

## **KEEPING UP WITH CHANGE: NO ALTERNATIVE**

### **TO TEACHING ADR IN CLINIC. AN AUSTRALIAN PERSPECTIVE**

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#### **INTRODUCTION**

Over the last 30 years alternative dispute resolution (ADR) has become more prominent in Australian legal practice due to the need to reduce the cost of access to justice and to provide more expedient and informal alternatives to litigation. There is a shift away from adjudicative or determinative processes and towards more cooperative processes for dispute resolution.<sup>1</sup> The rigidity, complexity and cost of formal structures has meant that courts, tribunals and other rights-based structures are often inaccessible to all but a few in society.<sup>2</sup> The incapacity of these structures to resolve conflict, although they may determine rights, has been a relevant factor in the development of alternative options for dispute resolution.<sup>3</sup> Clearly, Australian legal practice is undergoing change. As legal educators, we need to ask: how should we be preparing law students entering practice for these changes? How can we ensure that once they become lawyers, our students will not rely entirely on litigious methods to

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<sup>1</sup> Tania Sourdin, *Alternative Dispute Resolution* (LBC Thomsons, 5th ed, 2015) 13

<sup>2</sup> *Ibid* 12.

<sup>3</sup> *Ibid*.

assist their clients but instead look at alternatives for dispute resolution? According to Carrie Menkel-Meadow,<sup>4</sup> legal education is the most important site both for the development of approaches to conflict and for the construction of attitudes to ADR processes and, in particular, to the widely used options for negotiation and mediation for prospective lawyers.<sup>5</sup> In this paper, I argue that there is no alternative to teaching ADR in clinic in order to address client needs and to ensure that students engaged in clinical education are prepared for changes in legal practice today. I show that the increasing focus upon ADR in Australian legal practice represents a challenge for law schools, and that legal educators need to ensure they are educating students about ADR. More than this, however, law students who intend to go into legal practice would benefit from developing their skills with respect to ADR. Clinical legal education is a subset of legal education that focuses on educating law students about professional legal practice. Given its expressly practical focus, clinics represent one obvious setting in which practical ADR skills might be taught. I argue that it is important to determine whether ADR is being taught to students undertaking clinical legal education in ways that will enhance their preparation for legal practice. I will show that there is a need to explore: whether ADR is being taught within clinical legal education, the strengths and weaknesses of

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<sup>4</sup> Carrie Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities' (1997) 38 *South Texas Law Review* 407.

<sup>5</sup> *Ibid.*

existing approaches, and how the teaching of ADR within clinics can be improved. Although the focus of this paper is upon ADR in the Australian clinical context, I will also argue that changes afoot internationally – including, in particular, the requirements of ‘21<sup>st</sup> century lawyering’ – make these questions of relevance to a wider audience.

## **DEVELOPMENT OF ADR IN AUSTRALIAN LEGAL PRACTICE**

The United States has been the front-runner in the contemporary use of ADR in legal and justice systems.<sup>6</sup> Australia has followed with the large-scale inclusion of ADR, primarily through mediation, in court-connected programs.<sup>7</sup> Ardagh and Cumes<sup>8</sup> suggest that in Australia the evolution of dispute resolution processes has proceeded through three distinct phases: the first being the predominance of adversarial processes in a traditional legal environment.<sup>9</sup> The second was a growth of a new phase in which ADR involving non-legal processes and outcomes was the subject of major legal reform.<sup>10</sup> The third stage is what Ardagh and Cumes refer to as a ‘post-ADR period’ where ADR methods have been accepted as a normal part of conflict resolution and have become more institutionalised, rather than ‘alternative’.<sup>11</sup>

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<sup>6</sup> Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (Lexis Nexis, Butterworths, 2<sup>nd</sup> ed, 2002) 5

<sup>7</sup> See for a discussion of the history and growth of ADR in Australia: Astor and Chinkin, above n 6

<sup>8</sup> A Ardagh and G Cumes, The legal profession post-ADR: from mediation to collaborative law (Australia) (2007) 18 *Alternative Dispute Resolution Journal* 205

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

The development of a focus on ADR in Australia can be traced back at a federal level to the 1900's. Arbitration is mentioned in the 1901 Commonwealth Constitution alongside conciliation for use in preventing and settling interstate industrial disputes (Australian Constitution, s51(xxxv)).<sup>12</sup> In 1904, *The Commonwealth Conciliation and Arbitration Act 1904* (Cth) created the Commonwealth Court of Conciliation and Arbitration. The new tribunal was not to be bound by legal forms of the rules of evidence. It was required to act in accordance with equity, good conscience and the substantial merits of the case.<sup>13</sup> Parties were strongly encouraged to come to an agreement (conciliation) and where they could not, a decision was made for them (arbitration).<sup>14</sup>

In the 1940s and 1950s, in the international arena and in Australia, negotiation and conflict theories continued to be used to assist with planning and strategy development and to manage more complex relationships that were becoming an increasing feature of modern business activities.<sup>15</sup> In the 1980s, negotiation theory achieved popularity and greater interest with the publication of Fisher and Ury's text *Getting to Yes* in 1981.<sup>16</sup> The Fisher and Ury model was viewed

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<sup>12</sup> as cited in M King, A Freiberg, B Batagol, R Hyams, *Non-Adversarial Justice* (The Federation Press, 2009) 116

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, note: The court was abolished in 1956 following a decision of the High Court in the *Boilermakers'* case. The High Court held that the Court of Conciliation and Arbitration, as a tribunal exercising the non-judicial power of arbitration, could not also exercise judicial power as a Chapter III Court.

<sup>15</sup> Sourdin, above n 1, 14.

<sup>16</sup> *Ibid.* citing R Fisher, W Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin, Boston, 1981).

as a collaborative or co-operative model. The most important technique in this type of problem-solving negotiation is to distinguish between interests (or needs) and positions (desires, wants).<sup>17</sup> This model evolved from work completed in the late 1920s by the theorist Mary Parker Follett who developed and explored the model of constructive and integrative negotiation.<sup>18</sup> During the 1980s and 1990s, negotiation theorists continued to expand upon many of the notions contained in Follett's work and in the Fisher and Ury model of negotiation. In Australia, decisional models, in which a third party exercised either an advisory or determinative function, were most popular until the early 1970s.<sup>19</sup> Since then, focus has been less on third party interventions and more on providing support and assistance to disputants.<sup>20</sup>

In 1995, there was a significant development in ADR practice with the establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC). NADRAC was established as an Australian independent body providing policy advice about ADR to the Attorney-General of Australia existing until the end of 2013. NADRAC closely examined definitions and descriptions of ADR processes.<sup>21</sup> NADRAC described ADR as an 'umbrella

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<sup>17</sup> Sourdin, above n 1, 45.

