

TEACHING DISPUTE RESOLUTION: A REFLECTION AND ANALYSIS

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INTRODUCTION: DISPUTE RESOLUTION WITHIN THE SYDNEY CURRICULUM

In 1989 the authors taught for the first time a final year elective on dispute resolution at Sydney Law School. Although this course had been offered before, the introduction of the semester system and the very different backgrounds of the authors to that of the previous lecturer¹ necessitated a reappraisal and reconstruction of the course. This was also required by the constant evolution of dispute resolution processes within Australia in a number of contexts and through a variety of institutions.

In relation to the teaching of dispute resolution, Australian law schools are now at the same point reached by United States law schools in the early 1980s. Dispute resolution is rightly taking its place in academic courses in law, as well as other disciplines, and the number of such courses is beginning to burgeon.² At present, however, experience of teaching specialist dispute resolution courses in law schools in Australia is limited.

Dispute resolution themes and issues may be integrated in an ad hoc manner into the teaching of other established subjects in the law degree.³ This raises debate whether it is desirable to present dispute resolution as a separate subject to a limited number of students, or whether it could more effectively be integrated into the teaching of mainstream subjects. The integrated, or “mainstreaming” approach helps to avoid marginalisation or

“ghettoization”⁴ and should dispel the perception of dispute resolution as a peripheral option catering for the idiosyncratic interests of those who enjoy what some Sydney students have been heard to call “Mickey Mouse courses”. While mainstreaming avoids the drawbacks of marginalisation, teaching dispute resolution in any substantive context requires instructors to employ different pedagogical techniques and new perspectives on their subjects which may be unfamiliar to them and to which they may feel no commitment. Rewriting an established curriculum to integrate dispute resolution issues would have implications for academic freedom; it may be more easily achieved in a new law school such as that at Bond University where a Faculty commitment to the integration of dispute resolution may be made. Nevertheless we optimistically look forward to the time when dispute resolution perspectives are also included in more compulsory subjects and commercially based courses.

At Sydney a rather fragmented approach is taken. In addition to the dispute resolution option, there is another specialised option on International Dispute Resolution and students are free to enrol for both these courses. Dispute resolution is also included in the compulsory first year Legal Institutions course as well as in options such as Anti- Discrimination Law, Environmental Law and Family Law.

Our objective in this article is to describe and reflect upon what we did in teaching a course which we found intellectually and pedagogically stimulating. We hope that this may be of some assistance to the increasing number of people who are designing courses in and teaching dispute resolution to law students.⁵ We also hope to stimulate and encourage the exchange of ideas about teaching dispute resolution.⁶

COURSE OBJECTIVES⁷

Our first objective was to make the students consider the different contexts in which disputes arise within our society and the diversity of such disputes. From this starting point we wished to concentrate on four interconnected areas throughout the course. First, we wanted the students to become familiar with the range and operation of additional methods of resolving disputes. Secondly, we wished to examine the current use of these methods in a number

of different areas of substantive law in Australia and to suggest possible areas of future development. Thirdly, we wanted the students to acquire some experience of, and skills in, negotiation and mediation. Our aim was not to turn out skilled negotiators or mediators at the end of the course who could claim some formal accreditation.⁸ Such an aim would have been unrealistic and inappropriate.⁹ We did however want our students to have practical first-hand experience of the processes, to understand the complexity of the skills required, to begin to develop their own skills, to be able to evaluate their own potential and enthusiasm for undertaking further skills development in the area, to be able to evaluate the skills of others and make appropriate referrals in their future practice or employment.

Finally we wished the students to acquire a critical and evaluative perspective on all methods of resolving disputes. We made it very clear that this was not a course which proselytised uncritically for alternative methods of dispute resolution. There is a developing literature containing what we view as healthy criticism and evaluation of alternative dispute resolution processes and their application.

One of our first decisions was to title the course Dispute Resolution rather than Alternative Dispute resolution (ADR). The relationship between the so-called alternative methods (such as negotiation, mediation, conciliation and arbitration) and litigation is a complex one. Some of the “alternative” methods have always been used by lawyers and by courts.¹⁰ It has been argued that alternative methods are in fact, and should be, viewed as additional to litigation rather than as alternatives to it.¹¹ In the context of a law school curriculum it was inevitable that we would examine these additional methods in their relationship to litigation and we were not disposed to pre-empt a view of that relationship.¹² We therefore encouraged the students to consider whether additional methods are an improvement on the resolution of disputes by litigation or whether they simply present a different set of problems, requiring different analysis and skills. To this end, we wished to examine whether the interests of disputing parties are adequately protected by additional methods, to question who benefits from the use of additional methods and why, to question who is disadvantaged by their use and to consider which disputes may be most appropriately

dealt with by additional methods.

It was obvious to us when we planned the course that we would have to allocate the time available with great care in order to include all of these elements.¹³ It was also evident that it would comprise black letter law, policy considerations, theoretical evaluation, and interdisciplinary issues and skills. While the opportunities and need for a wide range of teaching methods were obvious and exciting, we felt some apprehension how law students at the end of their legal training would react to course content and teaching methods which would be different from other law school courses.

The danger in attempting to fulfil all of the objectives stated above was that in trying to do everything we would do nothing well. We think we avoided that danger, but as Sander has pointed out “global approaches have the virtue and the vice of teaching the student a little about a great many things.”¹⁴ The global approach is by no means the only approach possible for a dispute resolution course and many other emphases and course objectives are possible. In the United States separate courses which focus *inter alia* on negotiation,¹⁵ mediation¹⁶ commercial arbitration or skills and processes for effective lawyering¹⁷ are taught. These allow for a greater degree of specialisation or the development of some of the underlying philosophies of alternative dispute resolution. However, since the resources do not exist at Sydney to allow for such an array of courses, we had to decide upon our emphasis which was to provide an overview.

COURSE CONTENT

In accordance with the objectives stated above, the course content can be divided into a number of basic elements: analysis of the nature, causes and course of disputes including

- identification of the disputants, their claims and interests, situations conducive to disputes, the escalation or diffusion of disputes, the impact of disputes upon third parties and possible outcomes;
- information about dispute resolution processes;
- the use of alternative dispute resolution processes in chosen areas of law
- dispute resolution skills

- critical evaluation of alternative dispute resolution.

These elements were not taught sequentially in this order. In particular the skills component was integrated with the development of the students' learning about the processes and their application. Examples of the application of alternative methods of resolving disputes were given throughout the course, but developed in detail in relation to specific areas after a review of the processes. Issues of evaluation of alternative methods were also raised throughout the course, but again were developed in depth in the final section of the course when the students had become familiar with the processes, their application and had acquired some basic skills. We give more detail of the content of these separate strands below. We have most fully developed the content of the skills element of the course. This is not because we believe it to be the most important part of the course but because it is perhaps the most unusual element of a course in Sydney Law School where the teaching of practical skills has not traditionally been part of the curriculum.¹⁸

The debate about whether or not it is appropriate to teach lawyering skills at law school has been previously aired in the context of the development of clinical legal education. Concern was expressed that teaching skills through a clinical program was not sufficiently intellectual, academic or rigorous. The debate about clinical education was won, and clinical programmes introduced at some law schools — although not at Sydney. It is perhaps not surprising that the skills debate resurfaced with the proposal to teach dispute resolution.¹⁹

The dispute over the practical teaching of negotiation and mediation could potentially have been more difficult, since clinical legal education at least teaches law students to “act like lawyers” and allows them to assist real clients²⁰ The teaching of dispute resolution skills goes further by suggesting that the traditional “lawyering” skills which emphasise adversarial, competitive techniques are not sufficient. It requires that lawyers (and potential lawyers) recognise the need to acquire other skills.²¹ However, perhaps on the wave of popular and judicial enthusiasm for alternative dispute resolution and in an environment of rethinking the curriculum,²² the skills debate at Sydney was relatively short-lived, and the small skills element now represented in the

curriculum appears accepted.²³

This is not the place to recapitulate and develop the skills debate. The tensions between the traditional view of legal education at Sydney and the content and teaching methods we employed were apparent throughout the course. We were perhaps too concerned that what we were doing was unconventional and unfamiliar to the students. We often felt the need to justify to them both the content and methodology of the course. It is interesting to note that they embraced the skills element with great enthusiasm (without necessarily accepting the messages we were trying to imbue), although they were much more reserved about the interdisciplinary content of some parts of the course.

