Teaching ADR to Australian law students: Implications for legal practice in Australia

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Alternative dispute resolution (ADR) is entrenched in the legal process in all Australian jurisdictions and, as a corollary, in most law school curricula in Australia. This article examines the interface between ADR practice and contemporary legal education by reporting on an empirical study on attitudinal change among first-year students conducted at La Trobe Law and considers questions that persist about the effect of ADR training on Australian law students and its impact on legal practice in Australia.

INTRODUCTION

This article considers the several reasons why alternative dispute resolution (ADR) is taught as a component of the law degree in most Australian universities. ADR has become a reality of the Australian legal system and State and federal government policies signal that the movement towards collaborative problem-solving strategies to resolve disputes remains unfaltering. Australian legal practitioners also utilise ADR techniques as part of best practice contemporary lawyering.

The importance of ADR within the Australian legal framework is recognised by Chief Justice Gleeson in his State of the Judicature Address:

Both within and outside the court system, there is an increased emphasis on various forms of alternative dispute resolution. Arbitration has long been an important alternative to litigation, and has certain advantages, especially as a form of resolution of commercial disputes. Other procedures, such as mediation, conciliation, and early neutral evaluation, are also widely used. The courts have never had the capacity to resolve by judicial decision all, or even most, of the civil cases that are brought to them. Most legal disputes never come before courts; and most court cases are resolved by agreement between the parties rather than judicial decision.¹

Running parallel to the growth of ADR practices in Australia is the rise in clinical legal education programs and the acceptance of the mantra that law schools should expose students to a practical legal training regime.² ADR units in law curricula provide students with the opportunity to learn skills that are necessary and relevant to legal practice. However, the ADR component of the law program is minimal compared with the black letter rights-based units that comprise the bulk of law programs in Australian universities.

Given the growth and institutionalisation of ADR, the effects of ADR education on law students are important to gauge because any such effects have ramifications for the future focus and direction of Australian legal practice. If the lawyers of the future are unwilling to embrace ADR theory and practice, clinical legal education programs that incorporate ADR units and systemic acceptance of ADR processes may be difficult to justify.

This article describes the empirical inquiry conducted at La Trobe Law into the extent to which attitudes of law students change from an adversarial, rights-based approach towards a collaborative, interests based approach after taking the ADR unit offered to La Trobe Law students in their first year of law school. The article discusses the results of the study and poses questions for further practice-oriented research.

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THE CASE FOR TEACHING ADR AT LAW SCHOOL

Many law schools in the West include teaching about ADR as part of the curriculum. In the Australian context, the popularity of ADR among legal educators and law students has several underpinnings. First, ADR processes have been grafted onto mainstream legal institutions at most levels and in most jurisdictions. This means that legal practitioners need to be familiar with ADR processes in order to navigate the legal system. Moreover, there is growing recognition that the practice of law itself requires lawyers to utilise the micro communication skills, such as effective questioning and active listening, traditionally taught in ADR subjects.

Importantly, it is part of a lawyer’s ethical requirement to his/her client to suggest ADR if appropriate to the client’s dispute. Even if the lawyer perceives ADR merely in utilitarian terms, as a cost-saving and time-efficient way to resolve disputes, the responsibility to advise on suitable ADR options can be seen as being part of a lawyer’s duty to act competently to further the best interests of their clients, as well as fulfilling the lawyer’s obligation to act as an officer of the court and further the administration of justice. In its review of the federal civil justice system, the Australian Law Reform Commission noted that complaints made by litigants against legal practitioners concerned both ignorance of ADR processes and insufficient use of ADR processes. This finding not only illustrates that ADR is at the forefront of community consciousness and that consumer expectations concerning the retainer for legal services between lawyer and client include ADR advice; it also highlights the nexus between the increasing role and significance of ADR in legal practice and the legal practitioner’s duty to act competently and diligently.

