Changing the Family Lawyer's Philosophical Map

Narrowing the Gap between Practice and Legal Education

Donna Cooper*

1. Introduction

Revolutionary changes have occurred in the family law arena during the last ten years. There has been an increased focus on the rights and needs of children[1] and on the responsibilities and duties of parenthood.[2] Both parents are now expected to be emotionally and financially supportive of their children after separation.[3] Parents are more accountable for the way in which they behave towards each other and their children. This was ensured by the introduction of domestic violence legislation[4] and the subsequent recognition of the effects of family violence on children and families.[5]

The decision of *Re Marion*[6] has elevated the role of childrens rights by taking certain decisions away from parents. In circumstances where a *special medical procedure*[7] is being considered, such as sterilisation of an intellectually disabled child, parents no longer have authority to make decisions for their children and must seek the guidance of the Family Court.[8]

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* LLB (QUT). The author is currently undertaking the LLM at QUT. This paper was prepared for the subject *Legal Education*. The author currently teaches the final year elective subject *Legal Clinic* which is a collaborative effort between Griffith University and Caxton Legal Centre. The author acknowledges that the research undertaken occurred in second semester 1998 and that since writing this article the individual lecturers may have updated or modified their subjects.

1 For example in the *Family Law Act* 1975 (Cth), s 60B and the *United Nations Convention on the Rights of the Child.*

2 *Family Law Act* 1975, ss 60B and 61C.

3 *Ibid* and the introduction of the *Child Support (Registration and Collection) Act* 1988 (Cth) and *Child Support Assessment Act* 1989 (Cth).

4 For example in Queensland, *Domestic Violence (Family Protection) Act* 1989.

5 *Family Law Act* 1975, ss 43, 68F(2)(i) and (j) and 68K(1)(b).

6 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) FLC 92-293.

7 S Brady and D Cooper *A Question of Right Treatment - The Family Court and Special Medical Procedures for Children - An Introductory Guide* Family Court of Australia, 1996 at 8.

8 *Ibid* at 2.

Over this same period there has been a rise in orders for children to be separately represented as a result of the decision in *Re K*[9]. The requirements for the training and supervision of child representatives have become more stringent as the role has increased in significance.[10]

The Family Court has been faced with an increasing workload without the benefit of additional judicial personnel.[11] There have been changes to court procedure[12] in an attempt to streamline processes and make them more accessible to litigants in person. However, court backlogs have only increased as have the number of litigants in person.[13]

In Queensland, the introduction of Specialist Accreditation[14]and a proliferation of boutique family law firms has been a response to the expansion in knowledge and skills which a competent family lawyer must now possess.

On the legal aid front there has been a marked reduction in the availability of legal aid for family law matters. Reduced fees and other factors have resulted in a "flight of experienced practitioners from legally aided family law work in recent years."[15] As a result the most junior solicitors are now representing legal aid clients.

Perhaps the most striking evolution in family law this decade is the increased emphasis on what is regarded by the Family Court as "primary dispute resolution".[16] Dispute resolution is now regarded as the primary means of settling family matters, not an alternative to litigation.

This may be seen as economic rationalism, an attempt to deal with dire court backlogs[17] or simply validation of existing practice as it is well accepted that only 4 to 5% of all matters ever reach a judicial decision.[18] This philosophy has been adopted by Legal Aid Queensland where most family law clients will only ever receive funding for a

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9 (1994) FLC 92-461 set out the guidelines for the ordering of child representatives in family law proceedings. This case resulted in a doubling of Queensland expenditure on the provision of child representatives between 1993/94 and 1995/96. In other states the impact was more marked with expenditure in the same period increasing 20-fold in Western Australia and 14-fold in Victoria.

10 Legal Aid Queensland Training Manual.

11 Family Court of Australia Annual Report, 1996-97 at 19.

12 Family Court of Australia *Report of the Simplification of Procedures Committee to the Chief Justice* May 1994 at 2.

13 Australian Law Reform Commission *Review of the adversarial system of litigation, rethinking family law proceedings* Issues Paper 22, Commonwealth of Australia, November 1997 at 11.2.

14 Queensland Law Society Specialist Accreditation requirements.

15 Report released by the Queensland Law Society and the Family Law Practitioners' Association *The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland* (August 1998) Professor J Dewar, Mr J Giddings and Professor S Parker with D Cooper and C Michael of the Faculty of Law, Griffith University and *supra* n 2 at 21.

16 *Family Law Act* 1975, Parts II and III.

17 W Pengilly 'Alternative Dispute Resolution: The Philosophy of Need' (1990) 1 *ADRJ* 81.

18 A Filippello 'Simplifying forms and procedures to meet client needs' Paper, AIJA Court Administrators' Conference, Sydney, 21 August 1997.

conference.[19] Even in *special medical procedure* cases, protocols have been developed to ensure that dispute resolution is the first port of call for parents.[20]

Family Law in a State of Flux

Family law over the last ten years can therefore be characterised as being in a constant state of flux, with increasing emphasis on interdisciplinary issues such as psychological, sociological and medico-legal. For example, issues such as the needs of children upon and after separation, the rights of intellectually disabled children, and the impact of domestic violence on all members of the family are now of recognised significance. There have been new developments with advances in technology leading to fresh issues surrounding artificial conception.[21]

These changes and the rapid growth of dispute resolution have increased the depth and breadth of the skills and knowledge that family lawyers need to possess.