Dispute Resolution Processes

We commenced with a broad discussion of the nature of disputes and the myriad ways of resolving them. We were working with a group of students in the final year of their law degree, and we wished to broaden their familiar mindset towards legal definitions of disputes and litigation as the appropriate method of resolving them. Consequently our first focus was on methods of resolving disputes without litigation or recourse to lawyers and courts.

Our next step was to examine additional methods of resolving disputes and their relationship to litigation in more detail. This required an introduction to the idea of seeing dispute resolution as a co-operative approach to problem solving rather than as a competition or combat. To this end we examined the underlying rationales of negotiation, mediation and conciliation at some length and compared them with that of litigation. We also examined expert appraisal and arbitration. The latter was compared more specifically with adjudication in that it frequently becomes adversarial and formal. There was some discussion as to why this is so and how, to some extent, the failure of arbitration to live up to its goals of providing a cheap, informal alternative to adjudication has motivated the increased use of other alternatives²⁴ Arbitration also provides an interesting contrast to other non-adjudicative methods of dispute resolution as it is at present the only one regulated by statute.²⁵ One of the aims of the Commercial Arbitration Acts was to lessen judicial intervention into arbitration

and to increase the autonomy of the arbitrator. With increased discussion as to whether other forms of dispute resolution should be subject to statutory regulation the impact of that legislation is of special interest.²⁶

The importance of fact-finding to the resolution of disputes was examined. The legal and practical ability of mediators, arbitrators and judges to elicit facts from the parties was compared, and the reasons for the use of expert appraisers highlighted. Finally to demonstrate the flexibility of individual processes and their use in conjunction with each other, hybrids such as concilio-arbitration²⁷ and fact-based mediation were outlined.²⁸ We reviewed the ever-growing number of organisations and institutions (including the courts) using these methods in some form throughout Australia.

One method of presenting the alternative processes has been through a continuum ranging from the informal, consensual processes at one end (negotiation, mediation) through to the formal, coercive processes at the other (culminating in adjudication). The precise location of each process within this continuum has been the subject of discussion among instructors.²⁹ While we considered that comparisons between the processes in terms of commencement and access; participants; presence of third party; identity of decision-maker; forum; formality of proceedings; information; objectives; possible outcomes and control were illuminating.³⁰ we were uneasy with the notion of a continuum in the sense of progression from formal to informal or consensual to coercive. We concluded that this can distort the reality of the internal diversity of the processes; a mediation can be formal and appear coercive to an unwilling participant who nevertheless sees no viable alternative, while a Court hearing does not necessarily fit at the formal/nonconsensual end of the spectrum. Equally negotiation may comprise a telephone conversation between lawyers or a complex process over an extended period requiring a format to be agreed, multiple parties, multiple meetings and extensive documentation. Further a number of processes are available to all disputants and may be attempted separately or in conjunction with each other. It is in this sense that all dispute resolution processes may be “additional” and “alternative”. Steps towards litigation may have been commenced while other processes are under way; negotiation in the shadow of legal process is a frequently used strategy. A more accurate picture

of the inter-relationship of dispute resolution processes is complex and interlocking rather than linear as is suggested by a continuum.

The Use of Alternative Dispute Resolution Processes in Chosen Areas of Law

It was decided that consideration of the application and use of additional methods in particular areas of law in Australia would provide a contextual base for understanding the processes and extend students' comprehension of their practical application. The selection of substantive areas of law for analysis was informed significantly, but not entirely, by our own interests and expertise. The areas chosen were mediation of family disputes, conciliation of discrimination disputes and the resolution of international disputes. These areas had the advantages of allowing consideration of dispute resolution within a legislative framework and in the very different environment of international relations. Throughout the course we also emphasised the use of additional methods in commercial disputes of all types and notably within the construction industry. Further, the students were allowed to select their own topic for a research paper, and papers were written on issues of dispute resolution in, *inter alia*, labour disputes, environmental disputes, taxation disputes, disputes involving crime, and disputes involving aboriginal communities.

Skills Development

At the same time as we were examining the processes and their application we were introducing the students to some basic skills in negotiation and mediation. Thus skills sessions and more traditional instruction were continued in tandem to demonstrate the application of the skills that were being introduced in specific contexts.

Our first skills session consisted of a variant of the exercise commonly referred to as the XY game or the Prisoner's Dilemma.³¹ The players are divided into teams, and the teams must exchange X and Y symbols which, in combination, are worth points. It becomes obvious to the players after a few rounds of the game that in order to maximise the number of points scored for both teams a co-operative solution must be sought. Opportunities for inter-face

negotiation are given at two points in the rounds of the game and the rules for scoring are arbitrarily changed at that time.

While the purpose of the exercise was to introduce basic negotiation practice and the idea of developing co-operative solutions to conflict we found that it had a number of other side benefits³² It forced students to work in teams and to discuss and weigh each other's motives and concerns. Where these concerns were ignored or over-ridden students had to accept the tensions generated within the group. Whilst some of the students negotiated in order to maximise a beneficial outcome for both sides, there was a great deal of "double crossing" (negotiating an agreement involving an undertaking to act in a certain way and then acting to the contrary), not only between teams but also within teams. In a number of groups team members sent a negotiator to meet the other team with certain instructions but then refused to comply with their side of the bargain, even in the face of protests from their own negotiator! In some cases it was evident that the other team members had agreed upon this strategy even before the person negotiating returned. Such incidents demonstrated the need for trust in negotiations and the fact that it cannot be lightly assumed. It also highlighted the destructive consequences of breach of trust to effective working relationships, not only within the game but throughout the whole semester. Certain students consistently found themselves under suspicion because they had been instrumental in renegeing on a deal in this first exercise. Of course the game illustrates the benefits of co-operative negotiation but its outcome shows that negotiators cannot assume that the "other side" will be working from the same assumption; negotiators are likely to have a range of motives, not all of which will be predictable.

We debriefed this session extensively — the double crossing had created considerable tension which had to be diffused! This provided us with an early object lesson on the importance of allowing proper opportunity for participants to ventilate and deal with issues and emotions raised by the exercises. The students were at first somewhat sceptical that the exercises they were doing could raise emotions which had the potential to distort their relationships with each other, and with us. However, in this as in most other things, they learned quickly and in fact became most insistent on saving time for debriefing even if it entailed running over class

time. After they had participated in a number of skills sessions, the students themselves raised a concern that issues and tensions within the small working groups were not always properly resolved by the class debrief. We suggested ways in which they could debrief between themselves before returning to the full class.