<sup>18</sup> Ibid citing M P Follett, *Constructive Conflict*, Conference Paper (presented at Bureau of Personnel Administration Conference, January 1925) reproduced in EM Fox and L Urwick (eds), *Dynamic Administration: The collected Papers of Mary Parker Follett* (Pittman, London, 1973)

<sup>19</sup> Sourdin, above n 1, 16.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 4.

term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them'.<sup>22</sup>

The focus on ADR in legal practice was enhanced in January 2008, when the *National Mediator Accreditation System and Standards* focused on enhancing consumer certainty and supporting mediation referral.<sup>23</sup> Alongside this system, a compulsory accreditation system for family dispute resolution practitioners was developed encouraging the practise of a mix of mediation, conciliation and advisory practice.<sup>24</sup> The dispute resolution process in Australia has been assisted by the creation and growth of various professional organisations such as LEADR<sup>25</sup> and IAMA.<sup>26</sup> The establishment of Community Justice Centres in New South Wales<sup>27</sup> and Dispute Resolution Centres in Queensland<sup>28</sup> in the early 1980s were attempts to promote the use of ADR to resolve community-based disputes and to support the notion that justice can exist outside the courts.<sup>29</sup> The Dispute Settlement Centre of Victoria adopted ADR as the preferred method of conflict resolution, promising both peaceful and consensual decision making without the controlling influence of professionals

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<sup>22</sup> National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute Resolution Terms* (2003) as quoted in Sourdin above n 1 3

<sup>23</sup> *Ibid.*

<sup>24</sup> *Family Law (Family Dispute Practitioners) Regulations 2008*

<sup>25</sup> Leading Edge Alternative Dispute Resolvers (LEADR)

<sup>26</sup> Institute of Arbitrators and Mediators Australia (IAMA); among a range of other state-based organisations: Australian Commercial Disputes Centre (ACDC), Australian Dispute Resolution Association (ADRA). On 1 January 2015, LEADR and IAMA Combined to form the Resolution Institute

<sup>27</sup> *Community Justice Centres Act 1983* (NSW)

<sup>28</sup> *Dispute Resolution Centres Act 1990* (Qld)

<sup>29</sup> Sourdin, above n 1, 20.

and a faster and cheaper alternative to the court system, a more costly and lengthy option.<sup>30</sup> In addition, there has been a rise in the number of tribunals using ADR. In 1998, the Victorian Civil and Administrative Tribunal (VCAT) was established with a broad jurisdiction.<sup>31</sup> In 2009, Queensland introduced a similar tribunal, the Queensland Civil and Administrative Tribunal (QCAT).<sup>32</sup> These tribunals facilitate self-representation by litigants and provide opportunities for parties to attend mediation.<sup>33</sup>

There have also been a number of legislative initiatives to address the persistent adversarial frame of practice of Australian lawyers. For example, in Victoria there have been changes to civil procedure through the *Civil Procedure Act 2010* (Vic)(CPA). Section 22 of the CPA provides that lawyers and parties must use reasonable endeavours to resolve disputes by agreement between the persons in the dispute and these endeavours may include the use of ADR.<sup>34</sup> In light of these changes in Australia, the court systems have adopted ADR, primarily using mediation processes in case management to encourage swifter processes and higher rates of settlement of disputes. Susskind notes that alternative methods for dispute resolution is much needed as court systems are often

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<sup>30</sup> Gutman, J, Fisher, T, Martens, E, Why teach alternative dispute resolution to law students? Part one: past and current practices and some unanswered questions, *Legal Education Review* (2006) 125

<sup>31</sup> See *Administrative Appeals Tribunal Act 1975* (Cth), *Administrative Decisions Tribunal Act 1997* (NSW), *Victorian Civil and Administrative Tribunal Act 1998* (Vic)

<sup>32</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

<sup>33</sup> *Ibid.*

<sup>34</sup> *Civil Procedure Act 2010* (Vic) s22

unaffordable, excessively time-consuming, unjustifiably combative, and inexplicably steeped in opaque procedure and language.<sup>35</sup> Therefore, for many policymakers, the idea of improving access to justice has come to mean improving the way disputes are resolved.<sup>36</sup>

Australian Federal government policy has also increasingly supported ADR. As early as 2009, the report, *A Strategic Framework to Justice in the Federal Civil Justice System*, recommended increased use of ADR and case management and the better education of lawyers in non-adversarial processes.<sup>37</sup> More recently, in 2016, the Victorian Government released the *Access to Justice Review (The Review)*, which identified ways to help disadvantaged Victorians navigate the legal system and resolve everyday legal issues.<sup>38</sup> The review built on the Productivity Commission's 2014 *Access to Justice Arrangements: Inquiry* report, which found there were concerns across the country that the justice system was too slow, expensive and adversarial. The recommendations in *The Review* covered a wide range of areas, including: greater use of ADR for public bodies, including the courts and VCAT.<sup>39</sup> More specifically it was recommended that written guidelines be developed to aid decision-making, and promote transparency and consistency in relation to potential referrals to ADR.<sup>40</sup> *The*

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<sup>35</sup> Susskind R, *Tomorrow's Lawyers*, 2013, Oxford University Press 85

<sup>36</sup> *Ibid.*

<sup>37</sup> Access to Justice Taskforce, *A Strategic Framework for Justice in the Federal Civil Justice System*, (2009) 3.

<sup>38</sup> Access to Justice Review Summary Report August 2016

<sup>39</sup> *Ibid.*, Chp 4 Alternative Dispute Resolution Recommendation

<sup>40</sup> *Ibid.*



*Review* went further to recommend that the courts consider continuing to use judicial registrars to conduct mediation and judicial resolution conferences where resources permit.<sup>41</sup> To facilitate this process, the courts and VCAT are to consider developing a framework to facilitate communication regarding best practice in relation to ADR.<sup>42</sup> In addition, legislative changes may be suggested to the Victorian Government that would enhance the use of ADR.<sup>43</sup> *The Review* recommendations went further to include innovative online dispute resolution for civil claims which could provide a model for a more flexible and proportionate way of dealing with small civil claims, and could provide a model for efficiencies in other areas of law in the future, including minor criminal matters such as traffic offences.<sup>44</sup>

There has also been interest over the past decade in the creation of pre-litigation or pre-filing ADR obligations.<sup>45</sup> These obligations essentially require individuals or organisations to attempt to resolve their differences before commencing court or tribunal proceedings.<sup>46</sup> Some of the most comprehensive pre-litigation ADR requirements in Australia are evident in family law, via changes introduced in 2006. These changes included the introduction of a new hearing model in relation to children's matters (less adversarial trial (LAT)

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Sourdin, above n 1, 420.

<sup>46</sup> *Ibid.*

model),<sup>47</sup> as well as implementing family dispute resolution (FDR), which is largely conducted outside the courts. These changes have resulted in a dramatic reduction in the filing of cases in the Family Court.<sup>48</sup> Amendments to the *Family Law Act (1975) (Cth)* in 2007 mean that if a party wishes to apply to the court for parenting orders under Pt VII of the Act, they first need to attend FDR. The process is outlined in the *Family Law Act (1975) (Cth)*, Ss 601(7). Such changes to civil procedure and family law are evidence of the commitment of governments to encourage settlement prior to litigation through the use of ADR.<sup>49</sup> In addition, there has recently been a marked growth in industry-based, private, government and community-supported dispute resolution schemes.<sup>50</sup> The increasing emphasis on ADR represents a significant change to Australian legal practice. For law students, knowledge of these changes and an education as to ADR skills are essential for the effectiveness of the 'new lawyer' who will be entering legal practice.<sup>51</sup> Although the teaching of ADR need not be confined to clinical settings, I argue that these changes have an impact on how law students are taught in clinics and how they are prepared for the skills they will

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<sup>47</sup> Sourdin, above n 1, 275 and Chapter 9

<sup>48</sup> *Ibid* 275.