One theme is constant, that it is impossible for an undergraduate course to cover the entirety of knowledge and skills that a family lawyer will need in practice. And with family law constantly evolving to meet a changing society, the challenge is to teach students content that will be relevant when they commence practice. With this in mind the teaching of skills that can be utilised when a law student commences practice becomes increasingly pertinent.[22] As it has been said that "skills do not become redundant as laws and procedures change."[23]

Response of Law Schools

Against this dramatic backdrop I set out to examine the response of law schools to these significant developments in family law. Firstly, I decided to establish the parameters of my research by extensive literature review. I wanted to determine what the response of law schools should be to the shifting tides in family law and then to determine what has been their actual reaction.

Further, I had to determine how I was going to measure the law schools' response and what research methodology would be used.

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19 *Supra* n 15 at 45.

20 *Supra* n 7 at 11.

21 For example, *Re Evelyn (No.2)* (1998) FLC 92-817, Australia's first surrogacy case.

22 In relation to law in general, see A Chay 'If Not an LLB and PLT, Then What?' (1994) 12 (1) *Journal Professional Legal Education* 39 at 44 and F Martin 'The Integration of Legal Skills into the Curriculum of the Undergraduate Law Degree: The Queensland University of Technology Perspective' (1995) 13 (1) *Journal of Professional Legal Education* 45 at 47.

23 B Campbell, 'Professional Legal Education, Deep Learning and Dispute Resolution' (1997) 15 (1) *Journal of Professional Legal Education* 4.

2. Background to the Research

Primary Dispute Resolution

In 1995 the *Justice Statement* issued by the Commonwealth Attorney-General[24] focused on the importance of alternatives to litigation in family law. The *Family Law Reform Act* 1995 confirmed this course by introducing the concept of "primary dispute resolution".[25] The Act now places a duty on legal practitioners to consider whether to advise clients about the primary dispute resolution methods that could be used to settle their matters.[26]

For the vast majority of clients, dispute resolution is the first, and often last, intervention they encounter.[27] In the Family Court, approximately only four to five percent of matters require a judicial decision.[28] The Family Court followed on 8 January 1996 by introducing *Simplified Procedures*. One objective of the Simplification Committee was to assist the court in simplifying its process and forms "to offer all litigants the opportunity to determine their dispute by a dispute resolution method other than trial".[29]

The Family Court refers to its primary dispute resolution services as:

- Conciliation counselling re parenting matters
- Conciliation counselling re financial matters
- Joint conciliation re parenting issues and/or property
- Mediation (single or joint)
- Specific counselling intervention for high conflict families
- Parenting programs
- Childrens programs
- Group programs[30]

The Family Court had previously established a pilot mediation program in 1992 in the Melbourne registry and has since expanded the service to include the Sydney, Brisbane, Parramatta and Dandenong registries.[31]

A survey of Queensland family lawyers[32] shows the growing importance of dispute resolution in family law. Mediation was considered the procedure most appropriate to resolve child disputes, closely followed by negotiation, with litigation being ranked lowest at ten percent.[33] The exception to this was where there was a power imbalance

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24 *Justice Statement* Office of Legal Information and Publishing (Attorney-General's Department, May 1995) foreword by the then Prime Minister P J Keating.

25 The majority of this Act commenced on 11/6/96 - Part III – Primary Dispute Resolution.

26 *Family Law Act* 1975, s 14G.

27 *Supra* n 18.

28 *Ibid* at 2.

29 *Supra* n 12 at 2.

30 *Supra* n 11 at 12.

31 D Bagshaw 'Mediation of Family Law Disputes in Australia' (1997) 8 *ADRJ* 182. Please note that at the time of printing the Mediation Service in the Brisbane Registry was not operating.

32 R Field 'The Use of Litigation and Mediation for the Resolution of Custody and Access Disputes: A Survey of Queensland Family Lawyers' (1996) 7 (1) *ADRJ* 5.

33 *Ibid* at 6.

between the parties and then litigation was considered more appropriate by 60% of lawyers surveyed. The study concludes that for the majority of family law specialists litigation is an option of last resort, with 82% saying that generally mediation is worth trying before litigating.[34]

It is clear that in practice, dispute resolution is now accepted and actively promoted by the Family Court as the most appropriate way to resolve many matters. It is obviously not appropriate in all matters as issues such as domestic violence and power imbalances are extremely significant.[35] However, the primary question I wished to research was whether this change in mindset has carried over to the content of family law subjects in law schools?