At this first debrief a good deal of time was spent on comparing outcomes: the students were anxious to know who had gained the highest score. This was probably to be expected from law students who have been trained to be result-oriented. There was also a concern among the students to know who had won or who was “right”. We found that directing attention to outcome detracted from the analysis and consideration of process. As we gained experience we found it more successful to ask questions that made the students consider the process. Examples are: “What did you learn from this exercise?” “Why do you think we gave you this exercise to do?” “What was successful?” “What was unsuccessful?” “What would you do differently next time?” “What was the most important thing you learned from this exercise?”

The exercise and the tensions it created served as a good lead into our next skills session which dealt with interpersonal conflict.³³ We emphasised the pervasive nature of interpersonal components in all types of disputes and the relevance of skills in handling interpersonal disputes to professional life as a lawyer. This emphasis on legal practice was important to convince the students of the relevance of spending two classes on interpersonal issues. Whilst we rightly did not anticipate any difficulty in persuading the students that negotiation, mediation or other more formal techniques would be relevant to their professional life as lawyers or to their studies so far, we were more hesitant about their acceptance of the relevance of interpersonal skills.

We were also conscious that some of the methods and exercises we used are personally confronting. In our first class we had issued information and a warning that the course would contain some material and methods which would be likely to be personally revealing and challenging. We invited the students to consider very carefully whether, bearing this in mind, they wished to continue their enrolment. To the best of our knowledge, one and perhaps two students, did discontinue for these reasons. Others found it stressful to dwell upon personal and private issues which perhaps related to

conflict within their own lives. These tensions sometimes disrupted class discussion and at other times were revealed to us in private.

We raised the issue of the importance of personality in negotiation with a game³⁴ which divided the students into four groups according to their styles of relating with other people. They were then asked to consider within these groups how they would wish to be dealt with in a negotiation, and how they would dislike being dealt with. This session needed sensitive handling as it required participants to think about and assess their own personalities and to assign publicly certain characteristics to themselves. It was necessary to discourage the students from taking the exercise too much to heart, to emphasise positive qualities and to remind them that the qualities to which they were admitting were not immutable, exclusive or necessarily dominant. It was helpful that both teachers were prepared to discuss their own personal characteristics (which are very different) and did not feel threatened by doing so with a group of students. It caused the students to think about their own styles of interacting and their responses to other styles. They also were called upon to consider how their styles differed from those of others.

This game had a considerable impact on the students; we were told that there had been lengthy discussions outside the classroom, there were continual references to it throughout the semester and some students administered it to their friends and partners. Pedagogically, this game caused the realisation that the course and outcome of negotiations can depend upon personality and other matters extrinsic to the matters at issue. Diverse personal characteristics can and do shape peoples' reactions and responses during the course of negotiations and an effective negotiator will be prepared for this. The obvious personal and emotional components of negotiation form a striking counter-balance to the assumed neutrality of legal process.³⁵

Other sessions explored the importance of interpersonal techniques: active listening; being conscious of and receptive to body language; being able to open up dialogue; being aware of blocks to communication and able to ease them; and summarising skills. Again examples from legal practice were used and the relevance of these skills to practice was emphasised.

It would have been easy and probably useful to extend the

section on interpersonal skills. We did not do so because we had so much other material to cover and, perhaps, because we were uncertain of the students' tolerance of an extended period of teaching generalised skills. What was important was the subsequent integration of the lessons learned in these sessions into classes and exercises more directly and obviously related to lawyers. By the end of the course the students expressed an appreciation of its overall cohesion and the cumulative development of skills.

In tandem with the lectures on negotiation the students attempted their first negotiation. This was a comparatively simple problem of a dispute over noise between neighbours and conflicting life-styles. It was thought to be important that this first negotiation should not be complex and should relate to a situation many people could readily envisage. There is a danger in the demands of the simulations outpacing the conceptual aspects of the course. Partners for negotiation were picked at random by us and were changed throughout the semester. The approach of the students to this negotiation (and all subsequent ones) was serious and thoughtful. It was a characteristic of their early exercises that they were more concerned with the results of the negotiations than with the process and many strongly favoured the combative approach.

The debriefing emphasised the application of interpersonal skills and the development of options for settlement of the dispute in order to link this practical exercise with previous classes and contemporaneous lectures on negotiation. Two problems which were never satisfactorily resolved caused students particular concern. The first was the dilemma faced by the person attempting co-operative negotiation when the other negotiator is uncompromisingly competitive; the second is the difficulty faced by the negotiator when the other side gives misinformation or obscures certain facts. Our response was that such situations occur in real negotiations and an aspect of skills development is awareness of these possibilities combined with rigorous preparation for negotiation. The need for objective criteria in assessing offers in a negotiation and ethical controversies were also addressed. The ethical issues were further discussed in the evaluative aspect of the course when students were able to refer back to problems they had experienced in the skills sessions. Different attitudes to these issues caused a certain amount of

continuing tension and friction between students.

The second negotiation had a more complex set of facts involving the private sale of a house. The simulations were designed to cover a wide variety of factual situations and progressively to introduce new dimensions into the negotiation. This time we provided class time for the preparation of the negotiation and stressed the importance of full and effective preparation. The class was divided into two groups to prepare options for settlement and to consider each side's best alternative to a negotiated settlement. The benefits of team teaching which allowed each group a faculty leader were apparent. Students were urged to do further preparation at home, a request followed up by only certain students. In the debriefing following the exercise the benefits of preparation were evident compared with the first exercise where there had been no formal preparation. Most students assessed their negotiation as having worked well. However a concern with results (primarily assessed in monetary terms) rather than process was still dominant, with some students concerned at disparities between the settlements of different negotiating pairs. A number who had been satisfied with the price and conditions they had negotiated became less so when they discovered the outcomes of other peoples' negotiations.³⁶

The next element in the skills component of the course was mediation. To introduce the concept of mediation and the role of a mediator we performed a role play of the mediation of a simple two party dispute about the distribution of property consequent upon the breakdown of a relationship. We enlisted the support of a colleague to play one of the parties. The students were asked to observe how the mediator handled the disputants; who controlled the process and outcome; and how the mediation progressed. They were also asked to consider whether a satisfactory solution was reached from the point of view of the parties and whether they thought it workable. Again this ran in conjunction with lectures and reading materials on mediation

The first mediation attempted by the students themselves was preceded by a brief lecture on the work of the Australian Commercial Disputes Centre and the development of alternatives to litigation for commercial disputes.³⁷ This mediation involved an employment dispute. Some of the students expressed frustration

with their performance as mediators, while others exhibited a tendency to be directive and to elicit information from the parties as if conducting an examination in chief. Most students expressed surprise at how difficult it is to mediate and how easy it is to fall back on familiar adversarial techniques. Although they were highly self critical the debrief demonstrated that their skills were improving and that their personal dissatisfaction arose from a considerable development of their knowledge of the processes involved, an understanding of the interlocking of the relevant skills and an awareness that it takes practice as well as aptitude to make a good mediator.

The initial concentration upon commercial mediation was balanced in the next session by a visit from the mediation trainer from the Community Justice Centres in New South Wales. A video presentation of a Community Justice Centre mediation³⁸ provided graphic detail both as to the style of mediation used by the Centres and as to the type of cases that arise. In discussion the differences between the use of mediation in these disputes and commercial disputes were considered.