Additionally, legal practice is, in many areas, moving away from a lawyer-driver model that is paternalistic and highly interventionist towards a more client-focused one that embraces concepts such as promoting the client’s underlying interests, “shared decision-making” between lawyer and client, “unbundling” of the full-service delivery of legal services model leading to increased client participation and self determination. Furthermore, the focus of lawyering in some areas is moving from a more adversarial model towards a more collaborative style which accords with the philosophy of ADR. Parker and Evans challenge the traditional stereotype of lawyers’ work as being comprised of advocating on behalf of clients in a court-centred context. The authors argue that the majority of time spent by legal practitioners involves negotiation prior to curial resolution of disputes.

As mentioned above, court-annexed ADR is well established in the Australian legal system. This notwithstanding, it is the federal and State governments support for the development of ADR as a primary dispute resolution mechanism that has implications for the direction of legal practice in Australia. For example, non-adversarial modes of resolving family disputes are being endorsed by the Commonwealth government in its promotion of the role of Family Dispute Resolution Practitioners in

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9 ALRC, n 6 at [3.8].
the new and widely distributed Family Relationship Centres (FRCs),\(^\text{14}\) as well as in the practice of collaborative law within the Family Court of Australia.\(^\text{15}\) Best practice in both areas regards litigation as a last resort unless special circumstances obtain. The FRCs emphasise mediation, conciliation and counselling with a strong focus on the interests of affected children. In the case of collaborative law, the parties and their lawyers focus on settlement rather than litigation and on the parties’ shared goals. Other key elements are the voluntary and free exchange of information, interest-based negotiation, legal advice directed towards speedy, cost-contained, fair and just outcomes for both parties, and a commitment to the best interests of children.\(^\text{16}\)

Victorian government policy is similar, as evidenced by the therapeutic\(^\text{17}\) and restorative jurisprudential approaches taken in the Dandenong Drug Court, the Heidelberg Family Violence Court, the Koori Court and the Collingwood Neighbourhood Justice Centre.\(^\text{18}\) Douglas remarks on the rapid introduction of problem-solving courts into Victoria,\(^\text{19}\) which can be explained by qualitative and quantitative evidence showing that therapeutic and restorative paradigms of justice lead to many benefits including promotion of participant well being,\(^\text{20}\) reduced recidivism, decreased costs and increased compliance.\(^\text{21}\) The non-adversarial model, when used in the criminal law context, also provides both victim and offender with more satisfaction than the mainstream criminal justice system.\(^\text{22}\) King cogently remarks that problem-solving courts emphasise “collaboration and connection rather than adversarialism and separation”.\(^\text{23}\)

The Victorian Law Reform Commission, in its draft summary of civil justice reform proposals,\(^\text{24}\) suggests legislative intervention to increase active judicial case management by “encouraging disputing parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure”.\(^\text{25}\)

**LEGAL EDUCATION**

Whilst the link between legal practice, legal institutions and ADR is strong, so too is the practice-oriented trend of legal education in Australia. Since the naissance of clinical legal programmes in 1981, and their subsequent receipt of Commonwealth government funding,\(^\text{26}\)


\(^{15}\) See draft *Best Guidelines for Collaborative Family Law Practice* prepared by a Family Law Council Sub-Committee for consultation (2006).

\(^{16}\) Attorney-General’s Department, n 14, p v; letter of 2 June 2006 from Family Law Council (24 July 2006).


\(^{20}\) King, n 12.

\(^{21}\) King, n 12 at 92.


\(^{23}\) King, n 12 at 95.


\(^{25}\) VLRC, n 24 at [1.2.1].

practice-based courses have grown in Australian university curricula, in keeping with the notion that law school must teach more than theory. A good legal education should also teach students what lawyers actually do in practice.