<sup>49</sup> Tania Sourdin, 'Making an Attempt to Resolve Disputes Before Using Courts: We All Have Obligations' (2010) 21 *Australasian Journal of Dispute Resolution* 225.

<sup>50</sup> Sourdin above n 1 21 citing Ipsos Australia Pty Ltd, *Alternative Dispute Resolution in Victoria: Community Survey 2007* (Report, Department of Justice, State Government of Victoria, 2007); Ipsos Australia Pty Ltd, *Alternative Dispute Resolution in Victoria: Small Business Survey 2007* (Report, Dept of Justice, State Government of Victoria, 2007)

<sup>51</sup> Macfarlane, J *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Vancouver) 2008 23.

require in their future legal practice. As I explain in the next section, there are other reasons why an appreciation of ADR is increasingly essential for the next generation of lawyers.

### **The ‘New Lawyer’ and ‘the 21<sup>st</sup> Century Lawyer’**

Macfarlane and Susskind<sup>52</sup> refer to lawyers entering into practice in the 21<sup>st</sup> century as ‘new lawyers’ or ‘21<sup>st</sup> century lawyers’. According to these writers, most of the changes that have occurred in legal practice arise from the client’s need to be involved in the legal process. This has resulted in the need for changes in the lawyers’ approach and attitude towards their clients, their management of the matters and their professional relationship towards the court and other professionals. Susskind is of the view that the three main drivers of change: the ‘more-for-less’ challenge, liberalisation, and information technology essentially ‘drive immense and irreversible change in the way that lawyers work.’<sup>53</sup> The ‘more-for-less’ challenge concerns the client’s need for legal service at a lower cost. Clients of lawyers come in different forms. They may be individual citizens or large organisations, requiring a range of legal services. Although diverse in nature, what they all share is the desire for legal services to be delivered in an affordable way.<sup>54</sup> This, Susskind suggests, is one of the major challenges facing lawyers and clients today. How can lawyers

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<sup>52</sup> Ibid & Susskind R, *Tomorrow’s Lawyers*, 2013, Oxford University Press 135

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

deliver more legal services at a lower cost? <sup>55</sup>

Liberalisation, Susskind contends, concerns the flexibility that has arisen regarding who can be a lawyer. In the past, the practice of law has been strictly regulated with stipulations as to who can be a lawyer, who can run and own a legal business, and what services they can provide.<sup>56</sup> The justification for this, and rightly so, is the need to ensure that those providing legal advice be suitably trained and experienced. However, Susskind suggests, that while this is a valid argument, in reality, this 'closed community of legal specialists does not seem to offer sufficient choice to the consumer.'<sup>57</sup> As such, over the last few years, many have advocated for a relaxation of the regulations and laws that govern who can offer legal services and from what types of business.<sup>58</sup> Susskind emphasises that these developments are of 'profound significance and represent a major departure from conventional legal services.'<sup>59</sup> The idea behind this is to offer legal services in new, less costly, more client-friendly ways. The last of the three factors Susskind draws on is the impact of information technology on lawyers and courts.<sup>60</sup> New lawyers need to be familiar with the changes brought about by information technology and the connection between their social use of information technology and its

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<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid 10.

introduction and potential in their working lives.<sup>61</sup>

Supporting Susskind's views, Macfarlane focuses on the changes occurring in the lawyer-client relationship. She calls this the 'vanishing trial' phenomenon,<sup>62</sup> where there is a '98% civil settlement rate and the increasing use of negotiation, mediation, and collaboration in resolving lawsuits have dramatically altered the role of the lawyer.'<sup>63</sup> According to Macfarlane, 'the traditional conception of the lawyer as 'rights warrior' no longer satisfies client expectations, which center on value for money and practical problem solving rather than on expensive legal argument and arcane procedures.'<sup>64</sup> Macfarlane and Susskind share the view that most clients are no longer willing to allow the lawyer to 'run the matter'. In other words, clients need regular communication with their lawyer, and look for value for money in legal services.<sup>65</sup> Macfarlane sums up this trend by noting that clients are increasingly demanding a role in determining how much time, money, and emotional energy they invest, and in what type of resolution.<sup>66</sup> Macfarlane is of the view that 'both corporate and personal customers appear increasingly unwilling to passively foot the bill for a traditional, litigation-centered approach to legal services, preferring a more

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<sup>61</sup> Ibid 12.

<sup>62</sup> Ibid 24.

<sup>63</sup> Julie Macfarlane The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law (2008) *Journal of Dispute Resolution* 62

<sup>64</sup> Ibid and R Susskind & D Susskind, *The Future of the Professions: How Technology Will Transform The Work of Human Experts* (Oxford University Press, 2015)

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

pragmatic, cost-conscious, and time-efficient approach to resolving legal problems.’<sup>67</sup>

Whatever alternatives to dispute resolution are coming to the fore, the essence of this change is the need for change within this system, mainly with respect to the attitudes and expectations of practising lawyers.<sup>68</sup> Macfarlane states that, ‘Changes in procedure, voluntary initiatives, and changing client expectations are coming together to create a new role for counsel and a new model of client service.’<sup>69</sup> She speaks of the ‘warrior lawyer’, who provides narrow technical advice focusing on litigation and fighting, giving way to a more holistic, practical and efficient approach to conflict resolution.<sup>70</sup> Macfarlane sees this as a new model of lawyering with the ‘new lawyer’ building on the skills and knowledge of traditional legal practice, but different in critical ways.<sup>71</sup> Macfarlane suggests that there are three core dimensions to new lawyering: elevation of negotiation skills; communication skills; and skills to promote the lawyer client relationship.<sup>72</sup> According to Macfarlane, the new lawyer utilises all three core dimensions: communication, persuasion, and relationship building to develop the best possible outcome for the client.<sup>73</sup> It is crucial for the new lawyer to be adept at negotiation skills to be effective. There is now a

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Macfarlane, above n 63, 63.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Macfarlane, above n 51, 23.

<sup>73</sup> Ibid.

greater reliance on problem-solving strategies and more effort to directly include the client in face-to-face negotiation.<sup>74</sup>

Communication strategies such as listening, explaining, questioning and establishing rapport and trust are tools for lawyers to focus on in their work with clients. According to Macfarlane, in the past these have been viewed as only part of the more specialised skills of advocacy and procedural requirements.<sup>75</sup> The new lawyer now focuses on these skills and gives them priority so that they become the primary vehicle for resolving conflict.<sup>76</sup>

Macfarlane argues that this recognition of the importance of persuasive communication in conflict resolution also means a greater concentration on the needs and wants of the other side.<sup>77</sup> The third factor is the new lawyer's relationship with their client. This is where the new lawyer differs fundamentally from the traditional approach. According to Macfarlane, the new lawyer realises that a crucial part of their role is to assist clients to identify what they really need, while continuing to assess the risks and rewards as well as what they believe they 'deserve' in some abstract sense.<sup>78</sup> The client is regarded as a partner in problem solving, as far as is feasible. Macfarlane describes this as a 'mutuality of both purpose and action between lawyer and

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid 24.

client.’<sup>79</sup> This approach moves the lawyer away from the traditional, narrow, adversarial-based model towards a more flexible, conciliatory trajectory.<sup>80</sup> In seeking the best possible outcome, the new lawyer looks for options for the client based on the client’s needs and interests. As Macfarlane points out, ‘the new lawyer practises from the basis that almost every contentious matter will settle without a full trial, and some will settle without a judicial hearing of any kind.’<sup>81</sup> Therefore, the lawyer’s understanding of ADR affects the construction of their identity and influences the ways that they practise.<sup>82</sup>

Macfarlane advocates for law schools and clinics to embrace the changes taking place within the legal system.<sup>83</sup> These changes will prepare ‘new lawyers’ for the responsibilities and competencies that are desirable for an effective lawyer.<sup>84</sup> Taking from Macfarlane’s proposition that law schools and clinics should embrace the changes in preparation for the alternatives to litigation that the new lawyer will offer the client, we can ask: has legal education recognised this?