Another element of the skills section of the course required groups of 5–6 students to design a dispute resolution process tailored to a particular commercial dispute. This exercise was given at the end of a series of classes which had covered elements of conciliation, expert appraisal, arbitration and a number of hybrid processes, as well as legal problems with respect to the use of each. The students were thus now familiar with a range of additional processes and their potential advantages and shortcomings. The groups were allowed fifty minutes to do the exercise and then a rapporteur for each group explained the scheme they had devised. They were also asked to identify the features of the process that had appeared attractive in the context of the particular dispute. Student feedback on this exercise was very positive and the processes they designed were appropriate, imaginative and impressive. It is perhaps true to say that there was particular enthusiasm for this part of the course from some students because it was seen as being more legalistic and because of its commercial and case-law content which they saw as particularly relevant to their intended careers. A number of groups designed processes which included arbitration with which they felt more familiar than other methods. On the other

hand some groups were unable to agree upon a scheme because of internal conflict and disagreement which they were unable to overcome in the time available. In the standard law school curriculum very little (if any) time is allotted to co-operative or group working. Whilst developing this skill had not been the object of the exercise it became a useful side issue for discussion. The conventional form of legal training induces competition rather than working together towards a common goal.

The second mediation exercise was given to the students in that part of the course which dealt with the application of additional processes in particular areas of law. The subject of the mediation was a dispute over access to the two children of a divorced couple. By this time the students had been presented with a considerable amount of material on mediation, including the New South Wales Community Justice Centre video,³⁹ another video of the mediation of an access dispute;⁴⁰ readings on the resolution of family disputes and a lecture on the statutory framework for the conciliation of family cases. The developing skills of the students and their ability to relate what they had seen and read to their own attempts at mediation were obvious in this second mediation.

After this second mediation two thirds of the students had acted as mediators and all had participated in two mediations. We had originally intended to provide an opportunity for all the students to act as mediators, but at this stage of the course time constraints started to become pressing. Even a full two hour class is inadequate for a mediation and a proper debriefing session; a third mediation in class hours was an impossibility. However it was plain that certain students were disappointed not to have had the opportunity to act as a mediator. We therefore prepared a third mediation on the break up of a partnership which combined business, financial and personal disputes and those students who wished to do so organised the mediation in their own time. This was not an ideal solution as there was no formal debriefing, although students who performed the exercise reported that they conducted their own debriefing.

The final practical exercise was one in which the students were asked to role-play the screening agent of a multidoor court and which therefore involved the students in considering a range of different legal disputes against a range of processes and selecting an appropriate match. They attempted this after a lecture on multi-

door court schemes in the United States.⁴¹ This again required group participation which was more successful on this occasion.

The exercises throughout the skills component of the course were aimed at teaching a range of skills in a number of contexts in a systematic and developmental way. Their subject matter was broad and new aspects were introduced each time. The debriefing attempted to focus on the particular aspect that the students had been asked to address, without forgetting earlier lessons. The readings were to correlate with the exercises and supplement our instruction. Thus the earliest exercises required attention to be given to interpersonal skills, then attention was drawn to negotiating techniques and the need for adequate preparation, through to concentrating on skills required of a mediator. These practical exercises, combined with those that required students to consider the merits and demerits of the various mechanisms against the characteristics of particular disputes, required a range of skills. Fitting the process to the dispute is one of the most difficult aspects of dispute resolution and these exercises at least alerted them to the many facets of a dispute, the diverse factors that might contribute to resolution or non-resolution and the possible consequences of attempting one process in preference to another.

Critical Evaluation of Alternative Dispute Resolution Processes

In the final weeks of the course we drew together and expanded a number of critical and evaluative issues which had been suggested or touched upon throughout the course. We wished the students to evaluate the reasons for the recent enthusiasm for alternative dispute resolution from so many quarters, including some members of the judiciary and some politicians. We then wished to question who is benefited by the continuing and increasing use of additional methods and also to consider whether the interests of individuals and particular groups are adequately protected by additional methods.

The first area of discussion centred around issues of culture and the use of non-litigious methods for minority cultures, especially when they are imposed by the dominant culture. A significant part of this discussion focused on the appropriateness of additional methods for the resolution of disputes involving Aboriginal

people,⁴² both in individual discrimination disputes⁴³ and wider structural disputes relating to the disadvantaged position of Aborigines within white culture.⁴⁴ Despite the presence of many students from non-English speaking backgrounds these cultural issues were patently unfamiliar to many of the students and it seemed to be the first time that many had considered how processes for the resolution of disputes (including litigation) affected people who are not from the dominant culture. Many were uncomfortable with the discussion and resorted to ethnic stereotyping with which they were also instinctively uneasy. Despite Australia's multicultural society there is very little input on such issues in the Sydney Law School curriculum in general, which seems a cause for concern.⁴⁵

From disputes with cultural implications we moved naturally onto the issue of power in alternative dispute resolution processes. We considered in particular whether parties are sufficiently protected where there is an imbalance of power between them, again comparing litigation with alternative methods.⁴⁶ We focussed on power imbalance in mediation; it has been suggested that mediation can remedy imbalances of power by empowering the powerless and such arguments were evaluated.⁴⁷ Questions of power inevitably raise gender issues and we explored some of the developing feminist literature on alternative dispute resolution processes. Specifically we examined whether alternative methods are particularly appropriate to women, or problematic for them.⁴⁸ These questions were especially addressed in relation to mediation of domestic violence cases. The American experience and literature was examined and its relevance to Australia considered.⁴⁹ Any real attempt to appraise the use of mediation in domestic violence disputes and to examine the feminist literature requires reference to non-legal materials. Questions such as the causes of domestic (and other) violence, the impact of mediation and the criminal law upon violent men and the reasons why victims stay with the offenders necessitate interdisciplinary study with readings from sociology, social welfare, criminology, counselling and psychiatry. Other issues relevant to the politics of informal justice were also considered; the reasons for the current enthusiasm for alternative means of resolving disputes, the social and political context of informal justice, the question whether alternative methods offer an

informal, consensual and empowering system for resolving conflict or in reality a second class system of justice.⁵⁰

Throughout this final section of the course we were attempting to unravel the rhetoric and the reality of alternative dispute resolution processes both in the light of developments in Australia and the longer, more diverse experience in the United States. There were great variations in the level of sophistication of the students in dealing with these issues of policy and theory, in their familiarity with feminist literature and in their ability to deal with the required interdisciplinary material. We had reservations about dealing with the theoretical issues together at the end of the course. It seemed to us that there were two conflicting considerations and we were not convinced that we found the appropriate balance between them. On the one hand we felt the students needed to acquire sufficient knowledge about alternative dispute resolution processes, their application and advantages before they could be expected to evaluate them from various critical perspectives. Further, some students needed more time to get to grips with the theoretical and interdisciplinary material. Two aspects of the Sydney law curriculum make this especially the case: first, in the compulsory subjects students are generally unaccustomed to interdisciplinary study and, secondly, even though there is a compulsory jurisprudence component in the curriculum, it does not require students to become familiar with an overview of the major components of legal theory.⁵¹ On the other hand the early non-critical approach had frustrated some students who were orientated towards the critical literature and wished it to be dealt with immediately. Other students had begun by perceiving alternative dispute resolution processes as unqualifiedly beneficial and advantageous to disputants and were later distressed when a critical perspective was introduced. In this context we stressed our conviction that the proponents of additional methods must be self-critical and self-evaluative. An uncritical embracing of additional methods will not further their wider acceptance or appropriate adaptation to different contexts. Nor will it secure high standards or ensure the proper protection of participants. Those who are designing, working with or researching into alternative dispute resolution processes must constantly appraise their work from a variety of perspectives.