However, despite the acceptance of ADR by government agencies, the academy and the legal profession, the effect of teaching ADR to law students remains unclear for two reasons. First, most of the law curriculum is taught from a rights-based perspective using an adversarial model and what Riskin calls “the lawyers’ philosophical map”. This mindset permeates law students’ thinking and consciousness. The effect of this barrage of adversarial thinking on the ADR component of the law degree remains unknown. Secondly, even if the “ADR message” persists throughout law school, what is the core law school message? Is it that ADR is a client-focused, interest-based alternative to the rights-based lawyer, interventionist adjudication system? That is, does the ADR message filter through the law degree and affect the way law actually is practiced? Or, is ADR perceived by the law student as an adjunct to the traditional legal processes, an often-mandated and sometimes useful strategy to “fast-track” a case. The latter scenario may mean that the student may ascribe to the adversarial values that underscore the traditional “black letter” law subjects but use ADR as an efficiency tool in the battle against court bag logs and expensive litigation, often bringing to it an adversarial ethos that may undercut the ADR process that is ostensibly being promoted.

The results of empirical research conducted at La Trobe Law, La Trobe University Bundoora, begin to address some of the questions and issues raised above.

BACKGROUND
La Trobe Law has, over the last 10 years, offered students a suite of elective conflict resolution subjects taught at undergraduate and post-graduate level as well as a professional development programs for lawyers and other professionals involved in dispute resolution.

In 2005, La Trobe Law became the first Australian Law School to teach “Dispute Resolution” (DRE) as a compulsory first year law, stand alone unit. The goal of the unit is to provide students with a theoretical and practical base for evaluating the dispute resolution processes existing in Australia, with an emphasis on those processes that pertain to legal practice, particularly mediation. The theoretical aspects of the unit were delivered in a weekly lecture format. Small group seminar teaching (also weekly) focused on practical components such as communication and listening tools, negotiation techniques, and the macro and micro skills involved in the facilitative mediation process. Role play exercises comprised the centre point of the “learning by doing” seminar program, providing students with a taste of mediation practice.

THE LA TROBE LAW STUDY
First year law students (N=156) at La Trobe Law were surveyed in both the first (T1) and last (T2) lectures of the DRE unit. Included in the survey instrument was one section that requested demographic information such as age, gender and previous experience with the legal system. Another section asked students to record their level of agreement with 19 statements pertaining to the Australian legal system and the role of lawyers in managing conflict within that system. The statements were divided into the following five general categories, and the researchers aimed to place student responses along an integrated spectrum from generally adversarial (focusing on rights and entitlements and lawyer intervention) to generally collaborative (focusing on underlying interests and client empowerment):
1. Importance of ADR.
2. Lawyer client interaction.
3. Focus of approach.
5. Lawyer responsibility.

27 Noone and Dickson, n 2.
Method

The analysis employed by the researchers was the Statistical Package for the Social Sciences (SPSS). SPSS generated general frequency distributions for all subgroups on gender, age, background etc, and descriptive statistics (means and standard deviations) for all items, each group and each test. Analyses explored differences in attitudes towards legal practice in terms of gender, age, and various other background indicators. Means and standard deviations in attitudes for subgroups were examined, and one-way analyses of variance were conducted to determine whether subgroup differences were statistically significant (p<0.05). Change in attitudes over time, also in terms of background indicators, were then examined by comparing mean scores at T1 and T2 and conducting repeated measures tests to determine the significance of differences.

Within the data for each test, results were compared between male and female students, among different age and educational status groups, between groups with and without court experience and those with and without family background in the legal system. The researchers then checked for change by running comparisons (General Linear Model) between these: T1 and T2. All comparisons were checked for significance (p>0.05).

Results of section one (demographics)

The data indicated some statistically significant differences relating to demographic factors. Females moved further towards client-centred lawyering by semester end than did males. More educationally experienced students entered the law course with more collaborative and interest-based attitudes than those of their less experienced classmates, but differences lessened or disappeared by the end of semester. With reference to occupational background, despite little attitudinal difference at the start of semester, by semester end, those students without a personal or family legal professional background saw greater value in lawyers collaborating with other parties and being less positional than their counterparts with a background relating to law. Previous experience with the court system had a relatively strong effect on student attitudes before they had their first class in DRE but by semester’s end there were no statistically significant difference between the group with previous court experience and the group without.

