

SHAPING THE FUTURE: THE DISCOURSES OF ADR AND LEGAL EDUCATION

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Competing discourses in legal education shape practices in law schools and these discourses affect the teaching of Alternative Dispute Resolution (ADR). This area of study has become increasingly important for law students to understand, both at undergraduate or Juris Doctor level, due to the widespread adoption of ADR in our legal and justice system. Attitudes to ADR can be explored through the framework of the various discourses presently competing for dominance in Australian law schools. There are arguably six main discourses in legal education, doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism. This paper will apply these discourses in legal education to the subject area of ADR. The possibilities for legal education to more fully explore ADR to assist future lawyers to engage in the full range of dispute resolution options will be explored.

I INTRODUCTION

The teaching of ADR in law schools has come under increasing scrutiny in Australia and provides an area of rich research possibilities.¹ The term ADR is defined by the National Alternative Dispute Resolution Advisory Council (NADRAC) as:

ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is

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¹ For a discussion of the teaching of ADR in law school and the effect upon students' approach to conflict see J Gutman, T Fisher and E Martens, 'Why Teach Alternative Dispute Resolution to Law Students Part 1: Past and Current Practices and Some Unanswered Questions' (2006) 16(1-2) *Legal Education Review* 125; T Fisher, J Gutman and E Martens, 'Why Teach Alternative Dispute Resolution to Law Students Part 2: An Empirical Survey' (2007) 17(1-2) *Legal Education Review* 67; for a study of the effect of ADR learning upon a feeling of belonging in a law school environment see J Howieson and W Ford, *Teaching and Learning Skills: Increasing a Sense of Law School Belongingness* (2007) Teaching and Learning Forum <<http://lsn.curtin.edu.au/tlf/tlf2007/refereed/howieson.html>> at 20 February 2008. Research relating to the teaching of ADR in Australian law schools from the perspective of law teachers is presently being undertaken, see K Douglas, 'Mediation and Legal Education' (Paper presented at the sixth National Mediation Conference, Canberra, 18-20 September 2002) <<http://www.leadr.com.au/DOUGLAS.PDF>> at 27 February 2008.

commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage disputes without outside assistance.²

The teaching of ADR has grown in the last 30 years until law schools in Australia, and elsewhere in the western world, now regularly include ADR in their subject offerings.³ The subject area of ADR, sometimes referred to as 'Dispute Resolution', generally includes the range of non-curial methods of dispute resolution, but may also be combined with for example learning regarding civil procedure.⁴ Facilitative processes,

² National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003) 4. Astor and Chinkin note that any definition of ADR is 'culturally and contextually specific' and that the term is evolving see H Astor and C Chinkin, *Dispute Resolution in Australia* (Lexis Nexis, 2nd ed, 2002) 79. One of the newest ADR approaches is collaborative law, see P Tesler, 'Collaborative Law: What it is and Why Lawyers Need to Know About It' in D Stolle, D Wexler and B Winick (eds), *Practising Therapeutic Jurisprudence: Law as a Helping Profession* (2000) 187, 199; J McFarlane, *The Emerging Phenomenon of Collaborative Family Law: A Qualitative Study of CFL Cases* (Family, Children and Youth Section, Department of Justice, Canada, 2005); A Ardagh and G Cumes, 'The Legal Profession Post-ADR: From Mediation to Collaborative Law' (2007) 18 *Australasian Dispute Resolution Journal* 205. ADR processes can be linked to broader changes in our legal and justice system such as restorative justice and therapeutic jurisprudence: S Daicoff, *Lawyer, Know Thyself* (American Psychological Association, 2006) 169. New courts and approaches to conflict resolution, such as for example the Neighbourhood Justice Centre in Victoria (a Court that incorporates therapeutic jurisprudence and restorative justice philosophies), is evidence of a greater commitment to non adversarial practice in the Australian legal system and shows the continuing importance of teaching ADR to law students: J Gutman, T Fisher and E Martens, 'Teaching ADR to Australian Law Students: Implications for Practice in Australia' (2008) 19 *Australasian Dispute Resolution Journal* 42.

³ Spencer and Altobelli claim that 'nearly every law and business school in Australasia, England and America teaches dispute resolution as either a compulsory or elective undergraduate subject despite the fact that Western law schools still teach adversarial appellant law in order to introduce the doctrinal foundation of law': D Spencer and T Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, 2005) 1. The focus of this paper is confined to undergraduate legal education or postgraduate Juris Doctor education; that is programs aimed at admission to practice as a lawyer in the various states of Australia. The paper does not engage in any depth with the issues that arise regarding the educational needs of the significant percentage of students who study law but will not practice. Notably, ADR education is also provided in postgraduate legal education, pre-admission training in practical training programs or continuing professional development of lawyers; see generally C Brabazon and S Frisby, 'Teaching Alternative Dispute Resolution Skills' in C Sampford, S Blencowe and S Condlin (eds), *Educating Lawyers for a Less Adversarial System* (1999) 156, 158.

⁴ There are a variety of ways that ADR processes are taught in law schools. For example at La Trobe University Dispute Resolution is a core first year course which includes the study of arbitration, conciliation, mediation and negotiation. The option of litigation is also discussed but not in detail regarding civil procedure, see Dispute Resolution <http://www.latrobe.edu.au/law/courses/units.html> at 24 July 2008. Similarly, in the RMIT Juris Doctor program Negotiation and Dispute Resolution is a core third year course that focuses upon non curial dispute resolution such as arbitration, conciliation, mediation and negotiation with civil procedure as a separate course, see RMIT University, *Juris Doctor* <<http://www.rmit.edu.au/browse;ID=nle2pppng7qsz;STATUS=A?QRY=JD&STYPE=ENTIRE>> at 30 January 2008. In contrast some law schools combine ADR processes with civil procedure such as at the University of Melbourne in their Juris Doctor program. This combination course is a compulsory first year offering see Melbourne Law School, *Dispute Resolution* (2007) <<http://jd.law.unimelb.edu.au/index.cfm?objectid=8D2E733E-1422-207C-BAB07938AEBE04D9%20&view=overview&sid=4038>> at 30 May 2008. In the undergraduate program at Deakin University there is also a combination of ADR with civil procedure see Deakin

such as negotiation and mediation, are amongst the most utilised ADR options⁵ and can form a central focus of teaching in this area.⁶ Gutman et al argue that understanding ADR through academic legal education is important as lawyers need to explore with clients alternative options of dispute resolution as part of their ethical framework and their duty to the court.⁷ Increasingly, parties may be required to engage in ADR due to legislation; this requirement may be part of a system of pre-litigation compulsory dispute resolution or may be a step in the process of case management in courts.⁸ Negotiation and understanding of dispute resolution options are core skills of lawyers and are taught as part of practical legal training, prior to admission to practice, under national competency standards.⁹

University, *Civil Procedure and ADR* (2002) <https://www.deakin.edu.au/buslaw/unitguides/pdf-files/semester-2-2002/MLL112_Civil_Procedure_and_Alternative_Dispute_Resolution.pdf> at 30 May 2008. For a discussion of the benefits of combining ADR with civil procedure see K Mack, 'Integrating Procedure, ADR and Skills: New Teaching and Learning for New Dispute Resolution Processes' (1998) 9 *Legal Education Review* 83; J Sternlight, 'Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia' (2005) 80 *Notre Dame Law Review* 681.

⁵ There are a range of ADR processes including facilitative processes ie: negotiation; facilitation; partnering; conferencing; mediation; advisory processes ie: conciliation; neutral evaluation; case appraisal; dispute counseling; expert referral; and determinative approaches ie: expert determination; independent fact finding; mini trial; arbitration: T Sourdin, *Alternative Dispute Resolution* (Law Book Co, 2nd ed, 2005) 20. Astor and Chinkin state, 'Negotiation is the foundational technique relied upon by lawyers in settling disputes and thus plays a significant role in litigation and arbitration. It is also the foundational skill used in alternative processes. Mediation plays a central role in ADR; indeed to many people ADR is synonymous with mediation': Astor and Chinkin, above n 2, 76. Research by NADRAC in ADR statistics suggests significant use of ADR, particularly in court-connected contexts: National Alternative Dispute Resolution Advisory Council, *ADR Statistics* (2003). The list of ADR processes would now arguably include collaborative law, a process that is growing in use in Australia: Ardagh and Cumes, above n 2.

⁶ For example at La Trobe university one of the foci in their Dispute Resolution course (taught by two hour lecture and two hour workshop) is upon skill development in negotiation and facilitative mediation through role plays undertaken in the workshops see Fisher, Gutman and Martens, above n 1, 70.