## **ADR AND LEGAL EDUCATION**

In Susskind’s book, *Tomorrow’s Lawyers*, he poses the question: What are we

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid, citing Carrie Menkel-Meadow, ‘The Trouble with the Adversarial System in a Postmodern, Multicultural World’ (1996) 38 *William and Mary Law Review* 5, 37-39.

<sup>83</sup> Macfarlane, above n 51, 2.

<sup>84</sup> Ibid.



training young lawyers to become?<sup>85</sup> Susskind asks, ‘Are we training these lawyers to become traditional one-to-one practitioners specialising in black-letter law and charging by the hour or are we preparing the next generation of lawyers to be flexible, team-based, hybrid professionals?’<sup>86</sup> Susskind suggests that emphasis in law schools is on the former, with very little regard for the latter.<sup>87</sup> He is concerned that many legal educators and policymakers do not even know there is a second option, and that law schools are therefore training young lawyers to become ‘20<sup>th</sup> century lawyers’ and not ‘21<sup>st</sup> century lawyers’.<sup>88</sup> Susskind is not suggesting that core legal subjects such as contract and constitutional law should be ‘jettisoned’, but that there is a need to focus on how best to prepare lawyers for legal practice in the coming decades.<sup>89</sup> Macfarlane echoes these concerns and concludes unequivocally that ‘there is an urgent need for lawyers to modify and evolve their professional role from adversarial ‘pit bull’ to creative conflict resolver.’<sup>90</sup> She suggests that there needs to be ‘a dramatic overhaul of legal education to prepare new graduates for the negotiation and dispute resolution challenges they will face in practice and for their new roles and new identities as ‘problem solvers’ in society.’<sup>91</sup> As discussed previously in this paper, the emphasis for the 21<sup>st</sup> century lawyer

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<sup>85</sup> Susskind, above n 35, 135.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> Macfarlane, above n 51, 16.

<sup>91</sup> *Ibid.*

is on how to approach the changes occurring within the legal system, and how to become a practitioner who can address the needs of the client and focus on their interests. There is a need to increase the skillset of aspiring lawyers in order to empower them to deal with the developing and changing legal system. For over two decades, legal educators in Australia have recognised the need to re-think our teaching approach. In 1995, for instance, Australian clinician Ross Hyams<sup>92</sup> advocated for utilising various methodologies of law teaching ‘to make the legal system relevant for the students and to make the students relevant for the system’.<sup>93</sup> Hyams suggested that students be trained in the appropriate skills that they will need to survive in the professional environment.<sup>94</sup> Hyams argued that these reforms needed to go further than teaching students merely legal ‘operations’.<sup>95</sup> Rather, interpersonal, ethical and communication skills which are integrated into each subject using various teaching methodologies can prepare students for their professional life, even if they do not choose to continue in the legal profession.<sup>96</sup>

## **TEACHING OF ADR IN AUSTRALIAN LEGAL EDUCATION**

In early 2010, Kathy Douglas<sup>97</sup> investigated 12 law schools in Victoria and

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<sup>92</sup> Ross Hyams, ‘The Teaching of Skills: Rebuilding-Not Just Tinkering Around The Edges’ (1995) 13 *Journal of Professional Legal Education* 63

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.* 78.

<sup>97</sup> Douglas, K, ‘The teaching of ADR in Australian law schools: Promoting non-adversarial practice in law’, (2011) 22 *Australasian Dispute Resolution Journal* 55

Queensland and one in New South Wales. She found that ADR is taught as a compulsory stand-alone course, or combined with civil procedure or non-adversarial justice.<sup>98</sup> Douglas found that in some cases ADR was integrated into substantive law courses across the curriculum, with a later year stand-alone ADR elective available.<sup>99</sup> Douglas discovered that although those law courses included ADR in their curriculum, the place of ADR was sometimes uncertain.<sup>100</sup> Douglas argued that this was probably because ADR was not one of the compulsory knowledge areas for accreditation as an Australian lawyer. Law schools were free, in other words, to exclude ADR from their core offerings and not mandated to provide ADR as an elective.<sup>101</sup> Writers and educators such as King et al advocated strongly for ADR to be taught across the curriculum, so that students would not only develop a comprehensive understanding of ADR processes, but a desire to incorporate them into their future legal practice as appropriate and fundamental methods of dispute resolution.<sup>102</sup>

In 2008, the *Review of Australian Higher Education* (the Bradley Review)<sup>103</sup> was conducted to look at the quality of Australian higher education. According to the review, the standard of higher education in Australia had begun to lag

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> M King, A Freiberg, B Batagol, R Hyams, *Non-Adversarial Justice* (The Federation Press, 2009) 247

<sup>103</sup> Australian Government, *Review of Australian Higher Education* (2008) (the Bradley Report)

behind other Organisation for Economic Co-operation and Development (OECD) countries and Australia needed to increase funding, improve staff/student ratios and value teaching in universities and other providers.<sup>104</sup>

In response to this report, the Australian Federal government introduced a new regulatory regime to ensure quality in the tertiary sector. This regime required all higher education providers to meet Threshold Standards in order to enter and remain in the sector.<sup>105</sup> Selected discipline areas were given articulated threshold learning outcomes (TLOs) including for the Bachelor of Laws, under the Federal Government Learning and Teaching Academic Standards project.<sup>106</sup> In 2010, funding was provided to develop benchmark standards in law, as part of a new Higher Education Quality and Regulatory Framework and these standards were completed in December 2010.<sup>107</sup> The Australian Qualifications Framework (AQF) provides a hierarchy of education qualification categories. For each qualification category, there are specified learning outcomes – that is, levels of attainment in defined areas of skills and knowledge that students are expected to achieve by completing the university course.<sup>108</sup> Since 1 July 2015, all university courses have been required to comply

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<sup>104</sup> Ibid xi-xvi.

<sup>105</sup> Australian Government, Tertiary Education Quality and Standards Agency (TEQSA), About TEQSA <http://www.teqsa.gov.au/about-teqsa> at 3 January 2012.

<sup>106</sup> Australian Learning and Teaching Council (ALTC), 'Discipline Setting Standards' ALTC Newsletter 2010. <http://www.altc.edu.au/standards> at 3 January 2012.

