National Alternative Dispute Resolution Advisory Council

Third National ADR Research Forum
La Trobe University, Melbourne

13-14 July 2007

(Prepared for NADRAC by Dr Samantha Hardy, Forum Facilitator)

Notes from ADR Research Forum

The third national ADR Research Forum was convened by the National Alternative Dispute Resolution Advisory Council (NADRAC) in Melbourne on 13 and 14 July 2007. The aim of the Forum was to optimise research in ADR by promoting information sharing and collaborative effort among those involved in conducting or commissioning ADR research or evaluation. Over 100 participants and speakers took part in the Forum over the two days.

13 July 2007

Opening by the Honourable Philip Ruddock MP, Attorney-General

After an introduction by the Honourable Justice Murray Kellam AO, the Attorney-General opened the Forum. He noted the importance of alternatives to litigation as a means of resolving conflict in today's society and expressed the Federal Government's strong support for ADR processes and research.

Welcome by Dr Kerry Ferguson, Pro Vice-Chancellor (Equity and Student Services), La Trobe University

Dr Kerry Ferguson thanked the Attorney-General and welcomed everyone to La Trobe University and the Forum. She spoke about the importance of ADR in the university environment and the importance of teaching and research in this area.

Outline of Research Forum by Professor Tania Sourdin, La Trobe University Centre for Conflict Resolution

Professor Tania Sourdin noted the large number of presenters who were to speak at the Forum, and also the many practitioners and academics who had come to listen to the presentations and participate in discussion. She noted that this support for the Forum was encouraging. She also introduced Dr Samantha Hardy, Coordinator of the Postgraduate Conflict Resolution Program at La Trobe University, who chaired all the panel discussions during the Forum.

RESEARCH PANEL 1 : Cross Cultural Perspectives in ADR

Children and Families in Transition (CAFIT) Project, Dale Bagshaw, Director of the Hawke Research Institute's Centre for Peace, Conflict and Mediation at the University of SA

Associate Professor Dale Bagshaw presented research that had been undertaken by UniSA researchers, postgraduate students and Centacare staff in South Australia, with funding from the Telstra Foundation. The research focused on developing a model of children centred practice for Centacare which would provide a range of integrated/early access services (commenced before the Family Relationship Centres).

She explained that the project incorporated qualitative and quantitative research, with a multi-method research approach, including:

- Literature review
- Online survey with Australian service providers (213 responses to 83 questions, social workers and lawyers predominantly)
- On-line survey of German family service providers (108 responses, more child focused)
- Interviews with service providers in Indigenous communities
- A phone-in with parents and children using a semi-structured interview questionnaire (117 interviews: averaged 2 hours with adults; ¾-hour with the children)

Participants in the phone-in were from rural, remote and urban locations, and were anonymous. Most of the children were aged between 5-8 years with 2 Aboriginal, 3 rural. Participants were found by advertising widely in local newspapers, radio and email networks. One school counsellor arranged a group of children to call from school. There were two different sets of questions for adults and children. Most children who rang were quite distressed. They were referred on to appropriate assistance and offered counselling at the end. Some researchers also needed debriefing. Notes were taken during the interviews and two researchers analysed them using NVivo.

As an outcome of the research, parallel parent and child education groups have been set up by Centacare and are currently being evaluated by the researchers from UniSA. A child-centred website for parents, children and teens experiencing parental separation or divorce has also been established called *Children and Teens First*, see: http://www.chatfirst.com.au

For more information about this project, please visit the CAFIT website: http://www.unisa.edu.au/hawkeinstitute/cpcm/cafit.asp

Values and Cross-Cultural Conflict Resolution, Lola Akin Ojelabi, La Trobe University

Ms Akin Ojelabi's presentation was based on her PhD research. The research explored the role of culture in conflict and conflict resolution. She asked: 'How do we define culture. What are cultural issues? Is culture politicised in conflict? Do values have some relevance in conflict resolution, particularly the values of justice, peace, freedom and equality?' She argued that when conflicts involve discrimination, power imbalance, abuse of rights and deprivation of needs justified through cultural beliefs,

practices and customs, the discourse of culture should be replaced with a discourse on values. There are values which are widely acceptable and these can form the basis of dialogue and conflict resolution. She further argued that values are crucial to conflict and conflict resolution because values guide action and behaviour and the distinction between right and wrong. She argued that every society has in place moral and legal traditions which encourage some form of fairness and mutual support. Conflict resolution practitioners can draw on these moral and legal traditions to move the parties towards broader values of freedom, justice, equality and peace. She argued that the values of freedom, equality and justice are not absolute and must be placed on a hierarchy. The most important is the value of peace. All other values must be directed towards achieving the ultimate value of peace.

