lecturer has contributed to student learning.


20 The film The Scholarship Dispute is based on a role-play exercise written by Clare Coburn. The Faculty of Law and Management at La Trobe provided funding for the filming of the mediation.

21 Herrington and Oliver, n 7.
WELL-BEING

Field and Kift’s review of the literature outlining the “high levels of psychological distress experienced by law students” underscores the importance of delivering a law curriculum that not only identifies this concern, but addresses it in the first year of law school.22

The seminar program in Dispute Resolution is designed to assist students in becoming accustomed to present orally before the seminar group and to participate in role-plays. The subject design recognises that public speaking often presents as a stressful situation for students. In an effort to alleviate this stressor, the subject design focuses on seminar activities whereby students get to know each other by name in an effort to create a relaxed and nurturing teaching and learning situation. Student evaluations of the subject indicate that seminar exercises involving student interaction with each other and the seminar leader create a friendly and tolerant environment, which leads to students forming academic and social relationships outside the seminar group. Furthermore, student evaluations signal that these seminar activities make students feel comfortable about oral presentations in front of the group, and prepare students mentally for the role-play assessment that some students consider stressful. Both of these factors arguably contribute to increased student resilience which Watson and Field described as being “part of well-being” and also protective against the onset of mental illness.23

In addition, we contend that the teaching and learning model in Dispute Resolution fosters student engagement with both the law school and the university. The subject also boasts high retention rates and high pass rates.24 These two positive outcomes add to student satisfaction, thereby promoting student well-being.

Whilst much of the literature focuses on student well-being, Baron has drawn attention to issues concerning the well-being of law academics.25 She pointed to empirical studies that conclude that academics experience high stress levels that negatively impact on their well-being. Importantly, Baron asserted that stressed and unhealthy law academics may damage the well-being of law students and, in the end, this mindset is detrimental to the well-being of the legal profession.

We posit that feedback from academic staff teaching in Dispute Resolution is very encouraging. Teachers enjoy getting to know the students. Even though teaching the subject is demanding and challenging, there are opportunities for teaching innovation and creativity, both of which, according to Baron, promote well-being in legal academics.

We argue that Dispute Resolution enriches the lives of students and academic staff by encouraging staff-student engagement, by breaking down stressors, by privileging resourcefulness, and by humanising the study of law. The synthesis of these factors has the potential to enhance well-being in law students and law teachers.

FUTURE DIRECTIONS

The Scholarship Dispute was shown to students taking Dispute Resolution in semester one of 2012.

Prior studies in the area provide a springboard for further research into ADR and legal education. An empirical examination of students’ attitudes after completing Dispute Resolution at La Trobe University Law School, published in 2007, documented clear changes in students’ attitudes towards managing conflict after taking the subject.26 The La Trobe Law study into students’ attitudinal changes


24 Drop-out rates for the subject were as follows: 2008: 0.9%, 2009: 0.9%, 2010: 0.6%, 2011: 1.7%. Pass rates were: 2008: 94.9%, 2009: 95.8%, 2010: 96.4%, 2011: 96.5%.


towards lawyering and ADR showed, generally, that students’ views altered from a positional, rights-based, lawyer-focused approach to having a collaborative, interest-based, client-focused attitude. Other studies found “strong links” between students taking an ADR unit and both well-being and engagement with their law school.27

It is planned to focus the research on student understandings, analogies and misconceptions of mediation practice, including interviewing students both before and after a specially planned screening of the film *The Scholarship Dispute* during second semester in 2012.28 The project will examine student responses to core questions relating to the mediation process and the role of the mediators, paying particular attention to the conceptual language and analogies used by students. The findings from this study will contribute to the understanding of teaching and learning in Dispute Resolution, and will serve as a detailed evaluation of a teaching innovation. The film will also demonstrate to students that their suggestions based on their learning needs are addressed by La Trobe Law School. Finally, we hope that the film can make a positive contribution to teaching, learning and training in ADR education in law schools and beyond.

CONCLUSION

This article describes key features of Dispute Resolution, and explains why it is an essential component of first year law curriculum at La Trobe University Law School. Whilst the “learning by doing” focus of the seminar series assists students in mastering key skills that are needed for contemporary legal practice, seminars also provide the “right” environment for students and staff to forge academic and professional relationships in an atmosphere where links with the law school and university can grow and develop. This supportive and encouraging teaching and learning milieu is attuned to the well-being of both students and staff. Adding a film of the mediation process to the student-oriented teaching and learning regime in this subject will augment the program, and provide further opportunities for research into teaching and learning in ADR.

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28 Ethics approval is being sought from the Ethics Committee Faculty of Business, Economics and Law La Trobe University.