The Issues Paper of the Australian Law Reform Commission, *Review of the adversarial system of litigation, rethinking legal education and training*[36] looked at academic legal education.[37]

The Paper raises the issue that law schools may contribute to an orientation towards adversarial approaches to dispute resolution.[38] It has been suggested that the way in which law schools may expressly or unconsciously teach an adversarial style of lawyering is by:

- Not providing a comparative perspective on the adversarial system by including study of other legal systems and dispute resolution processes
- Promoting a court-centred view of the legal system and thereby promoting the adversarial form of trial adopted in Australian courts
- Using casebooks and course content which focuses on appellate and superior court decisions to teach legal principle
- Emphasising rules of law rather than issues of fact
- Encouraging mooting as a curricular or extra-curricular form of learning [39]

The Paper surmises that

> if law teaching gave greater emphasis to lawyers as managers and resolvers, this may be an important part of addressing perceived problems in the adversarial system of litigation. This would involve emphasising a dispute resolution model where lawyers are viewed as facilitators of harmonious legal relations and as legal communicators, providing a variety of means by which disputes can be resolved.[40]

In 1992 the Consultative Committee of State and Territorial Law Admitting Authorities compiled a list of compulsory subjects for academic study in law schools, known as the

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34 *Ibid* at 10.
35 R Field 'Mediation and the Art of Power Imbalancing' (1997) 12 *QUTLJ* 264.
36 Issues Paper 21, Commonwealth of Australia, 1997.
37 *Ibid* Ch 5.
38 *Ibid* at 5.7.
39 *Ibid* at 5.9.
40 *Ibid* at 5.14.

"Priestly 11"[41], which universities must adhere to. Neither Family Law nor Dispute Resolution form part of the designated compulsory areas of study. Although some law courses offer subjects in dispute resolution, they are not always compulsory.[42]

The *Pearce Report*[43] stated that students wanted a greater proportion of their law degree dedicated to practical lawyering skills. The legal skills referred to included negotiation and mediation, appreciating one's professional role, ethical issues, understanding the needs and perspectives of clients and others involved in the process, oral and written argument and exposition, and drafting legal documents.[44]

The Law Council of Australia in a submission to the Priestly Committee in 1992, had proposed ten skills areas of practical training, which included Negotiation and Dispute Resolution.[45]

In the United States, the *MacCrate Report*[46] is a comprehensive study of lawyers educational and professional development needs. The report's theme is that graduate lawyers are not adequately equipped to handle lawyering tasks and need more education in lawyering skills and professional values provided primarily by law schools. The report identified ten fundamental lawyering skills that included communication, counselling, negotiation and dispute resolution.[47]

It is clear that major changes have occurred in the practice of family law in relation to the importance of dispute resolution in settling disputes. As dispute resolution is now the primary tool this should be reflected in the content of family law subjects at law school. Prospective family lawyers now require training primarily in dispute resolution and secondly in the adversarial process.

Further, educating students about dispute resolution options is not only relevant to family law but law in general and could also be described as a "life skill".

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41 In April 1992, this Committee, chaired by Mr Justice Priestly, prescribed 11 "areas of knowledge" that must be covered by students during their law degrees in order to satisfy academic requirements for admission. These include civil procedure, evidence and professional conduct, criminal law and procedure, torts, contracts, property (real and personal), equity, administrative law, federal and state constitutional law and company law.

42 R Calver 'Teaching Alternative Dispute Resolution in Australian Law School: A Study' (1996) 2 *Commercial Dispute Resolution Journal* 209 at 216.

43 DE Pearce, E Campbell, & D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission: A Summary and Volumes I - IV* (AGPS, Canberra, 1987) quoted in S Kift 'Lawyering Skills: Finding their Place in Legal Education' (1997) 8 *Legal Educ Rev* 43 at 43, 44.

44 5.26 and *Pearce Report*, Vol 4, Ch 5.

45 *Supra* n 20, article of Fiona Martin at 51 who states that a Working Party at QUT in 1993 also identified Negotiation, Mediation and ADR processes, among 13 skills to integrate into the undergraduate teaching program.

46 Full title being the *Section of Legal Education and Admissions to the Bar, American Bar Association, Report of the Task Force of Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development - An Education Continuum* (Chicago 1992).

47 J Rose 'The MacCrate Report's Restatement of Legal Education: The Need for Reflection and Horse Sense' (1994) 44 *Journal of Legal Education* 548.

It has been said that the development of dispute resolution skills encourages a deep approach to learning as the teaching of these skills, by necessity, involves student-centred learning approaches.[48] Teaching techniques include the use of role play, observing mediations and simulations and discussion. Students are introduced to long-term concepts such as problem-solving, focusing on the needs of the client and assisting clients to make their own decisions.

Changing the Lawyer's Philosophical Map

It has been shown that intensive training in mediation can "change the lawyer's philosophical map" from an adversarial to problem-solving approach.

A paper written by Janet Weinstein[49] about her experience in implementing a clinical program designed to train students at the California Western School of Law to mediate and give them actual mediation experience shows positive results.

This study demonstrates that mediation training increases the general lawyering skills of students and their appreciation of the needs and interests of clients. A student after completing the program reported that as a result of the course "my ideas changed towards clients as people, not cases".[50]

Weinstein shows that learning mediation skills and then practising them improves skills such as the ability to communicate with clients, particularly listening skills, and the ability to assist clients make their own decisions.

Weinstein states that students learn through the mediation course how to take a "person-centred approach". She describes this as being based on the notion that clients know what they need, however, they require a skilled "helper" to set an atmosphere of trust and openness by being genuine and empathic, to assist them to make their own decisions.[51]

Therefore, not only should students gain knowledge of dispute resolution processes, they should obtain specific training in how to mediate and they should ideally have the chance to practice these skills on real people.