TEACHING METHODS

Most of the teaching in Sydney University Law School is through lectures and tutorials. A course in dispute resolution requires very different skills. Acquiring these skills was an important starting point. Many of those involved in alternative dispute resolution in Australia have attended specialist courses in America, notably the Harvard Negotiation Program and programs presented by CDR Associates in Colorado. We had not had the opportunity to do this and had therefore to assemble our skills from a number of sources. We both had participated in and benefited from different sessions of the Australasian Law Teaching Clinic.⁵² We found the dispute resolution course to be an ideal opportunity to use and expand the skills and information acquired there and to experiment with a variety of teaching techniques. In addition one of the instructors had attended a two and a half day Negotiation Workshop by the Harvard Program while it was in Australia⁵³ and a mediation training session with the Australian Commercial Disputes Centre,⁵⁴ while the other participated in a skills training course presented by the Conflict Resolution Network. In addition both of us have previously attended seminars and workshops on grievance procedures within institutions (notably Sydney University) and on conflict management. We found that these various training sessions gave a wide pool of resources to draw upon and enabled us to develop our own ideas and methodology without excessive dependence upon any one source. There is some danger in Australian instructors placing too heavy a reliance upon a particular American course they have attended without seeking input or alternative methods from other venues. However the preparation time for the course was consequently much greater than the hours spent preparing lectures. If one is to teach skills, it is necessary to develop and refine them oneself. Our initial preparation therefore included attendance at these courses in dispute resolution skills, and we feel that continued involvement will be necessary in a constant process of learning and polishing our own skills. Greater practical experience of mediation would of course be of enormous benefit in teaching skills. Mediator training sessions, for example by both Community Justice Centres and the Family Mediation Centre, rightly require a considerable

commitment of hours spread over a lengthy period of time. Given our other teaching duties and research interests neither of us has so far been able to take advantage of such training and experience.

An early decision related to the distribution of materials in the course. There is no Australian university textbook on dispute resolution in general,⁵⁵ although there is a growing body of literature in the legal journals⁵⁶ and a number of specialist books on, for example, commercial arbitration⁵⁷ or arbitration in the construction industry.⁵⁸ In the absence of an overall text two volumes of printed materials containing extracts from readings were prepared for the students. The first volume of materials, used at the beginning of the course, included a range of articles on alternative dispute resolution processes and their application in Australia and overseas, while the second focused on critical and evaluative material and was especially relevant to the final section of the course. While we felt that the students needed to supplement the lectures and discussions with readings we did not provide sufficient cohesion between them and classroom discussion. In retrospect we had rather assumed they would find the appropriate pages and study them in their own time. Had we organised the materials more specifically around class topics the less-confident students would have gained reassurance from being able to prepare in advance of the class and be sure of classroom discussion around what they had read. Our aim with the readings had been coverage, rather than putting emphasis on what we regarded as essential for understanding of specific topics and we may not have made this sufficiently clear.

Buzz groups and brainstorming sessions were used extensively to generate discussion. Our class limit of thirty enabled us to take advantage of having a relatively small group of lively and articulate students who became enthusiastic about participatory methods of teaching. Too often the “chalk and talk” methods frequently resorted to with large lecture groups ensure that a group of thoughtful, articulate and opinionated students is forced into silence for long periods of time. Admittedly such methods are economic of teaching resources and we were very conscious of our ratio of two members of Faculty to thirty students. Participatory teaching methods were embraced with enthusiasm by the students. Once convinced that their contributions were not only welcomed but

structured into the class, keeping the students quiet was more of a problem than persuading them to talk. On the occasions when we used a straight lecture format, the students quickly became restless and wanted to participate. It sometimes became necessary to explain that there was a body of information which we wished to impart over the next period of time and to ask them to allow us to do so with minimum interruption. This experience justifies the attempts that have been made at improving the staff/student ratio at Sydney Law School and made us only too aware of how difficult such teaching practices are in the many courses which have unrestricted enrolments. It raises the institutional policy question of whether other courses should be allowed to limit numbers of students to facilitate participatory teaching methods but at the cost of restricting student access to preferred courses.

We taught the skills components through a variety of techniques. One of the most useful was role-playing. We originally used this technique at the beginning of the course to generate discussion on the nature and variety of disputes: how disputes are caused, how they escalate, how disputes are resolved, why they need to be resolved, and what is meant by a resolution to a dispute. We began this session by staging a dispute we had roughly scripted before the class. One of us began as if to start a lecture when the other rudely interrupted. With raised voices and some heat we enacted a protest at the interruption, an accusation of pulling rank, and a complaint of lack of concern for personal difficulties known to the other. Our original plan had been to ask the students to describe the elements of this dispute, to consider how it had escalated, whether it could have been avoided, whether it could have been stopped, and how it could have been resolved. We had also planned to debrief between ourselves, to explain the importance of debriefing and why we would do it for every exercise. We had then planned to use buzz groups to discuss types of dispute and their resolution, and to brainstorm the questions: "What is a dispute?" "What methods are currently used to resolve disputes?" "Why resolve disputes?" "What do we mean by a resolution of a dispute?".

The impact of the role-play was considerable and all the issues we had planned to cover in buzz groups and brainstorming came spontaneously from the immediate discussion. Whilst not all of the

class were impressed with our histrionic skills, what appeared for a few moments to be a fight in class between two teachers most certainly seized their attention. Their initial consternation quickly gave way to amusement as they realised what we were doing. However the impact of that very brief role-play was sufficient to maintain the momentum of a two hour class without the need for the use of any other techniques to encourage participation, change pace or elicit ideas and discussion.

We learned a very basic and useful lesson from that first role-play; we had very carefully discussed the impact of it on ourselves, as well as its utility as a teaching tool. What we had not, and ought to have considered, was that the first reaction of the students to our “dispute” was one of concern for the likely impact upon themselves. They thought for a moment that they had committed themselves to a course which would be a disaster, with co-teachers unable to agree and sufficiently out of control to argue in class. Perhaps their palpable relief when they realised that the dispute was not real contributed to the enthusiasm with which they dealt with the issues we had planned to raise.

After the success of this first role-play, we used the technique several more times, specifically to introduce various skills. For example, the most extensive role-play was of a mediation, with one of us playing the mediator, the other one of the parties, and a volunteer (conscript) colleague the other party. We allotted sufficient time to demonstrate the full process and linked it with readings on mediation techniques. Again this worked well. The students found it amusing, instructive and provoking. In debriefing the students were able to question the participants about issues which had concerned them and to explore the participants’ reactions to the process. It also made some students less reticent about being asked to take part in role-plays; we after all were assessing their performance in the skills exercises, and they appreciated that we were prepared to do likewise. Shorter roleplays demonstrated active listening, use of body language and interviewing techniques.

Another method used in skills teaching was the presentation of videos, especially of mediations. These were carefully chosen to demonstrate the stages of a mediation and different styles of and approaches to mediation. These videos triggered class discussion

about what had been seen during the course of the mediation. However the students preferred the live role-play since they could challenge the participants for explanations of their behaviour and receive active feedback from them.

Inevitably the most effective technique for teaching skills was personal participation in exercises followed by debriefing and constructive criticism from us and fellow students. It would have been beneficial to have had a video camera to film some of the students' negotiations and mediations. To be able to review their own and perhaps others' performances, to examine their non-verbal behaviour, and consider and reconsider their interventions and styles, their problems and strengths would have accelerated the students', and our own, learning immeasurably. This is something we would like to introduce in future years.