<sup>107</sup> Australian Learning and Teaching Council, Learning and Teaching Academic Standards Project: Bachelor of Laws: Academic Standards Statement (December, 2010).

<sup>108</sup> See Sourdin, above n 1.

with the AQF.<sup>109</sup> Education providers are required to demonstrate student achievement of the AQF learning outcomes specified for the relevant qualification category. The Australian Learning and Teaching Council (ALTC) established discipline forums to develop standards that define the skills and knowledge required for particular discipline areas. The ALTC discipline forum for law developed the *Bachelor of Laws Learning and Teaching Academic Standards Statement* (the ALTC Standards), a statement of threshold learning outcomes for LLB courses offered by Australian universities.<sup>110</sup>

ADR can be seen as both theory and skills education and some scholars have suggested that this discipline area covers a number of learning outcomes that a law student should master as part of their studies.<sup>111</sup> ADR is relevant in four prime areas out of the six TLOS. These include TLO 1: knowledge, TLO 3: thinking skills, TLO 5: communication and collaboration and TLO 6: self-management.<sup>112</sup> What this means is that even though ADR is not currently mandated for admission as a lawyer in Australia, learning outcomes from ADR courses align with the requirements of contemporary legal education.<sup>113</sup> This initiative is seen as representing a significant increase in the status of ADR with many law schools likely to be influenced to include ADR in the compulsory

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<sup>109</sup> Ibid.

<sup>110</sup> Australian Learning and Teaching Council (ALTC), *Learning and Teaching Academic Standards Project: Bachelor of Laws: Academic Standards Statement* (December, 2010)

<sup>111</sup> Ibid.

<sup>112</sup> Australian Learning and Teaching Council (ALTC), *Learning and Teaching Academic Standards Project: Bachelor of Laws: Academic Standards Statement* (December, 2010)

<sup>113</sup> Douglas, above n 97, 283.

curriculum, in some form, due to the TLOs.<sup>114</sup> Importantly, Douglas tempers these findings with a warning that despite the potential for TLOs to encourage a deeper focus on ADR, law schools may meet these new requirements but still not offer students a quality experience of ADR theory and practice.<sup>115</sup> Douglas cautions against including ADR as an add-on to core law subjects such as civil procedure. She argues that if this were to happen, students would experience ADR within a litigation framework (given the specific subject being studied), and as a cursory treatment of ADR in the learning and teaching design.<sup>116</sup> According to Douglas, this integrated approach to ADR may mean that ADR is taught as a module that fails to address theoretical concerns in depth, and is unlikely to be taught by an ADR ‘expert’, which may diminish the effectiveness of the learning and teaching design.<sup>117</sup>

Over the last 10 years, a number of Australian law schools have included ADR as a focus in the curricula. By way of example, La Trobe University Law School was the first Australian law school to incorporate a compulsory dispute resolution subject into its law curriculum. Since 2005, all law students in La Trobe’s LLB program are required to enrol in the course, Dispute Resolution, which provides a general introduction to the theoretical and practical aspects of conflict and dispute resolution, including litigation.<sup>118</sup> More details of the

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<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Gutman, J and Riddle, M, ‘ADR in legal education: Learning by doing’ (2012)

structure of the course can be obtained<sup>119</sup>, though it must be noted that processes of arbitration, conciliation, mediation and negotiation are described and evaluated in this course. Guest lecturers who are experienced practitioners in the field of mediation are used in a variety of areas including family law<sup>120</sup> Skills- based training in negotiation and mediation is a major and compulsory component of the course. It is noted by Gutman and Riddle that ‘the ‘learning by doing’ teaching philosophy behind the program is the central point of teaching and learning in the subject.’<sup>121</sup> This is brought about by the exploration of theoretical concepts in lectures and discussing readings on the lecture topics in seminars. The seminars allow the students to develop fundamental skills such as communication, negotiation and mediation in a smaller environment.<sup>122</sup> According to Gutman and Riddle ‘student evaluations of this course ‘have been overwhelmingly positive’.<sup>123</sup>

In 2016, Monash University incorporated ADR into the Civil Procedure Unit for LLB and JD students. The teaching approach to the Unit includes lectures conducted in lecture/seminar style with three tutorials supporting the student’s learning. Students are given lectures on Introduction to the Civil Justice System and Alternative Dispute Resolution. In a tutorial focusing on ADR, a simulated

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23 *Australasian Dispute Resolution Journal* 191

<sup>119</sup> Ibid.

<sup>120</sup> Ibid 191.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid 192.

dispute is given to the students and there is an online component to the ADR exercise, which must be completed prior to the tutorial. Students work in small groups to resolve the online dispute using negotiation and mediation strategies. The students then attend the tutorial and complete the mediation with face-to-face ADR. After completion of the activity, students are required to submit a short reflective journal about their experiences in the exercise.<sup>124</sup>

Both Monash University and Melbourne University offer postgraduate courses in ADR. Monash University offers a Masters of Dispute Resolution. The guidelines for this Course state that it provides a thorough theoretical and practical grounding in dispute resolution and develops the advanced professional skills and specialist knowledge required for working as a dispute resolution practitioner, including as an arbitrator, mediator or other dispute resolution practitioner. It is suitable for graduates interested in developing or enhancing specialist careers in dispute resolution.<sup>125</sup>

Melbourne University offers a Graduate Diploma in Dispute Resolution.

According to the synopsis

This specialisation in dispute resolution works from the principles that underpin dispute resolution and management. The subjects examine how these principles inform the theoretical and practical aspects of this rapidly changing area of law. This course is relevant to legal practitioners and will appeal to others working in the design, reform and practice of dispute resolution. Judges, legal practitioners and legal researchers teach a broad range

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<sup>124</sup> Monash University Unit Guide for Civil Dispute Unit

<sup>125</sup> Monash University Unit Guide for Masters of Dispute Resolution



of subjects spanning litigation and alternative dispute resolution<sup>126</sup>

From this discussion it is clear that the teaching of ADR at law school has been recognised as adding value to students' legal education and so should have a key position in the legal curriculum. There have been some attempts to incorporate ADR into existing curricula at some Australian universities. In the next section I will look more closely at the place of ADR in Australian clinical legal education. I will focus on how the teaching of ADR can add value to students' clinical legal education and be brought in line with the integration of theory and practice.