⁷ Gutman, Fisher and Martens, above n 1, 125-7. For a discussion of the effect of ADR on the profession see A Zariski, 'Disputing Culture: Lawyers and ADR' (2000) 7 *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v7n2/zariski72.html>> at 22 May 2008. There is a need for academic education of Australian lawyers to include a skills focus such as in negotiation and ADR more generally: Australian Law Reform Commission (ALRC), *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) ch 2.

⁸ For example in Victoria under the *Owners Corporation Act 2006* (Vic) s 153(3) litigation cannot be pursued at the Victorian Civil and Administrative Tribunal until pre-litigation dispute resolution schemes are undertaken. At the Commonwealth level under the *Family Law Act 1975* (Cth) s 60I family dispute resolution must be undertaken prior to litigation in relation to parenting concerns. See for a discussion of these statutory requirements: National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters* (2006) 30-7. For a discussion of the use of ADR in Victorian courts as a case management option see Victorian Law Reform Commission (VLRC), *Civil Justice Review: Report* (2008) ch 4. Recommendation 17 of this report proposed an increase in the range of ADR options in the Victorian civil system: 284.

⁹ Admission to practice requirements can include as part of practical legal training negotiation and other dispute resolution options such as mediation and arbitration. For example, in Victoria under the *Legal Profession (Admission Rules) 2008* those who wish to be admitted to the legal profession in Victoria must have completed academic qualifications approved for admission: r 2.01. The academic qualification must include areas of civil procedure (but does not require learning in regard to ADR) sch 2. Additionally, those persons seeking to be admitted must have completed practical legal training that includes competency standards: r 3.01. The competency standards do require learning about some forms of ADR. The competency standards include three areas: (i) compulsory skills;

One concern identified in the literature relating to ADR is that lawyers may block the potential of ADR by approaching these processes with a traditional litigious mindset that is competitive in nature.¹⁰ The approach of some lawyers may be categorised as ‘adversarial’ even when engaging in ADR options that privilege collaborative problem solving or transformative approaches to relationships and emotions of those involved in conflict.¹¹ The Australian Law Reform Commission has raised the concern of excessive

(notably these include lawyer’s skills and problem solving); (ii) practice areas; and (iii) compulsory values. The area of lawyer’s skills includes skills in negotiating settlements and agreements and facilitating early resolution of disputes. A compulsory practice area is civil litigation practice that requires assessing the merits of the case and identifying the dispute resolution alternatives. The means by which a dispute might be resolved include, but are not limited to, negotiation; mediation; arbitration; litigation; and expert appraisal. In civil litigation practice and other areas of practice, such as employment and industrial relations practice, negotiation skills are required: sch 3. The Victorian practical legal training competencies adopt the competencies endorsed by the Law Admissions Consultative Committee in 2000: S Clark, ‘All the Way with PLT’ (2007) 81 *Law Institute Journal* 72.

¹⁰ C Caputo, ‘Lawyers’ Participation in Mediation’ (2007) 18 *Australasian Dispute Resolution Journal* 84; A Ardagh and G Cumes, ‘Lawyers and Mediation: Beyond the Adversarial System’ (1998) 9 *Australian Dispute Resolution Journal* 72. There are a variety of ways that lawyers can assist clients in negotiation and mediation through preparation and problem solving: B Sordo, ‘The Lawyer’s Role in Mediation’ (1996) 7 *Australian Dispute Resolution Journal* 20; D Golann and J Folberg, *Mediation: The Roles of Advocate and Neutral* (Aspen Publishers, 2006), but these approaches depend upon the culture of the lawyer: R Mnookin, S Peppet and A Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Harvard University Press, 2000) 167; D Jenaway, ‘Culture and Negotiation: The Role of Morality’ (2008) 19 *Australasian Dispute Resolution Journal* 49. There are ethical tensions inherent in the choices lawyers make regarding pursuing a collaborative problem solving approach as arguably on occasion an adversarial approach may provide the ‘best’ outcome for a client see S Peppet, ‘ADR Ethics’ (2004) 54 *Journal of Legal Education* 72. For a discussion of suggestions on ways that lawyers can advocate for their client in a mediation that utilises creative problem solving without using zealous litigious tactics, J R Sternlight, ‘Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Non-adversarial Setting’ (1999) 14 *Ohio State Journal on Dispute Resolution* 269. For a discussion of a lawyer’s role in family dispute resolution that assists clients to embrace collaborative problem solving see D Cooper and M Brandon, ‘Non Adversarial Advocates and Gatekeepers: Lawyers, FDR Practitioners and Co-operative Post-Separation Parenting’ (2008) 19 *Australasian Dispute Resolution Journal* 104. For a discussion of the need for lawyers to take care when acting as a mediator see M Noone, ‘Lawyers as Mediators: More Responsibility?’ (2006) 17 *Australasian Dispute Resolution Journal* 96; D Jesser, ‘Mediator - Not Legal Advisor’ (2003) 14 *Australasian Dispute Resolution Journal* 211.

¹¹ For an example of a well known transformative approach see R Baruch Bush and J Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, revised ed, 2005). For a bibliography of the range of transformative processes see H Burgess and G Burgess, *Transformative Approaches to Conflict*, Conflict Research Consortium <<http://www.colorado.edu/conflict/transform/index.html>> at 6 March 2008. Also narrative approaches deal with relationships and emotion from postmodern and social constructionist perspectives see, for example, J Winslade and G Monk, *Narrative Mediation* (Jossey-Bass, 2000). New models or approaches to mediation are evolving, for example another new model that deals with emotion is the understanding model. This model has a focus upon creating understanding of differing party perspectives concerning business and relational issues but also legal concerns relating to the conflict. The model encourages two conversations; one dealing with underlying interests and concerns, including emotions; and the other dealing with legal arguments and risk. This ‘legal conversation’ includes the active participation of legal representatives with the mediator ‘looping’, or summarising and reframing, the legal issues for understanding: G Friedman and J Himmelstein, ‘Resolving Conflict Together: The Understanding-Based Model of Mediation’ (2006) 2 *Journal of Dispute Resolution* 523.

‘adversarialism’ as an issue of professional practice for lawyers.¹² In the United States Nolan-Haley¹³ has identified the shift to ‘problem solving’ as an important development in the way lawyers practice, arguably representing a move away from the traditional litigious mind-set.¹⁴ She acknowledges that lawyers have always been involved in the solving of legal problems for their clients, but identifies the problem solving movement as providing a multidisciplinary framework for the role of lawyers in dealing with clients’ problems more holistically. Significantly, she views the philosophical approach of much mediation practice, the interest based approach, as an important foundation to this movement.¹⁵ Daicoff has recently explored the emergence of alternative stories of lawyers’ construction of practice, describing these as vectors in the ‘comprehensive law movement’, with an emphasis upon client’s needs and non-adversarial practices such as ADR.¹⁶ Similarly, Friberg¹⁷ points to non-adversarial processes as a rising paradigm in criminal justice in Australia (connected with the ADR movement) and advocates for change in legal education to assist with the development of these approaches.

One site for the construction of lawyers’ approaches to ADR is the law school and the shaping of law students’ culture through the experience of legal education. Law programs are not homogenous in their offerings in this area and therefore caution must be exercised in discussing trends, however the teaching of ADR in law schools is an important phenomenon to reflect upon given the possible impact of ADR learning and teaching upon the shape of lawyers’ professional identity.

¹² ALRC, above n 7, [3.30]. The concern of an excessive adherence to an ‘adversarial’ culture was raised in the Victorian review of the civil justice system: VLRC, above n 8, [3.7]. In the United States ‘adversarialism’ has been critiqued drawing upon postmodernist critical theory: C Menkel-Meadow, ‘The Trouble with the Adversarial System in a Postmodern, Multicultural World’ (1996) 38 *William and Mary Law Review* 5.

¹³ J Nolan-Haley, ‘Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective’ (2002) *Harvard Negotiation Law Review* 235.

¹⁴ This kind of ‘problem solving’ is a holistic approach to legal practice and arguably should be distinguished from ‘settlement’ driven mediation that is critiqued by many in the mediation movement for its sometimes myopic focus upon finding solutions to the problems that are brought to the mediation table. This approach is sometimes referred to as ‘problem solving’ mediation and is part of the ‘satisfaction’ story of mediation see Baruch Bush and Folger above n 11, 9.

¹⁵ Nolan-Haley, above n 13, 248.

¹⁶ Daicoff links a number of different stories of the law and justice system including: therapeutic jurisprudence; preventative law; procedural justice; creative problem solving; holistic justice; transformative mediation; restorative justice; collaborative law; and problem solving courts, to frame what she calls the comprehensive law movement; a movement that resists and challenges dominant discourses in legal practice see S Daicoff, ‘Law as a Healing Profession: The “Comprehensive Law Movement”’ (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1. In this paper Daicoff focuses upon transformative approaches rather than facilitative or evaluative models of mediation. This may be due to the focus upon settlement in these models. She also identifies a recent movement in the United States known as ‘Humanising Legal Education’ devoted to bringing balance to legal education, 49. Daicoff’s approach has resonance with the ‘relational’ lawyering approach identified by Parker and Evans; see C Parker and A Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2007) 31-7.