Integration of Dispute Resolution into Courses

Weinstein advocates the introduction of mediation training in first year. It also seems optimum that there is a compulsory subject to introduce students fully to these skills in first year and that they are also integrated into substantive subjects.[52] This view is supported by others who recommend overhauling the current law school curriculum and

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48 *Supra* n 23 at 5.

49 J Weintstein 'Teaching Mediation in Law Schools: Training Lawyers to be Wise' (1990) 35 *New York School Law Review* 199.

50 *Ibid* at 220.

51 *Ibid* at 227, the author states that this is based on the process of Carl Rogers, *On Becoming a Person: A Therapist's View of Psychotherapy* (1961).

52 J David 'Integrating Alternative Dispute Resolution (ADR) in Law Schools' (1991) 2 *ADRJ* 5 at 7.

accompanying texts, so that dispute resolution alternatives are "infused into the curriculum from the outset of the first year of law school".[53]

For example, instruction in dispute resolution[54] has been integrated into all first year courses at the University of Missouri-Columbia School of Law since 1984. This includes instruction in basic dispute resolution knowledge and skills including interviewing, counselling, negotiation, mediation, arbitration and how to choose and build a dispute resolution process.[55]

The reasons that dispute resolution was integrated into the course was to remedy weaknesses in traditional legal education such as obsession with rules and doctrine, study of appellate jurisdiction, and the adversarial mindset.[56] The goal was to "give a realistic picture of lawyering and to promote the idea that a good lawyer is primarily problem solver". It was agreed that first year was the best time to emphasise dispute resolution as this is when students are most impressionable.[57]

Interpersonal Skills

John Wade has commented that "practicing family lawyers not only need knowledge of case law and legislation but additional skills to deal with clients in crisis."[58] He points out that "lawyers receive virtually no training in diagnosis, interviewing and counselling of human beings. Yet clearly these skills take up a large percentage of a practising lawyer's time".[59]

Since this article was written, the situation has changed to some extent in that students now receive more skills training in the areas of diagnosis and interviewing, but little in regard to counselling.

It has been said that, "as a field, in which lawyers frequently encounter emotionally distraught clients, family law may lay special claim to the importance of interpersonal skills training for future practitioners".[60]

This writer argues that a family law course should contain three semesters, the first to cover doctrinal law, the second would concentrate on research and look at interdisciplinary matters such as relevant psychology, social science, medical and family therapy issues, the third the mastery of family law practice concentrating on

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53 K Kraemer 'Teaching Mediation: The Need to Overhaul Legal Education' (1992) 47 (3) *Arbitration Journal* 12 at 14 and 5.

54 L L Riskin and J E Westbrook 'Integrating Dispute Resolution Into Standard First-Year courses: The Missouri Plan' (1989) *Journal Legal Education* 509.

55 *Ibid* at 509.

56 *Ibid* at 509, 510.

57 *Ibid* at 510.

58 J Wade 'The Professional Status of Family Practice in Australia' (1985) 8 *University of New South Wales Law Journal* 183 at 185.

59 *Ibid* at 186.

60 N Zaal 'Family Law Teaching in the No-Fault Era: A Pedagogic Proposal' (1985) 35 *Journal of Legal Education* 552 at 554.

interpersonal skills and skills such as interviewing, negotiation, mediation and advocacy and cross-examination.[61]

It has been estimated the average lawyer spends about one-third of his or her time in a counselling role.[62] Family lawyers have called on universities to provide training in understanding the emotional needs of clients and in imparting communication and listening skills.[63]

Hugh Brayne has written that lawyers could benefit from learning counselling skills that would assist them build a successful relationship with the client. In particular they would improve their listening skills and to assist clients to explore and clarify their problem, consider their options and choose the best strategy for their matter.[64]

Client Dissatisfaction with Lawyers

The results of Janet Weinstein's study are particularly striking when looking at research findings that reveal the reasons why clients become dissatisfied with their lawyers.

A Report looking at Supreme Court Civil Special Sittings showed that 51% were dissatisfied with the level of information provided to them by their lawyers, 67% were dissatisfied with the level of control they had over their case, and 80% would have liked to participate more in settlement negotiations.[65]

This report showed that clients want more control over their case, more participation in decision-making and more information provided to them by their lawyer to make appropriate decisions themselves.[66] These were precisely the skills that Janet Weinstein's students had acquired at the end of their intensive mediation course.[67]

Further, a Report, *Managing Client Expectations and Professional Risk*[68] showed that the majority of all professional negligence claims were related to failure of the lawyer to establish an effective working relationship with the client and that failure in communications was the most significant contributing factor to complaints.[69]

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61 *Ibid* at 603.

62 T L Shaffer 'Lawyers, Counsellors and Counsellors at Law' (1975) 61 *ABAJ* 854.

63 R C Mussehl 'From Advocate to Counsellor : The Emerging Role of the Family Law Practitioner' (1977) 12 *Gonzaga LRev* 446.

64 H Brayne 'Counselling Skills for the Lawyer, Can Lawyers Learn Anything from Counsellors' (Spring 1998) *Law Teacher* v 32 n 2 at 137-156.

65 T Matruglio 'Plaintiffs and the Process of Litigation (1994) Civil Justice Research Centre, Sydney.

66 R Handley and D Considine 'Introducing a Client-Centred Focus into the Law School Curriculum' (1996) *Legal Educ Rev* 193 at 194.