The sessions described above required an enormous amount of preparation. Each role-play prepared for the students had to be drafted to include issues appropriate to their skills, understanding and experience at that time, to be manageable within the time frame and yet to include enough material to stretch the participants, to be as realistic as possible, and to cover a range of subjects over the course as a whole. Ambiguities had to be avoided. The facts had to provide sufficient flexibility to allow the mediation or negotiation to be developed without becoming weighed down by a mass of improvisation. The script for most exercises included a set of common facts known to both parties, (or a script of information known by the mediator) and separate information for each of the parties, sometimes running to two pages for each. We wrote most of our exercises ourselves which gave us complete familiarity with the problems, but the time-consuming nature of this task means that a priority for any teacher of dispute resolution should be the collection of begged or borrowed negotiation and mediation exercises to be used, adapted or redrafted (always of course, with due acknowledgement).

We were able to weave in at the appropriate points a number of guest speakers (both Australian and overseas) with areas of specific expertise. These speakers provided personal knowledge of the operation of such enterprises as the multi-door court in the United States, the use of alternative dispute resolution processes by the legal profession, the work of Community Justice Centres, the work

of the Australian Commercial Disputes Centre and cultural issues in dispute resolution. They also provided evidence of the increasing use of alternative dispute resolution in different contexts and gave different perspectives on its efficacy.

While a broad range of teaching methods provides variety and interest and, more importantly, caters for a number of different learning styles,⁵⁹ preparation is time-consuming and teaching more stressful, especially when methods depart from the students' expectations of the classroom. Explanations of the objectives of the exercises and the reasons for employing particular methods were felt to be necessary, especially at the beginning of the course.

CO-TEACHING

The entire course was co-taught, that is each class was jointly planned and we were both present at, and participated in, every session. Even when one of us had the main responsibility for presenting a particular subject or leading the discussion, the other was always present and involved in the class to some degree. This style of teaching required a great commitment of time to class preparation but was one of the most rewarding aspects of the course from a number of points of view. We were able to give each other constructive feedback after each class, and exchange ideas for improvements to teaching technique and substantive content. Given that we knew each other well before the course the level of stress induced by constant scrutiny of one's teaching was reduced. We have very different teaching styles and were able to learn a great deal from each other, as well as to take advantage of our different styles in planning classes. As we came to know each other better in the context of the classroom, co-teaching even extended to completing each other's sentences (not always to the satisfaction of the other). Having two teachers was also extremely beneficial in facilitating student participation. Whilst one of us was responding to questions or comments the other could note the order in which other students were volunteering to contribute, note carefully those who had already frequently spoken, and encourage students who were usually quiet. During brainstorming sessions one of us received contributions from the class which the other recorded on the whiteboard. We alternated these functions to avoid either of us being seen as the subordinate in classroom activities.

Having two teachers was essential in organising, supervising and assessing the skills exercises. Given that the negotiation and mediation simulations and class participation were all assessable, two people were needed to ensure that all the negotiating pairs or mediating groups were observed for a sufficient period of time to enable a fair assessment of their progress to be made. We were also able to compare notes on individual students' progress and reach a balanced assessment of their grades. While assessment loomed large with the students, the objective of the exercises was educative; a single teacher would not have been able to observe student participation adequately and provide on the spot assistance and advice. We were able to come to know their personalities, and to observe their particular talents and areas of weakness and therefore able to give encouragement and correction on an individual basis, which would have been impossible alone.

Co-teaching enabled two responses to some of the questions raised by the students, allowing different perspectives to be raised naturally in context. This was much appreciated by the students. The fact that their teachers had different perspectives and opinions supported the development of their own individual, critical and analytical views on dispute resolution and foreshadowed the evaluative component at the end of the course. In the course assessments⁶⁰ student reactions were all positive. Typical comments were:

“ . . . useful and stimulating . . . prevented any possibility of boredom”;

“ . . . greatly expanded the scope and my appreciation of the issues that arose in the course” and

“ . . . made the course much more interesting.”

The students also appreciated having two teachers with disparate styles, areas of expertise, and differences of opinion and approach on some issues. They reported enjoying and learning from two different points of view. They also watched and absorbed, sometimes with amusement, the fact that we were engaged in a constant process of negotiation with each other about our teaching and classroom activities. Both we and our students learned from this spontaneous “live” negotiation which took place throughout the course.

Co-teaching is very resource intensive, especially when the

teaching time of two staff members is devoted to a group of only thirty students. We found it impossible to convince all our colleagues that we were not each teaching half a load in this course, and that the preparation time for the classes as well as the class hours was easily equivalent to a full two unit optional subject for both teachers.

The course made us consider a number of aspects of co-teaching. Neither of us felt threatened by the presence of the other in the classroom or felt the need to compete for the students' attention or good opinion. While we have very different opinions on a number of the crucial topics of alternative dispute resolution we respect each other's viewpoint and both feel that we benefit from hearing and considering the other's. It has been noted that a central point of feminist theory and methodology (to which we both subscribe) is an emphasis on co-operation and mutual support rather than on an individualised, competitive approach which may make itself felt even in the classroom.⁶¹ In other words the success of our co-teaching was more than simply a matter of compatible personalities, it fed off our personal and intellectual commitment to feminism. However our genuine collaboration and the hard work that was necessary to achieve it was not recognised in full in our teaching allocation. Nor is genuine collaborative effort always recognised in written and published work.

COURSE ASSESSMENT

It was important that the assessment scheme reflected the course objectives and that the students were assessed according to their performance in the different components of the course. Accordingly the first element of assessment was class participation and general skills aptitude. Fifteen per cent of the overall mark was allocated to this and was based on observation of the students' grasp and development of the various skills and their ability to put into effect new skills as they were introduced. The students had some apprehension that they had to be "good" negotiators to do well in this form of assessment and that failure to reach agreement would prejudice their chance of a good mark. We tried to reassure them that the marks would be based on effort, awareness of the dynamics of the negotiation, improvement in skills and not on the outcome. There was also some hostility about fellow-students who

had made an exercise “difficult”. Again this was part of the anxiety about outcome from students who were concerned that they might lose marks if they did not achieve the “best deal”. It was important that students learn that there are difficult negotiators in the real world and that our marks were awarded for their skill in handling their particular negotiation. A problem for us was how to assess a student who after consideration of the co-operative techniques of negotiation rejected them in favour of “hard” adversarial bargaining.

A further 10 per cent was allocated to a final negotiation exercise which was carried out at the end of the course. Negotiation was chosen in preference to mediation because of the need to have all the students in similar roles. The problem involved negotiations for the notional sale of the Law School building and required consideration of the interests of a number of participants including the Law School, the University, the State Government and the potential purchasers. The situation provided scope for consideration of options other than price although this was still the focus of many of the negotiations. Each negotiating team was observed for 12 consecutive minutes by one teacher and for shorter periods by the other instructor and Professor Tractenberg, who was co-opted to assist in this form of assessment. All three instructors found themselves very much in agreement in the marks for individual students. Examining practical skills can bring unexpected problems, as when we realised that we had in fact 29 students,⁶² leaving an uneven number to engage in the final exercise. The same colleague who had role played in a mediation was co-opted to negotiate opposite a student, which caused that student some additional tension.

The students were required to write a 2,500 words research essay worth 25 per cent of the mark for the course. Students were encouraged to pursue their own interests and select their own essay topic after checking with one of us that the chosen topic would be appropriate. A number of students took advantage of this and, as stated earlier, research essays were written on a wide range of topics.

The examination was designed to allow students to demonstrate their understanding and evaluate the application of alternative dispute resolution processes. It comprised two compulsory

questions, one requiring a comparison of different processes for the resolution of commercial disputes, the other requiring an assimilation and evaluation of the critical materials.

One consequence of diverse forms of assessment with each testing different skills is that it is harder for students to gain consistently high marks. Inevitably some students who had demonstrated an effective grasp of the practical skills wrote weaker essays, while others were more effective in the standard examination. However we felt that the balance of assessment rewarded those students who had worked consistently and thoughtfully throughout the semester.