¹⁷ A Friberg, ‘Non-adversarial Approaches to Criminal Justice’ (2007) 16 *Journal of Judicial Administration* 205. King argues that a framework is required to assist in the choice of the various non adversarial processes available such as ADR, problem solving courts and restorative justice: M King, ‘Towards a More Comprehensive Resolution of Conflict: The Role of Restorative Justice’ (Paper presented at the Restorative Justice: Bringing Justice and Community Together Conference, Melbourne, 14 May 2008)
<http://www.varj.asn.au/pdf/08_KingM_MoreComprehensiveConflictResolution_RoleofRJ.pdf#xml
=> at 28 June 2008.

In the Australian context James posits that there are six discourses circulating in legal education.¹⁸ He notes that legal education is not a ‘stable and consistent body of knowledge and practices’¹⁹ and that these six stories compete for dominance in law schools and the universities of which they are a part. He typifies these discourses as modes of power-knowledge²⁰ and identifies these as doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism.²¹ These six stories of legal education construct the approach of law schools to the content and pedagogy of subjects in the various law programs in Australia and affect the teaching of ADR as a discipline area in the legal curriculum. These discourses are of relevance to any discussion of the place of ADR in legal education because it is the intersection of these discourses that help determine that place. Notably however, the place of ADR in legal education is not fixed, but is constantly shifting shaped by the competing discourses of legal education, as well as discourses of ADR circulating in our legal and justice system and more widely in the community.

This paper will consider legal education discourses as applied to ADR with a particular focus upon the options of negotiation and mediation. For those students who go on to be lawyers after completing a Bachelor of Laws or Juris Doctor the approach in law school to ADR will affect their understandings of legal practice and the place of ADR to deal with conflict in our society. Legal education is only one site for the shaping of the identity of lawyers, but it is generally recognised as a formative site. Importantly, other identity concerns will also influence a lawyer’s practice in relation to ADR, for example the law firm that they are part of, their own socio- economic background, race, gender, sexual orientation²² and the state or city in which they practice.²³ Arguably, in order for law schools to critically engage with the place of ADR in their programs the discourses of legal education need to be considered in any curriculum review. This paper begins with a general discussion of legal education in Australia to assist in reviewing the wider stories of legal education presently circulating in universities and the community. This discussion is followed by detail regarding the competing discourses in legal education as applied to ADR. The concluding section speculates upon the need for law schools to

¹⁸ N James, ‘Australian Legal Education and the Instability of Critique’ (2004) 28 *Melbourne University Law Review* 375.

¹⁹ *Ibid* 378.

²⁰ Power-knowledge is a term used by Foucault to indicate the close relationship between power and knowledge: G Kendall and G Wickham, *Using Foucault’s Methods* (Sage Publications, 1999) 47. James draws upon the work of Foucault in his analysis of the discourses circulating in legal education. Discourses ‘seek to both inform and influence, both to educate and dominate. They tell subjects about themselves and the world, and also construct that world and determine its subjects’: *ibid* 379.

²¹ James, above n 18, 378.

²² Legal culture is made up of a number of collective and individual orientations. See generally, for an analysis of such issues as gender and indigenous concerns in legal culture, A Lamb and J Littrich, *Lawyers in Australia* (Federation Press, 2007) ch 4.

²³ MacFarlane found differences in lawyers’ approach to the ADR option of mediation depending upon which city in Canada that they lived. In her detailed study of lawyers she found that commercial clients no longer left the running of a file to the discretion of lawyers but looked for settlement possibilities early in the dispute due largely to economic imperatives. Mandatory mediation also affected the way that matters were dealt with by lawyers and the likelihood of an earlier settlement. Exposure to mediation through the mandatory system introduced in Canada meant that many lawyers altered their approach to the lawyering role. Macfarlane created a number of categories to classify lawyers’ approaches to mediation. For more detail see J Macfarlane, ‘Culture Change? Tale of Two Cities and Mandatory Court-Connected Mediation’ (2002) *Journal of Dispute Resolution* 241.

review their offerings in ADR in light of these competing discourses and the continued growth in the use of ADR in our legal and justice system.

II LEGAL EDUCATION IN AUSTRALIA

Legal education is evolving in Australia among competing stories of what should shape the nature of law school education.²⁴ Various reports have sought to understand the circulating stories in legal education.²⁵ The most recent report, known as the Johnstone report,²⁶ provides a stock-take of law curriculum and teaching. This report identified the continuing significance of vocational influences upon legal education. Another recent report into legal education from the United States, the Carnegie Report,²⁷ is of interest as this research also identified the continuing influence of legal practice to legal education. The focus of legal practice was again emphasised in a learning and teaching report from the United States, the Stuckey report,²⁸ that articulated lawyer graduate attributes as the cornerstone to approaching legal education. In Australia these emphasises continue even though many law students will not practice law.²⁹

Historically, Australian lawyers were apprenticed in law offices and learnt through work-integrated modes of instruction.³⁰ Gradually, the teaching of law students moved to the universities, but admission to practice and the skills necessary for private practice still have a significant influence upon legal education.³¹ In most law schools links with the profession are maintained, but many law schools have sought independence from the concerns of practising lawyers, fearing too great a focus upon legal practice might curtail research agendas.³² In the United States the Carnegie report has advocated a return to a focus upon legal practice, albeit informed by recent pedagogical theory and with the normative aim of lawyers reconnecting to the community that they serve, due to a perceived need to ground legal education in lawyers' professional identity.³³ In

²⁴ M Keyes and R Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26(4) *Sydney Law Review* 537.

²⁵ See, for a history of legal education, links with the profession and various reports into this area, V Brand, 'Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education' (1999) 10(2) *Legal Education Review* 109. A significant report was completed in the 1980's: D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987).

²⁶ This report documented the expansion in law programs in Australia, the focus of each law program and the various teaching practices: R Johnstone and S Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by Australian Universities Teaching Committee (AUTC)* (2003).

²⁷ See W Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (John Wiley and Sons, 2007).

²⁸ R Stuckey and Others, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007).

²⁹ A large percentage of law school graduates will not practice, more than one third, and there is a trend towards law being a 'generalist' degree although students will choose subjects that allow the option of practising: R Guthrie and J Fenandez, 'Law Schools in the 21st Century' (2004) 29(6) *Alternative Law Journal* 276.

³⁰ See M Le Brun and R Johnstone, *The Quiet (R)Evolution: Improving Student Learning in Law* (Law Book Co, 1994) 18.

³¹ Keyes and Johnstone, above n 24, 548.

³² J Webber, 'Legal Research, the Law Schools and the Profession' (2004) 26 *Sydney Law Review* 565.

³³ Sullivan et al, above n 27, ch 1.

Australia Thornton³⁴ also acknowledges the influence of the legal profession upon legal education and identifies a number of additional key influences including the increase in student numbers due to the larger number of law programs, higher intakes in the established law programs and international students.³⁵ Legal education, like much of higher education, is affected by the trend to mass tertiary education and the decade long reduction of funding under neo-liberal policies.³⁶ Thornton argues that neo-liberalism has affected the kind of knowledge valued in many law schools and by some law students, with an increasing emphasis upon knowledge workers to assist the economy.³⁷ Pedagogical changes in legal education include a trend towards pre-packaged knowledge due to the larger numbers of students in law programs.³⁸ There is a greater use of intensive modes and online learning options.³⁹ Content of courses in law are often delivered in lectures, to largely passive student recipients, and there is a return to the widespread use of examinations due to the pressures of large numbers of students.⁴⁰ Controversially, Thornton argues that these influences have contributed to declining standards in some law schools.⁴¹ Another influence upon legal education is the relative low funding level for law programs that is in contrast to the high level of student contribution required by the government. Some law schools claim to be starved of the requisite level of funding to adequately deliver legal professional programs.⁴²

The growth of ADR in legal education has been incremental. Initial debates concerning legal education and ADR focussed on the need to include this discipline area in the law curriculum.⁴³ By the 1980's, both here and in the United States,⁴⁴ ADR as a subject in some form was included in the curriculum of most law schools.⁴⁵ In the United States⁴⁶ some innovative law schools included ADR as an integrated part of the curriculum and some evidence was gathered relating to the benefits of including ADR in law

³⁴ M Thornton, 'The Law School, the Market and the New Knowledge Economy' (2007) 17(1-2) *Legal Education Review* 1.

³⁵ Keyes and Johnstone, above n 24, 548.

³⁶ Thornton, above n 34, 2-12.

³⁷ Ibid.