Regarding age differences, the results suggest, to a limited extent at least, that when entering the law course older students more than younger ones were more likely to value interest-based interventions over rights-based ones and to favour client empowerment more than lawyer expertise. However, this gap narrowed and became statistically insignificant by the end of the semester, suggesting that the younger students gained greater appreciation of the importance and efficacy of interest-based and client-empowering approaches, perhaps because their stereotype of legal processes as positional and controlled by lawyers was challenged. Nevertheless, although there had been little difference at the beginning of the unit, by the end, older students held a stronger belief that ADR skills were likely to be employed as part of legal practice than their younger classmates. Notwithstanding this result, all groups clearly agreed that mediation and negotiation skills were useful, though there was virtually no change in the attitude of the youngest group during the course of the semester. Although interesting, these findings about age differences can only be suggestive because of the small size of the older groups.

Results of section two (questionnaire)

The second section of the instrument was designed to measure change, if any, in student attitudes towards various aspects of the practices in the legal system. Responses about attitudes towards lawyering and dispute resolution ranged from 1.63 to 3.22 on a scale of 1.00-4.00. The statement with the highest mean score prompts a reaction about the extent to which a lawyer should first focus on the common interests of the parties involved (rather than focusing solely on his or her client’s own legal position): students tended to strongly agree with this statement. The statement receiving the lowest mean response score (statement 3) states that lawyers have infrequent opportunity to use negotiation or mediation techniques: students tended to strongly disagree with this statement. There was little or no change to these views between T1 and T2.
Statistically significant change (p<0.05) in mean scores, with 1=strongly disagree (SD) and 4=strongly agree (SA), occurred in response to nine of the original 19 statements. Responses to the first eight of the statements showed a movement in respondents’ perceptions of the ways in which lawyers manage conflict from adversarial or position-based approaches towards collaborative or interest-based ones.

As stated above, the researchers organised the data under five separate but related categories. Statistically significant change occurred in reference to at least one statement for each category.

**DISCUSSION**

Taken together, the data showed statistically significant changes in respondents’ perceptions of the ways in which lawyers manage conflict from adversarial or position-based approaches towards collaborative or interest-based ones. It is, of course, impossible to ascertain with precision why this change occurred, given the range of uncontrolled factors inherent in this type of research. Nevertheless, it seems likely that the combination of information presented to students through lectures and reading and the skills to which they were introduced in the seminar program contributed to the outcome. DRE readings, lectures, and videos introduced materials to be absorbed cognitively, and specific communication exercises and role plays, conducted in small group settings, provided direct experiential learning opportunities to acquire and practise ADR skills. Thus, although attitude change was not a goal of the unit, it is clear that it did occur in ways that run counter to the standard “lawyer’s standard philosophical map” that guides the traditional law curriculum.

**SUMMARY OF THE FINDINGS**

Legal education, prompted to some extent by the realities of professional practice, has embraced ADR, at least as an increasingly important avenue for the management of justice relating to the court system, if not always as having a distinct and important value in itself. The 2005 curriculum at La Trobe Law mirrored changes that have been taking place in the teaching of law at many other law schools, particularly in the United States. However, unlike some law schools, La Trobe Law has not sought to treat ADR by systematically injecting information about it across other units in the curriculum. Rather, it has elected to maximise impact by offering a mandatory unit in the first semester of the law course, thus underlining its importance both as a part of legal practice and as a challenge to the “lawyer’s standard philosophical map”. DRE offers students an introduction to ADR that is both relatively broad and deep; it combines theory, empirical information, and experiential practice, all of which are assessed.