CONCLUSION

Our first conclusion at the end of the course was that it had been fun for us and for the students. Our enjoyment did not detract from the fact that it had required much hard work of a different nature from that generally associated with teaching law, although just as intellectually demanding. Pedagogically we expanded our skills and experience considerably. Unfortunately the time spent in attendance and participation in courses to prepare us for the skills sessions, and in preparation for teaching the course in an imaginative and participatory way is unlikely to carry a great deal of weight on an academic curriculum vitae or with promotions committees. The immense amount of work needed to familiarise ourselves with the insights of other disciplines and to incorporate them into our teaching is also characteristically unrewarded.

The way in which a course like this can be taught and its reception depends in part on the culture of the institution. The culture of Sydney Law School is that of a law school with a reputation for excellence, but for excellence in conventional black letter law teaching and researching. However it is also an institution in the process of undergoing great change in curriculum and attitude. This climate for change engendered support for what we were doing. It was, for example, novel to have limits on class size and to have team teaching without regarding each instructor as carrying only half a load or block teaching. While the students were, for the most part, prepared to experiment and to be tolerant of innovation they were a self-selected group. Even with these students some time had to be expended in explaining methodology

and in offering reassurance. It was important that we had explained our objectives at the outset. Of particular concern to some students was the introduction of non-legal materials and the corollary of lack of “hard” law. On the other hand when hard law was introduced (for example analysis of the *Commercial Arbitration Act*) there was some impatience and from some students a desire to return to the “games”. It was difficult to maintain a consistent balance between innovation in material and method and traditional legal approaches. It may be that introduction of similar courses into other Faculties or Law Schools would present teachers and students with very different issues. While the programme and skills we developed can perhaps most readily be generalised to the training of practising lawyers we are aware of the growing integration of dispute resolution into other disciplines. It is hoped that this article will serve to stimulate further discussion and debate and exchange of views on the teaching of dispute resolution in a variety of contexts.

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¹ The course had been introduced by Jenny David who had come to dispute resolution through work on victims and offenders in the criminal process. See J David, Teaching a Dispute Resolution Course in a Law School in Australia (1988), paper to the Society of Professionals in Dispute Resolution, Los Angeles. Our legal backgrounds are in family and discrimination law and international law respectively.

² As well as the Sydney course, to the authors’ knowledge alternative dispute resolution is currently taught or proposed at the Universities of Melbourne, Adelaide, Queensland, Western Australia, Wollongong, and New South Wales, Bond and Macquarie Universities and the University of Technology (NSW).

³ For example as it is integrated at Melbourne University by Richard Ingleby in the teaching of Family Law. See R Ingleby, (1989) 1 *Legal Educ Rev* 237. Bond University Law School circulated a proposal for a Dispute Resolution Centre in March 1989.

⁴ There are parallels here to the debate about the introduction of a “women’s” course into a curriculum in law schools in the form of Gender and the Law courses. See A Byrnes, *Feminism and Legal Education* (unpublished paper, 1987) citing, MJ Mossman, *Otherness and the Law School: A Comment on Teaching Gender Equality* (1985) 1 *Can J of Women and L* 213; C Boyle, *Teaching Law as if Women Really Mattered or What About the Washrooms?* (1986) 2 *Can J of Women and L* 96.

⁵ The increase in dispute resolution courses in American law schools was dramatic in the years 1983–1986. In 1983 25 per cent of ABA-accredited law schools offered courses in this area, by 1986 the figure was 63 per cent. See American Bar Association, *Directory of Law School Dispute Resolution Courses and Programs* (Washington DC: American Bar Association, 1986) at 2.

⁶ In 1984 the *Journal of Legal Education* devoted a substantial part of one issue to the teaching of dispute resolution. See (1984) 34 *J Legal Educ*. We hope to see similar discussions generated in Australia.

- 7 These objectives were printed in a course outline which also contained assessment information and was given to students at the first session. The objectives were then discussed with the students.
- 8 The question of the training and accreditation of mediators is the subject of a reference to the NSW Law Reform Commission. See the discussion paper, NSW Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators* (Sydney: NSW Law Reform Commission, 1989). The New South Wales Law Society Dispute Resolution Committee prepared *Guidelines for Solicitors who Act as Mediators*, approved by Council May 1988 in which it was said that solicitors should not so act without appropriate training. It was not, however, specified what training would satisfy this requirement.
- 9 In the words of Marc Galanter: “[Skills] exercises do not presume to make students expert negotiators any more than the torts course aims to make them personal injury specialists; they are there to provide a sense of the elements, the parameters, the possibilities.” M Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process* (1984) 34 *J Legal Educ* 268, at 271.
- 10 M Galanter, A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States (1985) 12 *J L & Soc’y* 1.
- 11 See for example the address of Sir Laurence Street to the 14th Australasian Law Reform Agencies Conference, reported in [1989] *Reform* 182.
- 12 Compare E Green, A Comprehensive Approach to the Theory and Practice of Dispute Resolution (1984) 34 *J Legal Educ* 245, at 250; LL Fuller, The Forms and Limits of Adjudication, (1978) 92 *Harv L Rev* 353.
- 13 The course is a two unit elective which entails four hours of class contact over a thirteen week semester. The students are expected to study assigned readings outside the formal contact time.
- 14 F Sander, Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles (1984) 34 *J Legal Educ* 229.
- 15 R Moberly, A Pedagogy for Negotiation (1984) 34 *J Legal Educ* 315.
- 16 L Riskin, Mediation in Law Schools (1984) 34 *J Legal Educ* 259.
- 17 See Sander, *supra* note 14. For a description of courses, clinics, teachers, key contacts, sample course descriptions and teaching methods in the United States, see American Bar Association, *Directory of Law School Dispute Resolution Courses and Programs* (Washington DC: American Bar Association, 1986).
- 18 The traditional method of teaching at Sydney Law School is through lectures and tutorials. There is frequently little student participation in lectures. Dispute resolution is an unusual course in a number of respects: a restricted number of students (30); co-teaching in all classroom sessions; student participation expected and encouraged in all sessions and the skills training.
- 19 See David, *supra* note 1.
- 20 We do not, however, accept that the skills we were teaching are inappropriate to the reality of legal practice. The skills appropriate to legal practice and their place in the law school curriculum are reviewed in JO Mudd, Beyond Rationalism: Performance Referenced Legal Education (1986) 35 *J Legal Educ* 189, although this article is marred for us by its sexist language. See also KW Marcel & P Wiseman, Why We Teach Law Students to Mediate [1987] *Mo J of Dispute Resolution* 77.
- 21 Mediation is perhaps the furthest from lawyers’ traditional skills, and appears to have been more difficult to introduce in the traditional United States law school curriculum. See Riskin, *supra* note 16. Compare AM Sacks, Legal Education and the Changing Role of Lawyers in Dispute Resolution (1984) 34 *J Legal Educ* 237.
- 22 One aspect of the new curriculum introduced in 1988 was to provide greater flexibility through the introduction of more electives.
- 23 Final Year students may also take a non-graded professional skills programme in which members of the profession play a significant role. This does not focus upon alternative dispute resolution processes.
- 24 This has been especially the case in the construction industry in Australia. See