³⁸ Ibid 12-15.

³⁹ Ibid 15-16.

⁴⁰ Ibid 16-18.

⁴¹ Ibid 18-25.

⁴² J Lewis and R Yousef, 'Law Schools Struggling to Maintain Quality: Deans' (2007) 45(3) *Law Society Journal* 10.

⁴³ Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Legal Education and Training* (1997) [5.7].

⁴⁴ For a recent update upon the inclusion of ADR in law programs in the United States, including a discussion of programs that focus upon ADR in an integrated manner see C M Bryce, 'ADR Education From a Litigator/Educator Perspective' (2007) 81(1) *St John's Law Review* 337. For a valuable bibliography of ADR and legal education literature (with a focus upon the United States) see T Farrow, 'Dispute Resolution and Legal Education: A Bibliography' (2005) 7 *Cardozo Journal of Conflict Resolution* 119.

⁴⁵ Spencer and Altobelli, above n 3. For a survey of universities, providing a snapshot of subjects and degrees offered in studies in Australia in ADR, see National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR*, Discussion Paper (2000) 125. However, the focus in this work is upon postgraduate offerings in ADR.

⁴⁶ In the United States, litigation and alternative dispute resolution processes are part of the 10 fundamental lawyering skills, see American Bar Association, *Report of the Taskforce on Law Schools and the Profession: Narrowing the Gap* (the McCrate Report) (1992) <<http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>> at 27 July 2008.

programs.⁴⁷ Although there have been strides in the acceptance of ADR into the law schools this acceptance has not necessarily impacted or brought discernible change to the overall curriculum of law programs.⁴⁸ The pedagogy of ADR subjects often reflect the interdisciplinary focus of the area that includes not only law but also communication, social sciences, management and psychological perspectives.⁴⁹

Lawyers are said to gain a 'standard philosophical map'⁵⁰ through their legal education. This map privileges the role of litigation in dispute resolution and arguably comes from the nature of legal pedagogy. The focus in law schools upon pedagogy that lacks comparative perspectives with other legal systems or dispute resolution processes; focuses upon a court centred view of the legal system; the teaching of largely appellate decisions; emphasises rules of law rather than issues of fact and encourages mooting has been said to promote an adversarial approach in students' orientation to conflict.⁵¹ Progressively, changes in legal education have seen a greater focus upon skills training and clinical practice in some law schools⁵² and these changes arguably have led to shifts in law students' orientations to conflict. Fisher et al have recently provided evidence that the teaching of ADR in a compulsory first year law course *Dispute Resolution* can

⁴⁷ For example: R Pipkin, 'Teaching Dispute Resolution in the First Year of Law School; an Evaluation of the Program at the University of Missouri-Columbia' (1998) 50 *Florida Law Review* 610. See also L Riskin and J Westbrook, 'Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan' (1989) 39 *Journal of Legal Education* 509; C Menkel-Meadow, 'To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum' (1993) 46 *Southern Methodist University Law Review* 1995. The literature relating to the various approaches to teaching ADR is summarised in Gutman, Fisher and Martens, above n 1.

⁴⁸ Arguably, there has been progress in the adoption of ADR subjects but the kind of radical change to law school curriculum where an integrated model is adopted has not been widely implemented in the United States see N Rogers, 'No Panaceas, Only Promising Avenues: Frank Sander's Legacy for Dispute Resolution in Law Schools' (2006) 22 *Negotiation Journal* 459. Adams provides a critique of the introduction of ADR into legal education in the United States and claims that it has largely stalled from the initial enthusiasm of the 1980's except in some select universities see generally D S Adams, *Alternative Dispute Resolution Programs in Law School Curriculum-What's Next? Report for the ABA Section of Dispute Resolution* (2001) American Bar Association <<http://www.abanet.org/dispute/adampaper.pdf>> at 19 June 2008. For a discussion of the Australian context of curriculum design regarding ADR and legal education see Gutman, Fisher and Martens, above n 1. A detailed discussion of this literature is beyond the scope of this paper.

⁴⁹ New South Wales Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators Report* (1991). Law teaching could emphasis lawyers as dispute managers and resolvers to address 'perceived problems in the adversarial system of litigation': ALRC, above n 43, [5.14].

⁵⁰ Law school education can mean that students develop a culture that disputes are dealt with as adversaries to be decided by a third party through the operation of legal principles: L Riskin, 'Mediation and Lawyers' (1982) 43 *Ohio State Law Journal* 29. In research undertaken in Western Australia it was found that the way lawyers discussed mediation results (described as 'law talk') affected disputants' sense of procedural justice: J Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9 *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92.html>> at 30 June 2008.

⁵¹ ALRC, above 43, [5.9]. The ALRC noted that students bring understandings of the lawyer role, often formed through popular culture, to their education, 'It may be that an adversarial style of lawyering is something students bring with them to their first class': [5.8]. Ball argues that students have agency regarding the construction of legal identity: M Ball, 'The Construction of the Legal Identity: "Governmentality" in Australian Legal Education' (2007) 7 *QUT Law and Justice Journal* 444. Parker and Evans categorise this 'adversarial mindset' as the traditional conception of the lawyer; the 'adversarial advocate' see Parker and Evans, above n 16, 23.

⁵² See Johnstone and Vignaendra, above n 26, 5.

affect the 'standard philosophical map' of law students to include non adversarial orientations.⁵³

While much attention has been given to the 'lawyers' standard philosophical map' less attention has been directed to another important area of influence upon lawyers' orientations to practice; the engagement with emotion.⁵⁴ In the negotiation literature there is a growing recognition regarding the impact of emotion upon negotiations.⁵⁵ Fisher and Shapiro⁵⁶ have recently highlighted the importance of emotion upon negotiations and the need to address emotion when negotiating. In mediation Jones and Bodtker⁵⁷ have noted the importance of mediators recognising the role of emotion in conflict. Lawyers impact upon the practice of negotiation and mediation as they frequently participate in these two processes, but some lawyers may not attend to the emotional content of conflict.⁵⁸ Sections of the legal profession may in fact suppress emotion as some lawyers regard this aspect of conflict as peripheral to a dispute. Commentators have argued that lawyers need to better recognise the emotional dimensions of the lawyer client relationship, akin to the physician patient relationship, where transference and counter transference can occur.⁵⁹ However, historically lawyers and legal education have largely not seen the emotional dimensions of conflict and the flow on effects upon lawyers as important.⁶⁰

⁵³ See generally Fisher, Gutman and Martens, above n 1. Changing legal education to promote non-adversarial practice in the family law jurisdiction has been suggested: D Cooper, 'Changing the Family Lawyer's Philosophical Map: Narrowing the Gap Between Practice and Legal Education' (1999) 15 *QUT Law and Justice Journal* 179.

⁵⁴ The need to deal with emotion in mediation was raised by Riskin, above n 50. The need to understand emotion has been increasingly acknowledged in a range of pursuits including business and has been popularly understood through best selling books see, for example, D Goleman, *Emotional Intelligence: Why it Can Matter More than IQ* (Bloomsbury, 1995).

⁵⁵ In a seminal work on negotiation there is recognition of emotion to a limited degree in the context of negotiators separating the people concerns from the problem that forms the basis of the negotiation, see generally R Fisher, W Ury and B Patton, *Getting to Yes* (Penguin Books, 2nd ed, 1991). A more sophisticated approach to emotion in negotiation is now evident in some parts of the literature engaging with this field: B Barry, 'Negotiator Affect: The State of the Art (and the Science)' (2008) 17 *Group Decision and Negotiation* 97.

⁵⁶ R Fisher and D Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Viking, 2005). See also C Freshman, 'Identity, Beliefs, Emotion, and Negotiation Success' in M Moffitt and R Bordone (eds), *The Handbook of Dispute Resolution* (2005) 99.

⁵⁷ T Jones and A Bodtker, 'Mediating with Heart in Mind: Addressing Emotion in Mediation Practice' (2001) 17 *Negotiation Journal* 217. In this article the authors provide a detailed discussion of the physiological and psychological dimensions of emotion and the need for mediation practice to better engage with emotional concerns in conflict. Interestingly, Jones has argued that some new models that attempt to deal with emotion, such as the Bush and Folgers model, are clumsy in their approach to emotion: T Jones, 'Emotion in Mediation: Implications, Applications, Opportunities, and Challenges' in M Hermann (ed), *The Blackwell Handbook of Mediation* (2006) 284.

⁵⁸ Foong argues, 'The legal culture is suspicious about emotion, as cognition and emotion have traditionally been seen as competing elements in the mental landscape. Lawyers and negotiators prefer to see themselves as keenly rational thinkers with hard skills and identifiable principles': D Foong, 'Emotions in Negotiation' (2007) 18 *Australasian Dispute Resolution Journal* 186, 186. In the context of United States legal education emotion is said to be seen as of minimal importance to legal deliberation: E Ryan, 'The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation' (2005) 10 *Harvard Negotiation Law Review* 231.