The La Trobe Law empirical study examined attitudinal changes towards lawyering and ADR among its DRE students. The focus of the study was not on the acquisition of knowledge and skills, which was measured with the regular academic assessment of the unit. Significantly, it was on changes in students’ perceptions of legal practice and conflict management, a topic of great importance, given the growth of ADR in legal practice. Future lawyers must not only have the knowledge and skills to practise ADR or advise their clients to use it, they also must be willing to do so. Thus, their attitudes towards ADR are crucial.

By surveying DRE students prior to the first lecture and immediately following the last, the study has been able to document clear changes in their attitudes towards managing legal conflict. Since this research is hardly controlled in the sense of a laboratory experiment, causal links for the changes are impossible to establish. Nevertheless, some important findings have emerged.

In general terms, there appear to be some relationships between student demographic and other background factors on the one hand, and attitudes toward legal practice and the justice system on the other. For example, females completing the unit expressed greater support than males for aspects of a collaborative rather than an adversarial approach, eg interest-based processes and client empowerment. Older students and those with previous academic qualifications tended to enter the law course with some attitudes illustrating a more collaborative approach than their younger and less experienced classmates, but these differences generally disappeared by the end of the semester.

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29 The teaching of the unit changed after 2005, and its role in the curriculum is likely to change further in 2008 and beyond.
By the end of the unit, differences had narrowed between older and younger students but had widened between males and females and between those with prior court experience and those without. The first finding lends support to the value of having classes composed of students of different ages and backgrounds. The latter prompts the question: to what extent does ADR embody more feminine, or “relational”, values than traditional legal practices? This topic is worth exploring as increasing numbers of women graduate from law schools.

Stronger results emerged from the second section of the survey instrument, which looked for changes in attitudes within the entire student group without reference to subgroups. Our research has documented unambiguous evidence of change to some assumptions students brought to their law course. In general, they moved from more adversarial to more collaborative stances as measured along two themes: rights vs interests, and lawyer intervention vs client empowerment. This result is unsurprising, since students were expected to gain greater understanding of these cornerstones of ADR and acquire skills in translating such principles into action. Nevertheless, if changes to the standard lawyer’s philosophical map usually acquired in the school curriculum are to be consolidated throughout the degree program, new information and skills must be embraced, not merely absorbed. So, if a goal of legal education is to broaden the perspective and skills base of those entering legal practice, making “Dispute Resolution” a mandatory first-year unit is an important, though probably not sufficient, step.

**Future Direction**

Taking DRE as a stand-alone ADR unit, first-year law students at La Trobe Law recorded changes in their attitudes consistent with the need articulated by many legal educators to enhance awareness of ADR, the changing role of lawyers, and the nature of dispute resolution in the Australian legal system for the next generation of lawyers.

The above notwithstanding, pedagogical and research challenges remain. One concern is the extent to which ADR processes, especially mediation, are seen merely as managerial solutions to the expenses and delays of the formal justice systems, a view embodied rather than having value in themselves, ie by promoting potentially better outcomes. To address this issue, research could be conducted on the stated goals, precise curriculum, and teaching of ADR courses.

Another issue is to what extent attitude changes relating to just one part of a multi-year curriculum actually extend to the completion of the degree and beyond. To what degree will they weather the onslaught of a legal education that continues to be predominantly “black letter”, rights based and adversarial? Furthermore, what effect will actual legal practice have on these attitudes? Useful research could address these issues by conducting longitudinal studies, eg resurveying the La Trobe Law cohort at the end of their final year.

**Conclusion**

The La Trobe Law study shows that the effect of teaching DRE to law students is attitudinal change from a positional, rights-based approach to lawyering to a collaborative, interest-based model. This finding endorses the actuality of contemporary lawyering, validates the plethora of ADR courses offered by Australian law schools and reflects both federal and State government policy direction and initiatives in key areas of law such as family law and criminal law. The finding also signposts the reality and future focus of Australian contemporary legal practice in which ADR and problem-solving skills continue to play a vital and indispensable role. While students’ attitudes change after studying DRE for one semester in first year law from adversarial to problem-solving, it is unclear whether the change persists for the duration of the law degree and into professional legal practice.

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