- for example Barrell et al, *Report on Resolving Disputes in the Construction Industry* (unpublished: 1988). The report was prepared by representatives of the Australian Federation of Construction Contractors, the Australian Construction Services, Department of Administrative Services and Australian Institute of Quantity Surveyors. It concluded that, "it is a reasonable perception that arbitration has broken down as a cheap and effective means of resolving construction disputes." *Id.* at 9.
- ²⁵ For example, *Commercial Arbitration Act* 1984 (NSW). Every Australian State except Queensland introduced largely uniform legislation on commercial arbitration in the mid-1980s.
- ²⁶ See NSW Law Reform Commission, *supra* note 8.
- ²⁷ See for example the publications of Concilio-Arbitration Ltd in London.
- ²⁸ G Marcus & P Marcus, Fact-Based Mediation for the Construction Industry (1987) 42 *Arbitration J* (No 3) 6.
- ²⁹ For instance at a seminar for Teachers of Alternative Dispute Resolution held at the Australian Commercial Disputes Centre, June 23–24 1989.
- ³⁰ They were presented in class in chart form on an overhead for ready referral and cross reference.
- ³¹ See Green, *supra* note 12, at 252 n 34. He comments that the game is commonly attributed to AW Tucker, a mathematician but was popularised in RD Luce & H Raiffa, *Games and Decisions* (New York: Wiley, 1957).
- ³² This is the experience of most educators in using the XY game. Compare Green, *supra* note 12, at 252–53.
- ³³ Hilary Astor participated in the Professional Skills Course on conflict resolution conducted by the Conflict Resolution Network. A number of the exercises we used in our classes derived from suggestions made and materials used in that course. H Cornelius, S Faire & S Hall, *Trainers' Manual* 5th ed (Chatswood, New South Wales: Conflict Resolution Network, 1988).
- ³⁴ The game is *called* the Disc Model. A diagrammatic explanation is to be found in Cornelius, Faire & Hall, *supra* note 33.
- ³⁵ This characterisation is of course exploded in the writings of inter alia the realist, critical legal studies and feminist theorists. It is still surprisingly pervasive among many students.
- ³⁶ Compare the observations in GR Williams, Using Simulation Exercises for Negotiation and other Dispute Resolution Courses (1984) 34 *J Legal Educ* 307, at 311.
- ³⁷ This mediation was supervised by Jenny David then Education and Research Manager of the Australian Commercial Disputes Centre.
- ³⁸ *Mediation Can Change the World* (video produced by McPhee Productions Pty Ltd, 1988). This video, which was produced with a grant from the Law Foundation of New South Wales, was awarded the Gold Mobie in the Public Service and Public Relations category in the International Television Association of Australia Award 1988.
- ³⁹ *Id.*
- ⁴⁰ For example, *Not When She's Around: Michael and Debbie* (video produced by JM Haynes of Mediation Associates Inc, New York, distributed by The Family Advancement Resources Co-op Ltd, Parramatta, New South Wales, 1987).
- ⁴¹ At the end of the course we were fortunate to have the input of Paul Tractenberg from Rutgers University, New Jersey who gave the lecture on the multi-door courthouse.
- ⁴² We were greatly assisted by Murray Chapman from the Human Rights Commission.
- ⁴³ For example, denial of access to service in hotels as in *Coe v Bobilak* (1984) EOC 92-026; *Maynard v Neilson* (1987) EOC 92-199.
- ⁴⁴ Human Rights and Equal Opportunities Commission Australia, *Toomelah Report: Report on the Problems and Needs of Aborigines Living on the New South Wales-Queensland Border* (Sydney: Human Rights and Equal Opportunities Commission, 1988).
- ⁴⁵ G Bird, *The Process of Law in Australia: Intercultural Perspectives* (Sydney:

- Butterworths, 1988) provides an accessible and excellent text for the introduction of these issues into other courses, especially first year legal institutions courses. A study is being carried out at Sydney University into the inclusion of multicultural issues in the university curriculum.
- 46 OM Fiss, *Against Settlement* (1983-4) 93 *Yale LJ* 1073; C Menkel-Meadow, *Judges and Settlement: What Part should Judges Play?* (1985) 21 *Trial* 24.
- 47 AM Davis & RA Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes* (1984) 6 *Mediation Q* 17.
- 48 C Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process* (1985) 1 *Berkley Women's LJ* 39; J Rifkin, *Mediation from a Feminist Perspective: Promise and Problems* (1984) 12 *L & Inequality* 21; A Bottomley, *What is Happening to Family Law? A Feminist Critique of Conciliation*, in J Brophy & C Smart eds, *Women in Law* (London: Routledge & Kegan Paul, 1985) at 162; M Leitch, *The Politics of Compromise: A Feminist Perspective on Mediation* (1986-7) 14-15 *Mediation Q* 163.
- 49 LG Lerman, *Mediation of Wife Abuse Cases: the Adverse Impact of Informal Dispute Resolution on Women* (1984) 7 *Harv Women's LJ* 57; LG Lerman, *Stopping Domestic Violence: A Guide for Mediators*, in H Davidson, L Ray & R Horowitz eds, *Alternative Means of Family Dispute Resolution* (Washington DC: American Bar Association, 1982) 429; CA Bethel & CR Singer, *Mediation: A New Remedy for Domestic Violence*, in H Davidson, L Ray & R Horowitz eds, *Alternative Means of Family Dispute Resolution* (Washington DC: American Bar Association, 1982) 363.
- 50 See RL Abel ed, *The Politics of Informal Justice* (New York: Academic Press, 1982).
- 51 Students select one strand of jurisprudence which gives them an in-depth knowledge of that one area but not familiarity with other aspects of legal theory such as feminism or critical legal studies.
- 52 B Boer, *The Australasian Law Teaching Clinic Its Past, Present and Future* (1989) 1 *Legal Educ Rev* 145.
- 53 Sponsored by the Law Council of Australia, Business Law Section, August 24-26 1988.
- 54 Run by Professors Peter Adler and Louis Chang from Hawaii.
- 55 In the absence of a distinctively Australian text SB Goldberg, ED Green & FEA Sander, *Dispute Resolution* (Boston: Little Brown, 1985 & suppl. 1987) is frequently referred to. See also G Pears, *Beyond Dispute: Alternate Dispute Resolution in Australia* (Sydney: Corporate Impacts, 1989). The authors are currently writing *Dispute Resolution in Australia to be published* by Butterworths, Sydney, in 1991. It is hoped that this will be of interest to legal and other practitioners as well as university law schools.
- 56 A specialist journal, *The Australian Dispute Resolution journal* published by Law Book Company commenced publication in February 1990.
- 57 For example, JJA Sharkey & SB Dorter, *Commercial Arbitration* (Sydney: Law Book Co, 1986); MJ Fulton, *Commercial Alternative Dispute Resolution* (Sydney: Law Book Co, 1989).
- 58 For example, P Fitch, *Commercial Arbitration in the Australian Construction Industry* (Sydney: Federation Press, 1989).
- 59 On identification of learning styles and the importance for effective teaching of recognising these different styles see D Kolb, *Learning-Style Inventory* (Massachusetts: McBer & Co, 1985).
- 60 The Faculty of Law no longer requires mandatory course evaluation by students. However, as this was a new course for us and one which employed teaching techniques unfamiliar to the students we were anxious to receive some feedback. We therefore requested them to complete an anonymous course assessment which included a question on co-teaching. Unfortunately we did not allow sufficient class time for completion of the questionnaire and therefore did not receive a full response.
- 61 See Byrnes, *supra* note 4, citing JR Elkins, *On the Significance of Women in Legal Education* (1983) 7 *ALSA Forum* 290, at 291.

⁶² Although the course had a ceiling of 30 students one dropped out too long after enrolment to allow another student on the waiting list to enrol.