#### **ADR and CLINICAL LEGAL EDUCATION IN AUSTRALIA**

In line with support for the notion of 'learning by doing' and the views of writers, academics and commentators that a legal education should also teach students what lawyers actually do in practice, a strong practice-oriented trend of legal education has developed in Australia.<sup>127</sup> According to the Best Practices

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<sup>126</sup> Melbourne University Synopsis for Graduate Diploma in Dispute Resolution

<sup>127</sup> Gutman, J, Fisher, T, Martens, E, Why teach alternative dispute resolution to law students? Part one: past and current practices and some unanswered questions, *Legal Education Review* (2006) 125 This research is focused on clinical legal education in the Australian context, but it must be noted that clinical education is accepted, encouraged, taught, learned and researched internationally. Much writing exists on clinics in the international context some include: Margaret Barry, *Clinical Legal Education in the Law University: Goals and Challenges* (2007) 27 *International Journal Clinical Legal Education* p 30, for discussions on clinical legal education in India, and p33 Legal Education Reform in United States; James Marson, Adam Wilson and Mark Van Hoorebeek, *The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective* (2005) 7 *International Journal of Legal Education* 29 for a discussion on clinical legal education in UK, Neil Gold, *Clinic is the Basis for a Complete Legal Education: Quality Assurance, Learning Outcomes and the Clinical Method*, (2015) 22 *International Journal of Clinical Legal Education* 1 for an overview on clinical legal education in Canada

Report<sup>128</sup> in Australia:

‘Clinic’ or clinical legal education (CLE) is a significant experiential method of learning and teaching. CLE places law students in close contact with the realities, demands and compromises of legal practice. In so doing, CLE provides students with real-life reference points for learning the law. CLE also invites students to see the wider context and everyday realities of accessing an imperfect legal system. Clinical pedagogy involves a system of self-critique and supervisory feedback so that law students may learn how to learn from their experiences of simulated environments, observation and, at its most effective level, personal responsibility for real clients and their legal problems. CLE is, in summary, a learning methodology for law students that compels them, through a constant reality check, to integrate their learning of substantive law with the justice or otherwise of its practical operation.<sup>129</sup>

Clinical legal education programs have grown in Australian university curricula, in keeping with the notion that law schools must teach more than theory.<sup>130</sup> The clinical model of legal education commenced in Australia in the early 1970s with the first Australian clinical program commencing at Monash University in 1975, followed by programs at La Trobe University (1978) and the University of New South Wales (UNSW)(1981).<sup>131</sup> This model embraced a strong emphasis on service and access to justice with the clinics at these universities being onsite live client clinics. Small clinical programs have since emerged in law schools around Australia. In recent years, there has been an

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<sup>128</sup> Evans, A, Cody, A, Copeland A, Giddings, J, Noone M.A & Rice S, Best Practices Australian Clinical Legal Education Office of Teaching and Learning 2013

<sup>129</sup> Ibid 20.

<sup>130</sup> Noone M and Dickson J, ‘Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers’ (2004) 4 *Legal Ethics* 127.

<sup>131</sup> J Giddings, *Promoting Justice Through Clinical Legal Education*, Justice Press 2013, 9

increase in external clinical placements with some being incorporated into existing community and government agencies.<sup>132</sup> It is recognised that clinical methodologies provide a forum for student learning about the effects that laws and legal processes have on people, moving further from cases to considering issues that exist both before and after any formal legal processes.<sup>133</sup>

Dickson provides a view of clinical legal education in Australia as ‘a legal practice based method of legal education in which students assume the role of a lawyer and are required to take on the responsibility, under supervision, for providing legal services to real clients.’<sup>134</sup> It is through this model of legal education that students learn fundamental practical skills recognised as of equal value to their comprehension of substantive law.<sup>135</sup> As Hyams et al emphasise, ‘...those learning the law at any stage of life as a law student, graduate or new lawyer are often a little surprised to realise that it’s not just what they know about the law that matters, but also how they learn it and apply it.’<sup>136</sup>

The most clearly recognised model of clinical legal education known as the ‘live

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<sup>132</sup> Ibid 10, with reference to clinics established at Deakin University (2003), the Australian National University (2004), Bond University (2004), Macquarie University (2004), University of Queensland and University of Sydney, see Giddings for detailed outline of clinical programs.

<sup>133</sup> Ibid 13.

<sup>134</sup> Judith Dickson, *25 Years of Clinical Legal Education at La Trobe Uni* (2004) 29 (1) *Alternative Law Journal* 41

<sup>135</sup> Ross Hyams, Susan Campbell, Adrian Evans, *Practical Legal Skills* (4<sup>th</sup> ed.) (Oxford University Press, 2014)

<sup>136</sup> Ibid 1.

client' clinic involves working with real clients.<sup>137</sup> According to Giddings, the complexities of working with real clients needs to be acknowledged as enabling students to deepen understandings already developed elsewhere in the curriculum.<sup>138</sup> The 'live client' clinic model is recognised as developing key understandings and skills (such as structuring and conducting an interview, preparing to negotiate and reflecting on personal performance) in order to then extrapolate and generalise from those experiences.<sup>139</sup> In the United States, a 2007 report by the Carnegie Foundation<sup>140</sup> into legal education emphasised the importance of legal skills. It was argued in this report that clinics 'can be a key setting for integrating all the elements of legal education, as students draw on and develop their doctrinal reasoning, lawyering skills, and ethical engagement, extending to contextual issues such as the policy environment'.<sup>141</sup> Giddings takes this further by stating that work with real clients in this context of learning provides particular opportunities for students to develop their understanding of the lawyer-client relationship and to refine their legal practice-related skills.<sup>142</sup> As such, these clinics are seen as enhancing 'the

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<sup>137</sup> Monash University has adopted such a clinical model at Monash Oakleigh Legal Service and Springvale Monash Legal Service. See further discussion on 'live client' clinics and other clinic types in Australia in A Evans and R Hyams, *Specialist Legal Clinics: Their Pedagogy, Risks and Payoffs as Externships*, (2015) 22 *International Journal of Clinical Legal Education* 3

<sup>138</sup> Giddings, above n 131, 78.

<sup>139</sup> Ibid 79, also see *Specialist Legal Clinics: Their Pedagogy, Risks and Payoffs as Externships*, (2015) 22 *International Journal of Clinical Legal Education* 2

<sup>140</sup> Ibid citing Carnegie Report 2007

<sup>141</sup> Ibid, citing William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Report) (2007) 10.

<sup>142</sup> Giddings, above n 131, 95.

learning experience because of the way in which the student must interact with the client'.<sup>143</sup> The student is made acutely aware of the individuality of the relationship between lawyer and client and the need for the competent lawyer to respond to the particular set of facts that arise in each case.<sup>144</sup> Clinical legal education and pedagogy<sup>145</sup> lends itself to the 'interconnectedness of theory and practice'.<sup>146</sup> In the teaching of ADR, this connection can occur by shaping students' knowledge, skills and attitudes towards non- adversarial options for resolving clients' legal issues.<sup>147</sup>

Macfarlane states that debate over learning about law can be reframed within a realisation of the 'interconnectedness of theory and practice'.<sup>148</sup> It is important to explore whether this 'connectedness' between the teaching and practice of ADR is in fact happening in various clinics in Australia. Macfarlane strongly advocates for clinical legal education to be warned against becoming 'stuck' in a conception of social justice lawyering that is heavily dependent on rights-based strategies and traditional hierarchical conceptions of the lawyer/client relationship.<sup>149</sup> Macfarlane traces the history of early clinics, which she notes

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid, citing John Boersig, James Marshall, and Georgia Seaton, 'Teaching Law and Legal Practice in a Live Client Clinic' (2002) 6(2) *Newcastle Law Review* 51,64.