⁵⁹ M Silver, 'Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship' in D Stolle, D Wexler and B Winick (eds), *Practising Therapeutic Jurisprudence: Law as a Helping Profession* (2000) 357, 361

⁶⁰ *Ibid*, 382.

Lawyers may focus upon the facts of a conflict and see ‘emotional’ reactions as suspect and problematic in the context of solving legal problems.⁶¹ Liberal concepts of objectivity and rationality, which are commonly taught in law schools, mean that ‘thinking like a lawyer’ may not value the expression of emotion.⁶² Arguably, law students need to understand more about emotion⁶³ and interpersonal skills.⁶⁴ This need can arguably be linked to their professional identity and the need to have a range of generic communication skills.⁶⁵

To more fully understand the place of ADR in legal education it is important to explore the competing stories of legal education in university law schools. Both the content and pedagogy of ADR courses are affected by these stories circulating in a particular law school, the value that each program group places upon ADR and the individual approaches of ADR law teachers.⁶⁶ The larger stories of ADR circulating in the community will affect the stories in legal education.

III LEGAL EDUCATION AND ADR

As indicated previously in this paper there are arguably six competing discourses (which may at times co-operate) circulating regarding legal education. These are doctrinalism; vocationalism; corporatism; liberalism; pedagogicalism; and radicalism. Discourses shape the stories of curriculum in the various universities in Australia. They are arguably largely mirrored in the United States, although there are some significant differences to legal education in that country compared to the Australian context; for example the preponderance of post-graduate education for lawyers through the Juris Doctor.⁶⁷

These discourses are important to reflect upon because they determine, amongst other factors, the kinds of subjects that are taught in legal education both in content and pedagogy. If law teachers are to be reflexive in their practice, considering their own

⁶¹ Ryan, above n 58, 234-9.

⁶² Ibid 248-60. See also, for a detailed discussion of the ways that United States legal education transforms law students in the way that they talk, read and write as well as the way that they ‘think’ about conflict, E Mertz, *The Language of Law School: Learning to Think Like a Lawyer* (Oxford University Press, 2007). The aligned issue of student well being in legal education is presently being researched in the Australian context: J Allen and P Baron, ‘Buttercup Goes to Law School: Student Wellbeing in Stressed Law Schools’ (2004) 29 *Alternative Law Journal* 285. See also studies in the United States, K Sheldon and L Krieger, ‘Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory’ (2007) 33 *Personality and Social Psychology Bulletin* 883.

⁶³ This can be achieved through negotiation courses: P Reilly, ‘Teaching Law students How to Feel: Using Negotiations Training to Increase Emotional Intelligence’ (2005) 21 *Negotiation Journal* 301. The understandings and reflections included in mediation training that deal with emotion can increase emotional intelligence: L Schreier, ‘Emotional Intelligence and Mediation Training’ (2002) 20 *Conflict Resolution Quarterly* 99.

⁶⁴ J Rosenberg, ‘Interpersonal Dynamics: Helping Lawyers Learn the Skills and the Importance of Human Relationships in the Practice of Law’ (2005) 58 *University of Miami Law Review* 1225.

⁶⁵ See Sullivan et al, above n 27, ch 1.

⁶⁶ Where the traditional model of law teaching is adopted individual teachers may be largely divorced from what other teachers are doing in their respective classrooms. Teachers tend to protect their individual areas: Keyes and Johnstone, above n 24, 547. Arguably, then teachers wield significant power over the content of the individual courses.

⁶⁷ See Sullivan et al, above n 27, 21.

approaches to learning and teaching and the power they wield in the classroom as well as the institutional power of the law school and indeed the higher education sector, the six discourses articulated by James provide a framework for reflection.⁶⁸ Each of the six discourses will now be discussed in turn and applied to the question of ADR's place in legal education.

A *Doctrinalism*

Historically one of the more dominant discourses evident in legal education is the doctrinal approach, although this approach has been displaced to some extent by the rise of vocationalism, corporatism and liberalism. The doctrinal discourse privileges the black letter approach to learning and teaching in law.⁶⁹ More critical discourses, such as feminism, critical legal studies and postmodernism, can be marginalised in this approach with the focus upon what law is rather than a radical critique of what it should be.⁷⁰ This approach tends to have a teacher focus where lecturers provide the knowledge of the appropriate cases and legislation in the discipline area and assessment concentrates upon students providing the 'correct' answer to legal case studies in examinations.⁷¹ There is little focus upon the wider context of legal problem solving, although some token focus does occur. Doctrinal approaches are evident in most law schools and privilege legal scholarship that promotes a positivist understanding of the law.⁷² There is kudos to this approach as it is seen to be a superior method of scholarship. James states:

Doctrinalism persists within the law school because many legal scholars benefit from its persistence. As an expression of power, doctrinalism seeks to preserve the legitimacy of 'law' as a discrete and highly privileged field of expertise within both the university and wider society. That purpose is not furthered by the facilitation or encouragement of critique. For doctrinalism, critique is a dangerous practice because it questions faith in the law and threatens to break down the disciplinary, academic and social barriers between law and non-law and between lawyers and non-lawyers.⁷³

The focus upon doctrine, while still valued by many within the profession has gradually been tempered with the call for law programs to provide a skills focus.⁷⁴ ADR provides little scope for doctrinalism in its traditional form. Although progressively there is more case law in relation to the practice of ADR, and in particular mediation, and there is a continual growth in legislation dealing with ADR, particularly mandating processes, the discipline area of ADR tends to focus upon interdisciplinary approaches to conflict with

⁶⁸ James posits that each law teacher does not remain loyal to one particular approach but might simultaneously adhere to a number of approaches, see N James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 1-2 *Legal Education Review* 55

⁶⁹ James, above n 18, 380.

⁷⁰ N James, 'Expertise as Privilege: Australian Legal Education and the Persistent Emphasis Upon Doctrine' (2004) 8 *University of Western Sydney Law Review* 1.

⁷¹ Ibid.

⁷² Doctrinalism is closely associated with the traditional teaching of law: Keyes and Johnstone, above 24, 541-2.

⁷³ James, above n 18, 382.

⁷⁴ D Weisbrot, 'Taking Skills Seriously: Reforming Australian Legal Education' (2004) 29(6) *Alternative Law Journal* 266.

a focus upon interest based problem solving.⁷⁵ ADR therefore is arguably not highly valued in the discourse of doctrinalism.

B *Vocationalism*

Vocationally centred discourse privileges legal curriculum that contributes to the development of the legal practitioner.⁷⁶ The focus of this discourse is upon the production of graduates who can ‘think like lawyers’ and who develop a professional identity.⁷⁷ As such there is increasing attention paid in legal education to the knowledge skills and ethics appropriate to practice.⁷⁸ Admission to practice is not solely reliant on undergraduate education in law, or graduate education for practice through the Juris Doctor, as some further training is required as provided by an articulated clerkship or practical legal training program. Here the Priestley 11, the subjects required for admission to practice become important. These subjects were recommended in the Priestley report and have become the parameters of choice for students.⁷⁹ This is because although not all students will practice law, students never-the-less choose to select subjects that allow them the option of practice.⁸⁰ After completion of the Priestley 11 there are only a small number of elective opportunities left in the degree. As indicated earlier in this paper some law schools mandate ADR as part of the compulsory subjects in the program (or combine ADR with civil procedure), even though they are not part of the Priestley 11, but others choose to leave ADR as an elective.⁸¹

Vocationalism discourse values ADR because much of legal practice includes ADR. For example, the Victorian Law Reform Committee has released a discussion paper canvassing a range of issues relating to the increased use of ADR in the Victorian civil system.⁸² This increased use of ADR has been endorsed by a major review of the

⁷⁵ NADRAC outlines legislative approaches to the use of ADR: NADRAC, above n 8. Interdisciplinary approaches are valuable in legal education and ADR provides the opportunity to engage with these approaches: K Douglas, ‘Mediation as Part of Legal Education: The Need for Diverse Models’ (2005) 24 *The Arbitrator and Mediator* 1, 11-12. For this argument in the United States context of legal education see Sullivan et al, above n 27, 112.

⁷⁶ See, for example, T Sourdin, ‘Meeting Today’s Law Curriculum Needs’ (2004) 78 *Law Institute Journal* 65. Clinical legal education is important for vocational education in law, see generally R Hyams and B Naylor, *Innovation in Clinical Legal Education: Educating Lawyers for the Future* (Legal Service Bulletin Cooperative Ltd, 2007). For an example of clinical education in ADR see J Giddings, ‘Using Clinical Methods to Teach Alternative Dispute Resolution’ (1999) 10 *Australasian Dispute Resolution Journal* 206.