67 *Supra* n 49 at 221.

68 R North and P North 'Managing Client Expectations and Professional Risk' (Stretton Consulting, Sydney, 1994).

69 *Ibid* at 11.

This is also the experience in the United States, where there has shown to be a rising trend of dissatisfaction with lawyers, and the majority of complaints stem from lack of people skills.[70]

Statistics show that in civil matters, it has been estimated that the number of civil disputes that carry on to trial is less than the 5%.[71]

These results show that mediation and interpersonal skills are not only important for students wanting to become family lawyers, but for all lawyers. For students not wanting to practice these skills would be relevant to their personal and professional life.

Conclusions

In relation to dispute resolution the least preferable option as outlined by Jennifer David is that one or several optional dispute resolution subjects be offered in a law course.[72]

The most desirable situation would be that the *Priestly 11* should be altered to include a first year subject which provided a general introduction to dispute resolution and should include at least mediation, negotiation, conciliation and arbitration and specific training in mediation and negotiation skills. In addition, the teaching of dispute resolution should be specifically integrated into undergraduate subjects and in particular, into the family law subject.

The teaching of mediation and dispute resolution should be introduced in first year at law school so that students are no longer moulded to have an adversarial mindset, but commence their legal education with a "problem-solving" approach to conflict. It should then be developed with modules in each year that progress the student's knowledge and skills.

This approach should continue into practical legal training courses where skills training could be consolidated by mediation practise in real life situations. Students could firstly co-mediate with experienced mediators, and once they gained more experience, mediate under supervision.

Training in interpersonal skills should be integrated into the undergraduate teaching of family law, particularly skills relevant to dealing with people in crisis. This appears to be a neglected area of legal education, which crosses into the social science realm.[73]

With the explosion in the content of family law, both in case law and legislation, it is crucial that students are equipped with sufficient doctrinal law and advocacy skills. However, it is clear that students should be taught to focus on the needs of the client and that the emphasis must now be on training students in dispute resolution and people skills.

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[70] C Laredo-Fromson 'Meeting the Challenges of Client Dissatisfaction' (1995) 13(1) *Journal of Professional Legal Education* 81 at 82.

[71] Justice de Jersey of Supreme Court of Queensland 'Alternative Dispute Resolution (ADR): Mere Gimmickry?' (1989) 63 *ALJ* 69 at 70.

[72] J David 'Integrating Alternative Dispute Resolution (ADR) in Law Schools' (1991) 2 *ADRJ 5* at 10.

[73] *Supra* n 60 at 555.

3. Aims of Empirical Research

The original aim of my empirical research was, after coming to my own conclusion about what law schools should be doing, to ascertain what they are currently teaching their students.

Primarily I set out to investigate whether within the family law undergraduate subject, law schools were teaching students with a view to producing an adversarial mindset or one of primary dispute resolution. In particular, had the introduction of the *Reform Act* which formally introduced the concept of *primary dispute resolution* led to lecturers changing the emphasis on dispute resolution in their family law courses?

Further, I wanted to ascertain whether the training of skills in dispute resolution was integrated into the family law subject, as is the case in some law schools in the United States.[74]

I also decided to look at whether the subject included the following elements which were identified in the Australian Law Reform Commission Issues Paper 22, *Review of the adversarial system of litigation, Rethinking family law proceedings*[75] as being possible specific training needs for lawyers and other system players in family law matters:

Education and training about

- child development
- communication skills
- family dynamics
- domestic violence
- child abuse
- cross-cultural awareness
- negotiation and facilitation techniques in family disputes

Further, I decided also to note whether the teaching of interpersonal skills was integrated into the subject as it was obvious that this was an important area for family lawyers and for lawyers in general.

Methodology

Due to time and budgetary restrictions my research was limited to four universities in the south-east corner of Queensland. I decided to compare the family law course at Bond University (Bond), University of Queensland (UQ), the Queensland University of Technology (QUT) and Griffith University (Griffith). To gain more perspective, as I was aware that some students undertake a practice course instead of Articles, I also

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[74] J M Nolan-Haley and M R Volpe 'Teaching Mediation As a Lawyering Role' (1989) 39 *Journal of Legal Education* 571 at 571.

[75] *Supra* n 13 at 148.

looked at the family law content of the Legal Practice Course at QUT.[76]
Qualitative methods were used in the form of semi-structured interviews which were staggered over August/September 1998. I used a set schedule of questions for the interviews with the four family law lecturers and the Legal Practice lecturer. All interviews were conducted in person apart from a telephone interview with John Wade. Interviews were approximately forty minutes to an hour in duration.

Interviews were conducted with the following lecturers:

- Professor John Wade of Bond University
- Iyla Davies of QUT
- Professor John Dewar of Griffith University
- Graham Kenny, Senior Lecturer, UQ
- Allan Chay, Assistant Dean at the QUT Legal Practice Course[77]

I also obtained the subject outlines for each family law subject and in some cases the course materials, so that accurate comparisons could be made between the courses. General information about the four different law courses and the QUT Legal Practice course was down loaded from the web. In some cases I needed to contact the lecturers to ask follow-up questions to clarify information.

4. Results

(a) General Comparisons

The Undergraduate Courses

Each family law course is an elective subject that runs for one semester. This places obvious limitations on the content that lecturers can include in their subject and each lecturer spoke of prioritising in this regard.