<sup>145</sup> See Best Practices Australian Clinical legal Education Office of Teaching and Learning 2013 for discussion on CLE Course Design, including Learning Outcomes, Principles and Best Practices pp11-14

<sup>146</sup> Macfarlane, above n 51, 226.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Julie Macfarlane, 'Bringing the Clinic into the 21<sup>st</sup> Century', (2009) 27 *Windsor Yearbook of Access to Justice* 35

were motivated by an 'ethos of public service and a desire to bring access to justice to underserved and marginalised groups within the community.'<sup>150</sup> In the process, Macfarlane notes, students would acquire important practical skills and skills teaching was seen as an effective answer to demands for competency that were gathering pace as a result of reports such as the MacCrate Report<sup>151</sup> in the US and the Marre Report<sup>152</sup> in the UK. According to Macfarlane:

'Clinics need to keep pace with the changing environment of legal service, and continue to capture the imagination of law students and funders, there needs to be a re-evaluation and modernisation of how we think about both the service and the educational goals of the law clinic.'<sup>153</sup>

Macfarlane suggests that clinics need to remain relevant and vital in their dual mission of legal education and justice. Clinics need to examine how far the ideology of a 'default to rights', and an assumption that the lawyer is 'in charge' in the professional relationship still drive their decision-making and sense of worth.<sup>154</sup> The challenge for clinics is to be willing to reevaluate how, in this new environment, they can fulfill their dual mission of education and service most effectively and with the greatest potential for transformation.<sup>155</sup> Legal clinics need to be brought into the 21<sup>st</sup> century and to revisit the 'sacred beliefs that

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<sup>150</sup> Ibid 36.

<sup>151</sup> Ibid citing Robert McCrate, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (New York Bar Association, 1992)

<sup>152</sup> ibid citing Marre Committee, *A Time for Change: Report of the Committee on the Future of the Legal Profession* (London: General Council of the Bar/ The Law Society, 1988).

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

drive both the law school curriculum and the operation of the legal clinics.’<sup>156</sup>

In order for legal clinics to prepare their students to be 21<sup>st</sup> century lawyers, there needs to be a move away from the ‘default to rights’.<sup>157</sup> In other words, clinics need to move away from assuming a ‘relentlessly normative view of conflict, in which one side is right and the other is wrong, and in which therefore there must always be a winner and a loser’.<sup>158</sup> An alternative and more beneficial approach would be for clinic clients to be advised of a range of options, including litigation, negotiation and dialogue, all with the overall commitment to practical problem solving.<sup>159</sup> Indeed, and as I explained earlier, there are some areas of law in which this is not only the *ideal*, but where it is also a legislative requirement. In the 21<sup>st</sup> century, there is a move towards ‘wise and transparent bargaining...towards finding the best possible settlement, this is a better strategy and may more directly address client’s needs, both legal and non-legal.’<sup>160</sup> It is interesting to note that in their research regarding ADR in clinical legal education programs in Australia, King et al observe that clinical supervisors will state that they have been teaching ADR for many years and that the type of law that they have been modeling and teaching students simply did not have the label of ‘non-adversarial’ until recently.<sup>161</sup> This view is based

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<sup>156</sup> Ibid

<sup>157</sup> Ibid.

<sup>158</sup> Ibid 46.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> King et al, above n 102, 248.

on the fact that clinicians in these programs often attempt to resolve client problems without resorting to litigation, because most clients of clinics cannot afford the time or expense of court proceedings.<sup>162</sup> King et al. suggest that many clinicians would argue that there are overlaps between non-adversarial ideologies and clinical legal education and that these techniques have been an implicit part of clinical pedagogy for years.<sup>163</sup> They also argue that it is not sufficient for clinical legal educators to point to this holistic and client-centered way of lawyering and state that they are teaching ADR skills.<sup>164</sup> Instead, they suggest that the teaching of ADR needs to be explicit, rather than implicit. They go further to suggest that

‘It is crucial for clinics to incorporate theories of non-adversarial justice not only in the practice of clinical legal education but in the scholarship and research, clinical legal education can provide students with more depth to their understanding of both practical legal skills and non-adversarial legal scholarship.’<sup>165</sup>

The issues raised by King et al have been echoed by experts in clinical legal education outside Australia. Frank Bloch, a leader in research on the global clinical movement, suggests that because ADR and clinical education share overlapping goals of advancing the interests of parties and addressing deficiencies in access to justice, ADR education and clinical legal education are

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<sup>162</sup> Ibid.

<sup>163</sup> For further reading of this issue see King et al, above n 102, 249.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.



slowly integrating and advancing beyond the teaching and practice of basic negotiation skills that have been included in the clinical curriculum for many years.<sup>166</sup> Bloch has researched the impact that the integration of ADR into the clinical curriculum has had or might have had in law schools in India, South Africa and the United States. He found that clinical programs that teach and practice ADR can inform, improve, and reform not only legal education, but also, over time, the practice of law and the legal profession.<sup>167</sup>

Bloch reports that many law schools in the United States offer ADR courses, with a few schools requiring students to take at least one ADR course.<sup>168</sup> In addition, law schools, for example in South Africa, also offer Street Law programs in which law students provide peer mediation and conflict resolution training for school students.<sup>169</sup> Taking into account these contexts, we can see that some clinical educators are alive to these issues and ADR is starting to be dealt with in more explicit ways in clinical settings. Indeed, in the US, some law schools have established clinics dedicated to ADR. A growing number of schools have developed mediation and arbitration clinics and some law schools offer community lawyering clinics that include ADR components. According to Bloch, some law schools in the US offer ADR clinics, where students may assist in employment mediations and consumer arbitrations. Some of these

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<sup>166</sup> Frank S. Bloch, *The Global Clinical Movement* (Oxford University Press, 2011) 254

<sup>167</sup> *Ibid* 260.

<sup>168</sup> *Ibid*.

<sup>169</sup> *Ibid*.

clinics are joined to court programs where litigants are offered an ADR option in place of a trial.<sup>170</sup> According to Bloch, 'it is in clinics that embrace ADR where law students develop their professional identity and fundamental lawyering skills and values as problem-solvers, conciliators, mediators and peacemakers'.<sup>171</sup> He concludes 'for these reasons, ADR has a unique contribution to make to clinical legal education around the world-as a richer way to teach and advance social justice.'<sup>172</sup>

The foregoing discussion indicates that ADR has been recognised by clinicians in some clinical settings as an important aspect of lawyers' practice and therefore that ADR skills and processes, in particular, negotiation and mediation, are viewed as a pivotal focus in the education of lawyers. According to Evans et al, clinical legal education confronts law students with the realities, demands and compromises of legal practice.<sup>173</sup> In so doing, it provides students with real-life reference points for learning the law.<sup>174</sup> Clinical legal education also invites students to see the wider context and everyday realities of accessing an imperfect legal system, enabling them to integrate their learning of substantive law with justice implications of its practical operation.<sup>175</sup> Evans et

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Evans, A, Cody, A, Copeland A, Giddings, J, Noone, M.A & Rice S above n 128

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

al, suggest that both the aims<sup>176</sup> and the ‘learning outcomes’<sup>177</sup> are central to the clinical design of a course, which is ‘designed to promote specified student learning outcomes’.<sup>178</sup> *Best Practices*<sup>179</sup> proposes possible learning outcomes for clinical legal education, which include ‘an understanding, and appropriate use, of the dispute resolution continuum (negotiation, mediation, collaboration, arbitration and litigation)’.<sup>180</sup> A focus in clinical legal education on concepts of justice where the practice of mediation or forms of dispute resolution other than litigation are utilised, will enable students to question adversarial approaches to dispute resolution that are reinforced in their legal studies through a case method of teaching.<sup>181</sup> Students are encouraged to view the client’s matter holistically and are provided with strategies and theoretical models to support their practice.<sup>182</sup> In this way, students will become aware that ADR is a fundamental part of the analysis of any case, in the same mode of taking instructions as to what is the cause of action that the putative litigant presents in clinic. This awareness for students is particularly apparent in the clinical context as most clinics are situated in community settings, offering clients access to justice, not available in private legal practice. As the clients in

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<sup>176</sup> Ibid 78 seen effectively as a statement by the law school of why it is offering the course

<sup>177</sup> Ibid 78 a statement by the law school of what a student will be able to show they have learnt from a course

<sup>178</sup> Ibid.