⁷⁷ This approach is supported by educational research which explores and advocates the development of skills during undergraduate education that move graduates into professional employment see A Reid, V Nagarajan and E Dortins, ‘The Experience of Becoming a Legal Professional’ (2006) 25 *Higher Education Research and Development* 85.

⁷⁸ Johnstone and Vignaendra, above n 26, 5.

⁷⁹ Ibid 91. The Priestley 11 is augmented by the graduate competencies required in practical legal training. As indicated these competencies do require understanding of some forms of ADR: see *Legal Profession (Admission Rules) 2008*, sch 3.

⁸⁰ Guthrie and Fernandez, above n 29. ADR might be included in the Priestley 11 to ensure that law schools and students value this area of learning. Including dispute resolution as part of the Priestly 11 was canvassed in the 1997 ALRC discussion paper on legal education and training see ALRC, above n 43, [5.29].

⁸¹ For example, see discussion of courses in some law programs in Victoria: above n 4.

⁸² Parliament of Victoria Law Reform Committee, *Alternative Dispute Resolution*, Discussion Paper (2007).

Victorian civil justice system by the Victorian Law Reform Commission.⁸³ This report identified the need for the use of a greater range of ADR options and in particular advocated for the increase in the use of collaborative law.⁸⁴ Additionally, some commentators have argued that there are increasing settlement rates in our civil justice system that are due to the wider use of ADR, although further research is required to test whether these assertions are true.⁸⁵ In the United States reductions in trial numbers have been described by some as the phenomenon of the vanishing trial,⁸⁶ due to increased rates of disputes being resolved by agreement.

Although Zariski⁸⁷ argues that there has been acceptance of ADR in our legal and justice system by lawyers, that acceptance may be categorised as a grafting of the ADR approach upon the 'litigation mindset' rather than a fundamental change in lawyers' approach to conflict.⁸⁸ Lawyers' adoption of ADR may vary depending upon the context of the dispute. Lawyers practising primarily in family law may have a different approach to ADR, where alternative processes have long been established, than other areas of the law.⁸⁹ Some lawyers in traditionally litigious areas, such as commercial law, may have adopted ADR as a matter of expediency; primarily driven by case management, mandatory mediation legislation and mandated pre-litigation schemes

⁸³ VLRC, above n 8, ch 4.

⁸⁴ Ibid 245-8.

⁸⁵ In the Victorian jurisdiction there is a need to research whether there has been a reduction of trials due to ADR or other factors: *ibid* 66-7. A reduction in trials has been speculated upon by some commentators in Australia; see, for example, The Hon G Davies, 'Civil Justice Reform: Some Common Problems, Some Possible Solutions' (2006) 16 *Journal of Judicial Administration* 5, 9.

⁸⁶ See, for a recent discussion of this trend, K Kovach, 'The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice' (2005) 27 *Cardozo Journal of Conflict Resolution* 27. The contribution of mediation to the reduction in trials is part of the use of ADR largely as a cost saving mechanism and has been described by Bush and Folger as the 'satisfaction' story of mediation see Bush and Folger, above n 11, 9-11.

⁸⁷ Zariski, above n 7. It may be the case that lawyers have come to accept a particular model of mediation; the evaluative model. In this model the mediator generally provides an evaluation of the merits of the dispute and thus influences the parties' decision to settle. The other main model used in courts is the facilitative model, where an evaluation is not given and the focus is upon mutual gains negotiation. Mediators tend to move through a range of models in any mediation, see L Boulle, *Mediation: Principles, Process, Practice* (Lexis Nexis, 2nd ed, 2005) 43-7. There has been debate about the use of evaluative mediation as this approach can impact upon party self-determination: N Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1. However, this model seems increasingly accepted and is particularly linked to the legal culture: J Stemple, 'The Inevitability of the Eclectic: Liberating ADR from Ideology' (2000) *Journal of Dispute Resolution* 247. See also Australian National Mediation Standards, *Practice Standards: For Mediators Operating Under the National Mediator Accreditation System* (2007) 6, where a 'blended process' of facilitative mediation coupled with some level of evaluation is included. Note that there must be party agreement and the mediator must have appropriate expertise.

⁸⁸ J Macfarlane and J Manwaring, 'Reconciling Professional Legal Education with the Evolving (Trial-less) Reality of Legal Practice' (2006) 1 *Journal of Dispute Resolution* 253. Lawyers are able to appreciate changing norms brought about by understandings of ADR options such as mediation: J Lande, 'How Will Lawyering and Mediation Practices Transform Each Other?' (1997) 24 *Florida State University Law Review* 839.

⁸⁹ B Batagol, 'Formenters of Strife: Lawyers and Family Dispute Resolution in Australia' (Paper presented at the third National NADRAC Research Forum, Melbourne, 13-14 July 2007); see also D Cooper and M Brandon, 'How Can Family Lawyers Effectively Represent their Clients in Mediation and Conciliation Processes' (2007) 21 *Australian Journal of Family Law* 288.

than a conviction that ADR has intrinsic benefits for their clients. Boule warns that lawyers may have adopted ADR on economic grounds without any real change to the traditional litigious mindset.⁹⁰ Alexander states that courts value results that focus upon case management rather than the potential ADR can bring to transforming relationships.⁹¹

The teaching of ADR that contributes to the development of understandings and skills for practice, that is an understanding of the lawyers' role in ADR and communication and process skills, will be likely to be valued under vocationalism. This discipline area is often linked to a greater focus upon skills development for lawyers in areas such as empathic listening, summarising and reframing and in recent times these kinds of skills have been recognised as valuable for prospective lawyers to master.⁹² It is unlikely that recently articulated theories of negotiation,⁹³ or models of mediation,⁹⁴ that draw upon postmodernist and social constructionist perspectives will be similarly valued. These approaches often critique dominant settlement orientated paradigms of practice. Some of these efforts might be seen to be divorced from conventional legal practice and aligned more with the social sciences and the therapeutic orientations of psychologists and social workers.⁹⁵

C Corporatism

In the context of legal education corporatism relates to 'the set of statements and practices about legal education produced by law schools, law teachers and legal scholars that emphasise and prioritise the accountability of teachers and students, the efficiency of the teaching process and the marketability of the law school.'⁹⁶ Corporatism's influence in legal education is profound in both content and pedagogy. Accountability

⁹⁰ L Boule, 'In and Out the Bramble Bush: ADR in Queensland Courts and Legislation' (2004) 22 *Law in Context* 93.

⁹¹ N Alexander, 'Mediation on Trial: Ten Verdicts on Court-Related ADR' (2004) 22 *Law in Context* 8, 17.

⁹² ALRC, above n 7, ch 2; L Boule, 'Educating Lawyers in ADR' (2005) 8 *ADR Bulletin* 28.

⁹³ Understanding postmodern theory, such as positioning theory, has been used in negotiation: D Kolb, 'Staying in the Game or Changing It: An Analysis of Moves and Turns in Negotiation' (2004) 20 *Negotiation Journal* 253. This theory, and general discourse analysis, has been applied to turning points in negotiation: S Cobb, 'A Developmental Approach to Turning Points: "Irony" as an Ethics for Negotiation Pragmatics' (2006) 11 *Harvard Negotiation Law Review* 147. Conflict transformation is arguably possible in negotiation as well as mediation: L Putman, 'Transformations and Critical Moments in Negotiation' (2004) 20 *Negotiation Journal* 25.

⁹⁴ See, for a discussion of the use of postmodern theory and social constructionism in narrative mediation, Winslade and Monk, above n 11, ch 2.

⁹⁵ James makes the point that vocationalism is unlikely to value socio-political forms of critique see James above n 18, 386. In the United States approaches to the role of the lawyer that do value interdisciplinary practice have been increasingly debated; see, for example, M Silver, *The Affective Assistance of Counsel* (Carolina Academic Press, 2007). This volume includes: reflections upon therapeutic jurisprudence; collaborative law; creative problem solving; emotional intelligence; multicultural competence; and mindfulness in legal practice.