All lecturers, besides Iyla Davies of QUT, spoke of a predominance of female students in the class when compared with the general law student gender mix.

All lecturers omitted the law of de facto property settlement, or only touched upon it, as it was covered in an Equity subject.

The courses all varied, with a stark contrast between the content of Bond and the three others. This could be attributed to funding, Bond being a private university and also philosophy of the law school and lecturer. Bond's course appears best designed to train students to be family lawyers, the three others are more a general introduction and overview of "family law".

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[76] I would have liked to investigate the Bond Professional Legal Training Program, however time escaped me. A deeper examination of the family law content of Practice Courses could be the subject of a further research paper.

[77] I would like to thank all five lecturers who gave their time generously for these interviews and provided materials and in some cases, some guidance.

The Bond course deals with some interesting areas, very relevant to practice. For example one topic is entitled "The Lawyer as Skilled Helper - Behaviour and Ethics" which covers tactical behaviour and ethics. The Bond course also focuses on learning that will continue to be relevant after graduation.

The UQ course appears to be the most theoretical. Griffith students only attend lectures. Small groups or tutorials are not offered as this is not an option for elective subjects at this university. There is the question of whether these students are disadvantaged in how could they obtain practical training, for example, practice in answering hypothetical questions, with no opportunity for small group teaching?[78]

QUT Legal Practice Course

The family law content is bundled together with the teaching of wills and estates. Although the overall course has heavy emphasis on practical training a large amount of the family law content is delivered by way of guest speakers with the opportunity for discussion. Within the family law content the opportunities for students to gain practical experience are focused on the adversarial process, the drafting of documents and appearance in the Family Court, although one step in this process is conciliation, a form of dispute resolution.

Allan Chay spoke of market pressure on QUT's 28 week course to compete with the Sydney College of Law's 15 week course. He is commissioning researchers to determine what students and law firms are wanting in a practice course. It seems that pressure to reduce the length of the course will make it difficult to add any specific skills components such as training in mediation.

(b) Undergraduate Family Law Course Comparison

The following shows an "at a glance" comparison on the four different undergraduate courses in second semester 1998.

[78] Griffith now offer an elective *Advanced Family Law Clinic* which provides students with "on the job" training and experience in Family Law at Caxton Legal Centre. Another elective, *Legal Clinic*, also provides students with practical experience, including in Family Law, at Caxton Legal Centre.

	Bond	Griffith	QUT	UQ
Main lecturer	John Wade	John Dewar	Iyla Davies	Graham Kenny
Average no. students in lecture	28-70	90	170-180	170-180
Average no small groups	10 or less	N/A	20 or more	Under 20
Credit points	NA	10	12	10
Hours of lectures	36	28	26	26
Hours of small groups/ tutorials	12	0	12	12
Total hours for semester	48	28	38	38
Teaching methods	Mixture of teaching strategies, traditional lecture, videos, discussion, practising skills etc	Chalk and talk, occasional discussion	Lectures, discussion, videos, pyramid, mixture of "chalk and talk" and interactive	Chalk and talk, hypotheticals in tutorial

(c) Results of Interview, Undergraduate and Legal Practice

The following sets out the results of the issues that I set out to address.

Question 1
Whether within the family law subject or the family law content of Legal Practice, law schools were teaching students with a view to producing an adversarial mindset or one of primary dispute resolution? In particular, had the introduction of the Reform Act which formally introduced the concept of primary dispute resolution led to lecturers changing the emphasis on dispute resolution in their family law courses?

Undergraduate

The answer was a resounding "no". None of the lecturers had changed the emphasis on dispute resolution in their subject since the introduction of the *Reform Act*.

This was either because they had already adopted a dispute resolution mindset for their subject, or that they were yet to, or had gradually begun to. However, for those who had begun to introduce the concept of dispute resolution into their subject it was interesting to note that the *Reform Act* did not push them to greater emphasise it.

Each lecturer acknowledged that dispute resolution plays a major role in family law as approximately only 4-5% of cases are ever judicially determined.[79] However, only Bond seem to truly approach the subject from what could be called a "dispute

[79] *Supra* n 18.

resolution" or "problem-solving" mindset the course being titled "Bargaining in the Shadow of the Law".[80]

When questioned about whether his course had changed since the introduction of the *Reform Act*, John Wade replied

> ... in short, no changes...as these are only symptomatic of epidemics of change which will be obsolete by the time of graduation...My family law has had a marginal case emphasis for many years.

John's contention is that he wants to teach students policy, skills, ethics and procedure and a few long lasting rules that will make the course content relevant with the fast changing pace of law.

John Wade's course appears to have been framed from a dispute resolution mindset long before the *Reform Act* brought in this formal ratification of existing family law practice.

At the opposite end of the spectrum UQ's Graham Kenny stated that his course concentrates on "black letter law". Dispute resolution options may be mentioned, however an elective subject is available elsewhere in the course. The course appears to concentrate strongly from an adversarial mindset emphasising the relevant case law and legislation.