<sup>179</sup> Ibid 81.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

the community setting do not have the means to litigate, it becomes all the more important for students to consider other options for resolution of disputes other than litigation. These options will need to be addressed according to the client's means.

Clinical legal education in Australia has many connections with social justice.<sup>183</sup>

There is a longstanding relationship between clinical programs and community legal centres and this relationship has influenced the teaching of various aspects of social justice goals in Australian courses.<sup>184</sup> Evans et al suggest that situating clinical courses in community legal centres gives a particular context to teaching legal ethics and challenges concepts of value-neutral, objective lawyering.<sup>185</sup> As such teaching lawyering skills in community legal centres highlights the legal skills required in a social justice setting.<sup>186</sup>

When a clinic operates in a community legal centre setting, it is in the nature of the work that issues of access to justice arise daily, with almost every client who comes through the door.<sup>187</sup> This means that clinics offer students a powerful opportunity to analyse the 'justice' dimensions of law, ranging from the relationship between law and the perceived justice of its effect, to a lawyer's ethical obligations to achieve what a client wants as a 'just' result, to systemic

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<sup>183</sup> Evans et al, *Australian Clinical Legal Education* (ANU Press, 2017) 97

<sup>184</sup> *Ibid.*

<sup>185</sup> Evans, A, Cody, A, Copeland A, Giddings, J, Noone M.A & Rice S, above n 128 40

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid* 116.

questions about access to law and legal services.<sup>188</sup> These are especially rich opportunities for reflective practice.<sup>189</sup>

The role of the clinic as a service provider will itself raise systemic questions about access to justice, for example, about available alternative services (private, public, legal and non-legal), about accessibility (geography, physical, cultural, language, financial etc). Within the work of a clinic based in a community legal centre or legal aid organisation, questions of access to justice attach to almost every client, inviting students to reflect on, for example, why the legal needs of a client and a community are not being met, or how they can be better met.<sup>190</sup>

## **CONCLUSION**

Despite this recognition, there is still uncertainty as to whether or how ADR, especially negotiation and mediation, is taught to students in clinical contexts. Researchers like Giddings recognise the educational value of the real client clinic in providing opportunities for students to develop skills relating to legal practice and an awareness of social justice.<sup>191</sup> The legal clinic is where students are provided with opportunities to develop a range of attitudes, skills and understandings associated with legal practice.<sup>192</sup> As such, if ADR is becoming

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<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid 117.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

recognised as a prominent component of legal practice, it follows that the connection between students' acquisition of knowledge in ADR and the application of this acquired knowledge to resolve client disputes should be a focus of clinical legal education.

The issue of where and how to ensure that ADR has a place in clinical legal education may extend further than creating ADR clinics, to a focus on legal service delivery in a social justice context. Students need to be taught to focus on client issues and how best to solve them. This may involve students being skilled up to actually learn about and start to think differently about using ADR frameworks in how they approach client matters and how they seek to resolve them. It may not be that the 'clinical learning outcome' is necessarily to teach students to become the best mediators or arbitrators but rather to provide students with holistic strategies, which they may use to negotiate for their clients in seeking alternatives for resolution of disputes.

In this paper I have argued that ADR processes are increasingly considered by legal practitioners to be an important aspect of lawyers' practice and by legal educators as a necessary ingredient of legal education. For the reasons I have explained, there is a need to ensure that clinical legal education is keeping up with changes in legal practice and legal education. Educators in the clinical legal education context should be providing students with sufficient knowledge of methods for dispute resolution to adequately prepare them for practice as '21<sup>st</sup> century lawyers'.

Susskind states that law schools cannot ignore future practice and law students should be provided with *options*, to study current and future trends in legal services and to learn some key 21<sup>st</sup> century legal skills that will support future law jobs.<sup>193</sup> ADR is a growing area of legal practice resulting in changes in models of client service and advocacy.<sup>194</sup> The issue then is how best to prepare young lawyers for these changes. According to Sourdin, legal academics (and law schools) play an essential role in the training and education of lawyers and in interpreting these changes.<sup>195</sup> Sourdin sees legal education and training as ‘a continuum along which the skills and values of the competent lawyer are developed.’<sup>196</sup> There is a need to explore whether clinical legal education is taking these changes in legal practice on board and moving away from teaching traditional adversarial models towards teaching a more ADR skills based curriculum. There is a need to look more closely at whether the ‘interconnect’ between the teaching and practice of ADR is in fact happening in clinics; if so, how this teaching is happening including an examination of clinical curricula. If it is established that this teaching is taking place, then research needs to be done to determine the strengths and weaknesses of existing approaches to teaching ADR in the clinic, and to consider whether and in what ways this teaching can be enhanced. We may also need to investigate whether it is

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<sup>193</sup> Ibid.

<sup>194</sup> Macfarlane, above n 51, 243.

<sup>195</sup> Sourdin, above 1, 5.

<sup>196</sup> Ibid.

sufficiently contributing to students' knowledge of non-adversarial approaches towards conflict resolution.

According to Sourdin, 'changes to the law school education environment supporting ADR in a realistic, rather than marginal way should mean that there is a greater chance that law school education in Australia into the future will be both relevant and supportive of respectful dispute resolution in its traditional and alternative forms.'<sup>197</sup> Clinical scholars view clinical legal education as a method of learning and teaching law.<sup>198</sup> It includes teaching about skills as well as the broader legal system.<sup>199</sup> In this paper, I have shown that ADR has become a part of the legal system both in Australia and internationally. If clinical legal education is to teach students about the skills needed for practice then it follows that a focus on the teaching and learning of ADR skills is needed. Extensive research has shown that ADR has an important role in legal education. It places emphasis on a non-adversarial process of resolving conflict and provides lawyers with the knowledge and skills to engage with legal problems in a holistic manner. Law students engaged in clinics who understand and adopt these processes will become lawyers who focus first on client's needs and interests when problem solving and resort to adversarial practice only when necessary. In this way, clinical legal education

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<sup>197</sup> Ibid.

<sup>198</sup> Evans, A, Cody, A, Copeland A, Giddings, J, Noone M.A & Rice S, above n 128 40

<sup>199</sup> Ibid 41.



can ensure that law students are well prepared for their roles as ‘new lawyers’ in 21<sup>st</sup> century legal practice, who will utilise their comprehensive knowledge of ADR options to assist their clients to gain access to justice in more timely and cost effective ways. One can argue that in both the wider legal practice context and in the clinical education setting, ADR has a prominent focus. As such, taking into consideration the arguments put across in this paper, to prepare law students for legal practice, there is no alternative but to teach ADR in clinic.

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