⁹⁶ N James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26 *Sydney Law Review* 587, 588. James states that 'The success of corporatism within the discursive field of Australian legal education is shown to be a consequence of various social and historical contingencies. These include the history of intervention by the Australian government into legal education; the obligations imposed upon law schools in order to qualify for both public and private funding; the charging of student fees; the influence of management theory and scholarship; and the marketability of "law" as an educational product': 590.

can be said to include government and university initiatives to govern law schools such as through the evaluations of subjects and programs.⁹⁷ Efficiency has become a major issue in law school education due to the funding of undergraduate courses in this area. Although undergraduate students are charged the highest band of contribution to study law the funding provided by the Commonwealth government is the 'lowest amount that it contributes to any discipline.'⁹⁸ Marketability refers to the competition amongst law schools for the highest calibre of undergraduate students, international students and students paying full fees for Juris Doctor programs.⁹⁹

Many scholars lament legal education's move to corporatism seeing it as reducing the opportunity for socio-legal scholarship in legal education.¹⁰⁰ This is because corporatism values a marketable product. Prospective and ongoing students generally value legal education that links with the profession and the prospect of employment as a lawyer rather than socio-legal scholarship. James argues that for the various universities in Australia 'law schools are prestigious faculties which attract relatively bright students for comparatively low investment.'¹⁰¹

There is then a nexus between vocationalism and corporatism with the powerful story to be told that law schools should have links and be aware of the profession. This perceived need to engage with the profession, which arguably harks back to the days when law was seen as an apprenticeship, can be said to be sporadic and piecemeal in most Australian law schools¹⁰² and similarly in the law programs in the United States.¹⁰³ If not inclusive of all kinds of scholarship there is a real danger that marketing of law programs, with the accompanying focus upon black letter law, will marginalise efforts to place the law in context.¹⁰⁴

The adoption by government of ADR, and to some extent the legal profession, means in most instances that ADR could be said to enhance the marketability of law programs. This may not be to the degree high prestige areas of law, such as international commercial law, contribute to prestige but given the recognition of ADR as a site for the development of key lawyering skills arguably this discipline area does contribute to vocationalism and thus marketability. In this respect the strengths of ADR are also its weaknesses. Learning and teaching strategies that value small group learning through role-plays and skill development, a common approach in ADR teaching, are often

⁹⁷ See, for a discussion of Course Experience Questionnaire (CEQ), University of Sydney, *About the Course Experience Questionnaire (CEQ) and the Australian Graduate Survey (AGS)* <<http://www.itl.usyd.edu.au/CEQ/>> at 30 May 2008.

⁹⁸ Lewis and Yousef, above n 42, 10.

⁹⁹ See generally Johnstone and Vignaendra, above n 26.

¹⁰⁰ See, for example, R Collier, 'We're All Socio-Legal Now? Legal Education, Scholarship and the "Global Knowledge Economy" - Reflections on the UK Experience' (2004) 26 *Sydney Law Review* 503; M Thornton, 'The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy' (2001) 8 *International Journal of the Legal Profession* 37.

¹⁰¹ James, above n 96, 602.

¹⁰² Some argue that law schools should gain further autonomy from the influence of the legal profession as these links with the profession can be an impediment to change in legal education: Keyes and Johnston, above n 24, 555.

¹⁰³ Sullivan et al, above n 27.

¹⁰⁴ See, for example, M Thornton, 'The Dissolution of the Social in the Legal Academy' (2006) 25 *Australian Feminist Law Journal* 3.

expensive to run as compared to substantive law subjects offered in large lectures.¹⁰⁵ Thus ADR generally falls foul of the efficiency imperative of corporatism.

D *Liberalism*

The discourse of liberalism circulates in legal education privileging content and pedagogy that values ‘individual freedom, social responsibility and the inculcation of an informed rationality.’¹⁰⁶ Liberalism advocates intellectual freedom for both the law school and the law teacher and generally rejects corporate objectives. It favours an intellectual endeavour that searches for universal truths and seeks to include in the law perspectives from other disciplines, such as for instance psychology, and other cultures.¹⁰⁷

Liberalism is valued by many legal academics, as a certain status is perceived to attach to the promotion of a liberal legal education that values scholarship. Concepts of reason, fairness, equality and ethicalness are routinely engaged with through a critique of the law that privileges liberal rationality.¹⁰⁸ Law is placed in context and lawyers and law students are encouraged to think beyond ‘black letter’ approaches to practice. This approach to legal education received significant support over the last three decades in a number of different law schools, but with the rise of the corporatist discourse there has been a refocussing upon doctrinalism.¹⁰⁹

Liberalism generally critiques vocationalism, where that discourse is narrowly framed in engaging with legal practice. But on occasion writers have attempted to reconcile the two discourses, endeavouring to articulate an approach that values ‘vocational legal scholarship while at the same time suggesting that some of those points would be improved by being reconciled with the liberal world view.’¹¹⁰ The opportunity for party empowerment and self-determination in ADR is commonly linked with increased access to justice for the community.¹¹¹ Liberalism also critiques ADR due to the use of these options to move justice from the court system to the bureaucracy. Scholars argue that there is potential for unfair agreements stemming from the private practices of ADR in comparison to publicly scrutinised litigation practices and that there are dangers in the reduction of precedents, that often lead to positive social change, due to increases in private ordering.¹¹² However, a liberal approach to legal education also values a

¹⁰⁵ Skills are more frequently taught in present day law schools as compared to traditional legal education, but small group classes where skills are taught are generally expensive: Keyes and Johnstone, above n 24, 550.

¹⁰⁶ James, above n 18, 389.

¹⁰⁷ N James, ‘Liberal Legal Education: The Gap Between Rhetoric and Reality’ (2004) 1 *University of New England Law Journal* 164, 171.

¹⁰⁸ James, above n 18, 391.

¹⁰⁹ M Thornton, ‘The Idea of the University and the Contemporary Legal Academy’ (2004) 26 *Sydney Law Review* 481.

¹¹⁰ James, above n 107, 178.

¹¹¹ Boule, above n 87, 139-65. Bush and Folger describe this as the ‘social justice’ story of mediation: Bush and Folger, above n 11, 11-13.

¹¹² See Astor and Chinkin, above n 2, 9-10; B S Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (Jossey-Bass, 2004) ch 2. Bush and Folger describe these critiques as the ‘oppression’ story of mediation: Bush and Folger, above n 11, 15-18.

multidisciplinary approach to ADR. For example where ADR theory draws from economic,¹¹³ psychological,¹¹⁴ or from inter-cultural discourses.¹¹⁵

E *Pedagogicalism*

The story of pedagogicalism in legal education is piecemeal, but arguably growing in importance amongst the competing discourses of legal education. This discourse privileges 'effective teaching and learning and insist[s] that law be taught in a manner consistent with orthodox education scholarship.'¹¹⁶ James notes that pedagogicalism emphasises the concepts of 'deep' and 'surface' approaches to learning and generally privileges deep learning. Ramsden¹¹⁷ discusses these approaches drawing from the seminal work of Ference Marton and Roger Saljo. A student who employs a deep approach to a learning task approaches that task in a manner that promotes learning; he or she approaches the task in such a way that understanding is promoted. In contrast a student who employs a surface approach to a learning task approaches that task in a manner that does not promote learning; he or she approaches that task in such a way that understanding is not promoted. A deep approach, as the name suggests, gives the students the ability to better reflect on meaning and a surface approach means that the student merely skates along the surface of a learning task.¹¹⁸

Pedagogicalism links with corporatism in promoting this kind of learning and teaching that is largely assessed through course evaluations, required by the larger university policies, and is increasingly linked with the promotion prospects of academics.¹¹⁹ In the United States the Carnegie report emphasises the use of communities of practice where novice law students can learn from expert academics in three areas: legal analysis; practical skills; and professional identity. ADR is highlighted as providing skills that can be learnt from simulations and as an area of study that can shift law students' culture from 'adversarialism' to more collaborative problem solving.¹²⁰ Pedagogicalism values ADR as traditionally this area focuses upon experiential learning through role-plays, mainly in the areas of negotiation and mediation.¹²¹ Teachers of ADR commonly value having relatively low numbers in tutorial groups to assist with the organisation of the role-plays and to promote student teacher dialogue and reflection regarding the role-play. However, cost (the concern of corporatism) may be an issue in the continuation of these kinds of learning and teaching strategies.

¹¹³ J Gerarda Brown, 'Insights from Economics' (2004) 54 *Journal of Legal Education* 30.

¹¹⁴ G Howard, 'Contributions from the Social Sciences' (2004) 54 *Journal of Legal Education* 34.

¹¹⁵ P K Chew, 'The Pervasiveness of Culture in Conflict' (2004) 54 *Journal of Legal Education* 60.

¹¹⁶ James, above n 18, 392.

¹¹⁷ See generally P Ramsden, *Learning To Teach in Higher Education* (Routledge, 2nd ed, 2003) and also Le Brun and Johnstone, above n 30.

¹¹⁸ Another approach that has been identified is an 'achieving' approach. Students assess what time and effort is required to achieve in a task and whether understanding or merely rote learning is required: J Biggs, 'Approaches to the Enhancement of Tertiary Teaching' (1989) 8 *Higher Education Research and Development* 7.

¹¹⁹ James, above n 18, 394.

¹²⁰ Fisher, Gutman and Martens, above n 1, 96. See also Sullivan et al, above n 27, 111-14.