QUT's Iyla Davies teaches mediation both in the QUT Masters Course and co-facilitates external mediation courses with Gaye Clarke. Her interest in the subject means that she emphasises to students that when looking at each legal principle and problem scenario they should look firstly at whether dispute resolution alternatives are appropriate, then look at litigation. Iyla has written, "A family law course which does not include an examination of the process or theory of negotiation procedures does not provide students with a realistic interpretation of the operation of family law".[81]

John Dewar, of Griffith seemed to fall between QUT and UQ. He has about 90 students in his course, so has smaller numbers to work with than QUT or UQ. His course appears more theoretical than Bond and QUT with an emphasis still on litigation, but leanings towards dispute resolution as an important option.[82]

QUT Legal Practice

Dispute resolution options are presented, however it appears that this course is still structured to encourage an adversarial mindset as the emphasis appears to be on drafting documents and advocacy. However, mediation and negotiation are included in the course and some opportunities provided to participate in role plays.

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[80] Bond University School of Law, *Family Law*, Course Materials, September 1998.

[81] I Davies 'Teaching ADR in Family Law: One Way of Easing the Tension between Practice and Theory in Legal Education' (Paper delivered at 1992 ALTA Conference) at 13.

[82] This course has recently been updated to include training in skills such as drafting, Family Court documents, memorandum to Counsel and learning court protocol.

Question 2
Whether the training of skills in dispute resolution was integrated into the family law subject

Undergraduate

There is some integration of dispute resolution skills into the Bond family law subject. The law course at Bond is unique in that it includes the integration of skills teaching into 18 key subjects. It is the only university to integrate dispute resolution skills training into undergraduate subjects. A core first year subject is *Communication Skills*[83] which includes interviewing and negotiation skills. There is an incremental approach to development of skills taught in the substantive subjects.

Iyla Davies of QUT does a small amount of skills training in pyramid in lectures and tutorials, however, stated it was difficult to do so as her lectures contain approximately 170-180 students. She stated that even in tutorials of about 20 students it was difficult to effectively teach mediation skills with one tutor as issues such as supervision and debriefing are important for effective learning.

Both Griffith and UQ had no integration or attempt at integration of dispute resolution skills into the family law subject.

Griffith has some integration of skills into core subjects, one being negotiation into the property law subject, however, other dispute resolution skills such as mediation are not integrated into any of the course subjects. It also has some integration of skills into its "Offices" program.[84] As with QUT and UQ a dispute resolution subject is available as an elective, usually in workshop form.

Legal Practice Course

Surprisingly, throughout this course, students never receive specific training in mediating. They participate in one role play of a mediation in property proceedings, where they either play the role of the lawyer or client. This is based on the premise that the course is preparing students to be first year solicitors and that junior lawyers do not act as mediators. However, this argument ignores the benefits that training in the role of mediator could provide to students. A greater awareness of the mediator's role would ensure that a solicitor attending a mediation was better able to represent their client. Also I have talked above at length of the studies that show the benefits of intensive mediation training to increase general lawyering skills.[85]

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[83] Bond University School of Law, Schedule of Undergraduate Subjects, *<http://www.bond.edu.au/bondlaw/Subjug.htm>*.

[84] L Godden, D Lamb and M J Le Brun 'The "Offices" project at Griffith University Law School and the Use of Video as a Tool For Evaluation' (1994) 12(2) *Journal of Professional Legal Education* 149. Further, the elective subjects *Advanced Family Law Clinic* and *Legal Clinic* provide students with experience in interviewing, advising clients, negotiation, letter and document drafting and participating in a workplace environment.

[85] *Supra* n 49 for example.

Allan Chay stated that in the past students had participated in a simulated legal aid matter and were involved in applying for aid and attending a mock legal aid conference. However, this segment was dropped as legal aid is now less available in family law.

In light of the recent study that showed that the solicitors representing legal aid clients are usually first and second year solicitors[86] it can be strongly argued that training in how to run a legal aid matter should be reinstated. In particular, practical training in legal aid conferences is essential, as this is usually the first and last port of call for clients. It has been shown that legal aid often calls conferences in inappropriate matters such as where domestic violence is an issue.[87] Students should receive training in why these matters are inappropriate for dispute resolution and, if their client is forced to attend, how to best represent her to be aware of the power imbalance.

Question 3
Whether the subject includes education and training about:

- *child development*
- *communication skills*
- *family dynamics*
- *domestic violence*
- *child abuse*
- *cross-cultural awareness*
- *negotiation and facilitation techniques in family disputes*

Child Development and Family Dynamics

The Bond course is the only course that touches briefly on child development which is relevant when advising clients about appropriate contact arrangements for their children. Students are provided with handouts that set out the stages of development and what contact arrangements are suitable for different age groups.

Iyla Davies from QUT said that she would like to include information about this, together with family dynamics however, felt that these topics could be better presented by people with a social science background. UQ does not include this area and Griffith looks at families from a theoretical perspective.

QUT Legal Practice

A social worker as guest speaker provides information in the dynamics of family breakdown over a three hour period.

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[86] *Supra* n 15 at 72.
[87] *Supra* n 15 at 84.