Participants at the forum were given the opportunity to reflect on the issues by completing a questionnaire on values and conflict resolution.

The research methodology was theoretical and also involves case studies.

Innocents Abroad, Dale Bagshaw, Director of the Hawke Research Institute's Centre for Peace, Conflict and Mediation, University of South Australia

Associate Professor Dale Bagshaw introduced this project, which is currently being established using seed funding from UniSA. The project includes academic researchers from different countries in the Asia Pacific region and will involve the writing of an edited book based on research-based case studies from the region. The tentative title for the book is *Challenging Mediation in the Asia-Pacific Region. Peacebuilding Activities*. This project will address the need for Western mediation educators and trainers to value the way that Pacific Island and Asian peoples conceive and approach conflict, and will suggest ways to co-construct models of mediation which will both privilege local conflict resolution practices and also incorporate the useful aspects of Western models.

The project also involves the establishment of the online Asia-Pacific Mediation E–Centre website, which aims to promote culturally sensitive study and practices of mediation in the region. This project is led by Dale Bagshaw with Elizabeth Porter (CPCM at UniSA) and includes Toni Bauman (Native Title Research Centre), Di Bretherton (La Trobe), Polly Walker (ACPACS), Craig Jones (SANTOS), Suresh Prasad (Sydney), Anita Singh (India), Ian McDuff (NZ and Singapore), Bruce Barnes (Hawaii), Graham Hassel (Fiji) and postgraduate students from UniSA.

Professor Bagshaw noted that it was important to respect and value how Indigenous people in the Asia-Pacific region approach and resolve conflict. The book will be based on the assumption that mediation education and training in the region needs to incorporate and respect customary/local knowledges and practices. She pointed out how dominant Western discourse 'others' people who are different, including Indigenous and migrant groups within Australia. She expressed concern for the prescriptive nature of the dominant Western mediation models that are being taught in the region (often in an 'imperialistic' manner). This work is particularly important

with the increased emphasis on globalisation. Professor Bagshaw warned that we can inadvertently cause harm to other cultures/communities.

RESEARCH PANEL 2 : ADR Training and Education

Peace and Conflict Resolution Education in Australian Universities, Melissa Conley Tyler, University of Melbourne

Ms Melissa Conley Tyler presented research on the International Conflict Resolution Centre at University of Melbourne which she had jointly conducted with former Director, Di Bretherton. She noted that although the Centre provided opportunities for practice for students, the question that arose was whether University was a place for peace education. The centre was established in 1994 and had a focus on practice, and a high use of volunteers (students). The research studied the effect of the internship program. It was qualitative research and examined what 60 interns got out of it.

Their motivations:

- Wanted to learn about conflict resolution and peace work
- Values
- Opportunity to put into practice
- Few vocational centres.

What they did generally fell within three parts:

- Conduct individual training in general skills and specific ADR skills
- Involve in project
- Contribute to general running of the Centre.

Broad scope of research topics/projects, including: teaching, developing courses and acting as training assistants (e.g. Vietnam); conference and forum hosting. Community engagement (e.g. aboriginal study circle, Cypriot community on-line dispute resolution project).

Impact on people:

- Improved knowledge of conflict resolution theory and practice and other areas
- Opportunity
- Interest in going further in peace studies as a field.

Who:

- Exchange students
- Undergraduates (for course credit)
- Postgraduates
- Graduates (working part-time).

Importance of practice (conflict resolution and general skills, community (group of likeminded people), some point to it (not just personal self development).

Nine Lessons for Teaching Negotiation, Naomi Cukier

Ms Naomi Cukier's presentation was based on the paper she wrote with Melissa Conley Tyler, which was published in the Legal Education Review. It reflected on the challenges of basic negotiation models and practical lessons. They argued that negotiation can be learned and taught, but that the standard teaching model led to a confused experience of training. There was often an over reliance on theory, role plays were often too basic and ignored real life context, there was no rich review, instructors used single examples to illustrate principles, and micro-skills were not focused upon. In contrast, innovative models looked at emotional intelligence, analogical reasoning and computer assisted learning. The nine lessons are:

1. Students won't learn just from experience
2. Students won't learn just from theory
3. Role plays need to be credible, contextual, detailed
4. Students need a rich review
5. Students learn best through analogical reasoning
6. Observation is one of the best learning techniques
7. Real world placements are an effective learning tool
8. Emotional intelligence and interpersonal skills enhance learning
9. Technology can enhance negotiation learning.