¹²¹ M Conley Tyler and N Cukier, 'Nine Lessons for Teaching Negotiation Skills' (2005) 15 *Legal Education Review* 61; E H Greenebaum, 'On Teaching Mediation' (1999) 2 *Journal of Dispute Resolution* 115.

F *Radicalism*

Radicalism in the law includes critical legal studies, feminisms and post-modernist perspectives. These approaches seek to expose and question the ‘undisclosed, political positions, gender biases, cultural biases and/or power relations within legal education and within law.’¹²² These critiques seek to challenge dominant positivist representations of the law as an objective, rational and coherent body of rules. Radicalism can be marginalised in the competing discourses of legal education as the various strands, including for instance feminisms and critical race theory, are sometimes seen to undermine confidence in the law and thus not contribute to the ‘professional role’ of the lawyer. As such both the vocational and corporate discourse can marginalise the value of critical theory in legal education. Discourses of doctrinalism and liberalism are often directly attacked by radical critique. Radicalism argues that a ‘black letter’ approach to the law or an approach informed by liberalism, seeks to establish universal truths; a task that is not possible due to differing world views. Frequently radical discourse, including postmodernist and feminist critiques, involves an analysis of power and attempts to introduce the voices of marginalised ‘others’ into the stories of the law.¹²³ However, since the rise of corporatism students are less likely to choose courses with a critical theory framework as these courses are not seen by students to contribute to employment.¹²⁴ Radicalism frequently embraces student centred approaches to learning in that these approaches are seen to be more progressive and resisting orthodox traditional legal education.¹²⁵

In terms of ADR the influence of radicalism is evident in the newer models of mediation, such as narrative¹²⁶ and transformative mediation.¹²⁷ These models draw from radical discourse to critique dominant models. This can be seen as undermining the legitimacy of ADR in the legal system as radical discourses, such as postmodernism, critique notions of the neutral mediator as a legitimising framework of most court connected mediation schemes.¹²⁸ Alternative approaches to the way that ADR has been traditionally framed have grown in the last decade or more. Mediation has been the forerunner of alternative stories of the way that third party facilitation of conflict occurs in our society. The greater use of mediation has been matched by the development of different models of mediation and some of these models might be described as drawing from radical discourses. Some writers focus upon power and promote mediation practice that is reflexive.¹²⁹ This approach requires mediators to reflect upon, and be

¹²² James, above n 18, 398.

¹²³ James, above n 18, 400.

¹²⁴ Thornton, above n 109, 495.

¹²⁵ James, above n 68, 69.

¹²⁶ For example narrative mediation explicitly utilises postmodern and social constructionist perspectives, see generally Winslade and Monk, above n 11, ch 2. In regards to negotiation and postmodern practice, see above n 93.

¹²⁷ D J Della Noce, R A Baruch Bush and J P Folger, ‘Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy’ (2002) 3 *Pepperdine Dispute Resolution Law Journal* 39.

¹²⁸ K Douglas and R Field, ‘Looking for Answers to the Mediation Neutrality Dilemma in Therapeutic Jurisprudence’ (2006) 13 *Murdoch University Electronic Law Journal* 177, 187.

¹²⁹ For example: D Bagshaw, ‘Self Reflexivity and the Reflective Question: Broadening Perspectives in Mediation’ (2005) 24(2) *The Arbitrator and Mediator* 1; H Astor, ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16 *Social & Legal Studies* 221.

accountable regarding the power¹³⁰ circulating in the mediation. Writers concerned with power frequently critique dominant western notions of conflict.¹³¹ Ethical concerns in ADR practice have become increasingly important¹³² and arguably radical discourse, with its focus upon power, can assist with mediation¹³³ and lawyer¹³⁴ ethics.

IV CONCLUSION

As discourses compete in legal education the place of ADR in the legal curriculum shifts and changes. For instance a law school that values vocationalism, pedagogy and corporatism may well prioritise the place of ADR due to the perception that negotiation, mediation and other ADR options are now important to legal practice. This preference for ADR may occur in ‘newer’ law programs due to the perceived need to establish programs in the legal education market place. Those law schools that engage with professional practice in a systematic manner may also privilege ADR for the same reasons. However, in law schools that privilege vocationalism and corporatism there may be pressure on teachers to promote and enhance ADR practice that accords with current legal professional norms. Therefore diversity in ADR practice,¹³⁵ in terms of more recent models of mediation may not be a priority. For instance a focus upon the vocational story of legal education might mean that more therapeutic models of mediation, such as narrative mediation, are not taught in law schools as generally therapeutic paradigms of legal practice are not widely adopted in Australia.¹³⁶ Narrative mediation, with its reliance on postmodernist and social constructionist perspectives, might be seen as irrelevant to the traditional practice of law. Emotion as an area of study in ADR may fare better due to the liberal notion of interdisciplinary study being appropriate to law. Emotion could be said to draw from the discipline area of psychology and psychology’s connection with the law is well established. However, this may be dependant not only upon whether a law school adopts the liberal story of legal education, but also whether an individual teacher of ADR does so.

Many issues relating to ADR in legal education are dependant upon the construction of legal practice. If emotion is seen to be a relevant part of legal practice it may be included in the courses dealing with ADR. Generally it would appear that due to present trends in legal education in many law schools the stories of liberalism and radical critique are progressively marginalised due to the influence of corporatism. The effect of these trends may mean that ADR in legal education will be relatively conservative in its approach; drawing upon established models of negotiation and mediation that

¹³⁰ Winslade and Monk, above n 11, 120; see generally regarding issues of power: H Astor, ‘Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner’ (2005) 16 *Australasian Dispute Resolution Journal* 30. For an approach that values reflective practice: M D Lang and A Taylor, *The Making of A Mediator: Developing Artistry in Practice* (Jossey-Bass, 2000).

¹³¹ M Brigg, ‘Mediation, Power and Cultural Difference’ (2003) 20 *Conflict Resolution Quarterly* 287.

¹³² See, for example, R Field, ‘A Mediation Profession In Australia: An Improved Framework for Mediation Ethics’ (2007) 18 *Australasian Dispute Resolution Journal* 178.

¹³³ Postmodern theory can assist regarding ethical practice see J Winslade, ‘Mediation with a Focus on Discursive Positioning’ (2006) 23(4) *Conflict Resolution Quarterly* 501.

¹³⁴ Radical discourse can assist with lawyers’ ethics see, for example, M Thornton, ‘Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the ‘New Corporatism’ (1999) *Melbourne University Law Review* 28.

¹³⁵ Law students need to appreciate the range of models available in mediation in addition to the dominant models such as the facilitative model see Douglas, above n 75, 6-10.

¹³⁶ Douglas and Field, above n 128, 193.

reinforce present dominant professional norms. Some law schools may favour doctrinalism and liberalism, with less of a focus upon vocationalism and corporatism. In these law schools the place of ADR may be marginalised due to the low doctrinal content of ADR, the categorisation of ADR by many as a skill and the high cost of the ADR pedagogy that favours role-play simulations. In contrast a law school that focuses upon pedagogy would value the contribution that ADR provides for learning from simulations.

The discourses of ADR and legal education are not stable and the impact of outside forces, such as government stories favouring ADR, will be likely to have an increasingly positive impact upon the future teaching of ADR in law schools in Australia. As both federal and state governments prioritise ADR processes the pressure on law schools to better prepare students for non-adversarial practice will grow. The vocationalism discourse has the most potential of securing the place of ADR in the law school curriculum. To what extent law schools recognise this trend is presently unclear and requires research. A subsidiary question in such research is the kind of learning that students experience in ADR classes. For instance are students being taught about emotional issues and the range of models of mediation, and in particular those that incorporate postmodernism, drawing from radical discourse? Or are these kinds of issues largely ignored due to the perception of emotion as a 'soft' issue and the marginalisation of the radical critique? The answer might also be affected by the sheer volume of material that it is now possible to teach under the banner of ADR and the difficulties of including all the different kinds of models. Choices by law teachers may reflect their own ideologies as well as those of the law schools in which they teach. However, ultimately to ensure the improvement of legal education these choices need to be made by law schools that integrate their curriculum goals, articulating the kind of lawyer that they hope for their students to become. Due to the changing nature of legal practice the lawyer of the future must not only understand and value litigation but must also value non-adversarial options in our legal and justice system. They must be able to navigate the emotional landscape of practice utilising the full range of ADR models available and thus better serve the needs of their clients.

ADR and legal education is an evolving story in Australia and similarly in the United States. Law schools need to engage with the question of the place of ADR in their law programs. To do this they need to reflect upon the six discourses of legal education and also articulate the focus of their law degree. Outside the world of law schools ADR is increasingly adopted in our legal and justice system and to ensure that lawyers of the future are prepared for changing paradigms of practice law schools need to value the place of ADR in their legal curriculum.