This highlights the value of some training for family lawyers presented by social science teachers. Law lecturers cannot be expected to have expertise in these areas as they were not themselves trained in them. There is a wide scope for the teaching of law to open its eyes to interdisciplinary areas such as social science and gain great insight.[88]

Communication and Interpersonal skills

Undergraduate

Bond has a specific first year subject that deals with oral and written communication. In John Wade's subject he deals with some specific communication skills relevant to family law such as strategies to deal with angry and upset clients. Some of the educational goals of his course are:

10. To gain some insights into our own emotional responses to crisis and people in crisis.

11. To learn about the importance of emotion as compared to the intellect of decision making by lawyers and clients.

Among the "Methods by which these goals may be achieved" are "observation of events in court and in lectures, videos and simulations".[89]

Griffith offers the option of participating in mooting. They have some integration of communication skills in several core subjects, such as legal interviewing, negotiation and some skills are integrated into their Offices Program.

QUT and UQ have oral presentations in their tutorials. They can participate in mooting in other subjects and improve written skills in some specific research subjects.

In Legal Practice students obtain practice in interviewing skills by various role plays. However, there does not appear to be any training in the interpersonal skills particular to family law.

Domestic violence

Undergraduate

All the lecturers cover the issue of domestic violence to varying degrees. Bond devotes two hours to the topic and part of a tutorial. QUT considers it an important issue and includes information about the Cycle of Violence and understanding the perspective of a victim of violence. Griffith spend two hours of a lecture on this topic and on the relevant areas of the *Family Law Act* and State legislation. UQ cover it in the heading "Injunctive relief" and talk about Protection Orders, Peace and Good Behaviour Orders

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[88] P Brest 'The Responsibility of Law Schools: Educating Lawyers as Counsellors and Problem Solvers' (1995) 58 (3 & 4) *Law and Contemporary Problems* 5 at 10.

[89] *Ibid* at 4 and 5.

and briefly about stalking. Both Bond and QUT appear to go into more detail in this area.

Legal Practice

This topic is covered by a guest lecturer who is a criminal lawyer and who talks about how to apply for a Protection Order and injunctions in the Family Court. The underlying dynamics of violence are not covered.

Child abuse

No lecturer, including in the Practice Course, went into this topic in depth. It was considered complicated and the relevant state legislation was covered and the role of the child representative talked about. This and domestic violence are both areas which are significant in practice, but do not seem significant in any of these family law subjects. These are areas where students could benefit from some additional training by social scientists as they are so predominant in practice.

Cross-cultural awareness

Bond has a specific first year subject, *Cultural and Ethical Values* and one of the themes of the family subject is "cross cultural values concerning families". Each lecturer talked about these issues being relevant to parenting decisions and in some cases to the structure of the family. The Practice Course does not appear to touch on these issues.

Negotiation and facilitation techniques in family disputes

Bond includes some specific training in this area. For example, the students watch a video showing a mediation and undertake some interactive learning in the family law course.

However, in the main each course had elective subjects dealing with this area. Bond offers the electives, *Alternative Dispute Resolution* and a *Negotiation and Mediation Project.* Bond also integrates dispute resolution skills into some core subjects. Griffith has integrated negotiation into the property law subject. The clinical subject *Legal Clinic* where students service clients at Caxton Legal Centre provides practical experiences in negotiating on behalf of a client, sometimes in family law matters.[90]

The Practice Course provides a guest lecturer, a family law barrister to speak about negotiation. There are also some role plays so that students can practice these skills.

5. Conclusion

It is conceded that this was a small-scale study limited in geographic area and with the primary research tool being interviews with key lecturers and the obtaining of written

[90] Now the elective *Advanced Family Law Clinic* provides students with negotiation experience in family law matters.

materials relevant to the course. It would be desirable to follow this up with some quantitative surveys of students in the courses, or perhaps better still, interviews with students to gain a more balanced perspective of the courses.

However, it appears that in general, as has previously been said, the teaching of dispute resolution, apart from at Bond University, "cannot be viewed as mainstream legal education.[91] It seems highly likely that that students graduating from the three other universities will leave with an adversarial mindset. This must be the case as unless they decide to undertake the elective dispute resolution subject on offer, they will receive little or no training in these concepts apart from it being touched upon from time to time in substantive subjects.

The future of legal education must hold a compulsory dispute resolution subject in first year as it is not only in the family law arena where this option is of growing importance. Civil courts and tribunals[92] are utilising it with increasing enthusiasm.

In the family law subject, depending on the university they attend, students may see dispute resolution as an option of varying importance. In general undergraduate teaching does not mirror the perceptions of people in practice and the philosophy of the Family Court that it is the primary method of resolving disputes.

Students would benefit greatly from specific training in interpersonal skills and dealing with people in crisis. This training should be provided by teachers with a social science background who could also provide insight in areas such as communication and interpersonal skills, child development, family dynamics, domestic violence, cross cultural matters and issues surrounding child abuse.

In the QUT Legal Practice Course there appears to be the need for the addition of specific training in mediation skills and interpersonal skills and more emphasis on dispute resolution. However, market demands may force the course to contract to 15 weeks, making the addition of further skills problematic.

There is a large gap between the practice of family law and legal education that must be bridged. There is great scope for an overhaul of law courses so that students will no longer graduate with an outdated adversarial mindset. In the family law arena of teaching there is, in general, an urgent need to bring legal education to meet the shifting tides of practice.

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91 *Supra* n 42 at 209.

92 For example, the Small Claims, Equal Opportunity, Building Tribunals and the Supreme and District Courts.