The Teaching of Diverse Models of Mediation in Australian Law Schools, Kathy Douglas, RMIT

Ms Kathy Douglas noted that mediation is evolving. Lawyers are key players and have a strong impact. There is a need for teaching to include consideration of culture and the different mediation models and practice. Ms Douglas pointed out that the court-connected model had its own kind of divergence. Ideally, teaching would include interdisciplinary perspectives and value all players. Her research looked at lawyers' education. Mediation in practice is fairly fluid but tends towards evaluative, especially in court cultures. The research examined whether legal education contributed to this emerging culture. She referred to the study by Tom Fisher et al about how the experience of studying ADR can change law students' attitudes.

Ms Douglas' focus was on teachers of ADR and their practices. She looked at ADR/Mediation subjects in particular, what models/approaches are being taught and interdisciplinary approaches (mindfulness, improvisation). The research was based on the premise that there is value in diversity.

The methodology consisted of a survey of all teachers of ADR in Australian law schools, asking about their background, content and practices. Some Victorian respondents are to be interviewed, and this will be quantitative and qualitative. Future directions for the research could include a study of the effect of accreditation on teaching.

RESEARCH PANEL 3 : Dilemmas for ADR Practitioners

Addressing dilemmas about neutrality through an alternative ethical paradigm for mediation, Rachael Field, Queensland University of Technology

Ms Rachael Field's PhD research is a theoretical study looking at neutrality and ethics. She wondered whether we are over the 'neutrality dilemma'. She acknowledged the notion of impartiality (Boulle) but refers to Astor's recent comments about the luxury of talking about semantic distinctions. Neutrality and impartiality are terms that are effectively used interchangeably. Ms Field noted that the new family law does not use either term, but refers to an 'independent' family dispute resolution practitioner.

Ms Field pointed out that although neutrality is a critical element in the definition of mediation and practice, and that it relates to inferences of fair practice and credibility, there was a problem with defining the term/concept.

She asked: 'What do we represent to parties about this? Are we setting ourselves up for claims of misrepresentation?'

Ms Field's work argued that we should move away from the whole concept of neutrality. She suggests considering what it means, and concentrating on how we can achieve this. For her, ethics is the answer. She noted that current ethical codes tend to be quite general, but suggested there are different ways to approach ethics that are suited to mediation.

Mediator neutrality: Themes in the construction of meaningful practice, Susan Douglas, University of the Sunshine Coast

Ms Susan Douglas conducted an empirical study in the Australian context, asking whether mediators are neutral or not. She is undertaking a post modern critique of that as opposed to a binary yes/no answer. She asked: 'What is actual experience of neutrality?', and how in practice it extends beyond the literature. Her research questions were:

- How do mediators make sense of neutrality in practice?
- What is the range of meanings?
- How are they operationalised?

Her study is qualitative/exploratory and used an interpretivist perspective of social constructionism. She used case studies and draws parallels with researcher neutrality/mediator neutrality. Her emphasis was on party self determination and neutrality = interrelated. Legal/community/therapeutic themes re neutrality and mediation conceptual frameworks. She used a post-modern idea of power and a systems analysis of interactions in mediation. There are limits to the appropriateness of interventions/mediation power. She referred to the notion of self-

determination/personal agency. She reframed neutral as the relationship between mediator and the parties.

Ms Douglas also noted that she had difficulty accessing parties for the research.

The Experience of Listening in Mediation, Clare Coburn, La Trobe University

Ms Clare Coburn asked for suggestions from the audience for the qualities of a good listener. She also asked what the audience thought were appropriate interventions to promote inter-party listening.

Ms Coburn's PhD research looks at listening. She has interviewed mediators about the qualities, capacities and interventions which promote listening. She referred to influences on her work such as Gemma Corradi Fiumara, an Italian philosopher who suggests that in Western culture, our expressive skills are usually far more highly valued than our capacities as listeners. A rebalancing of this capacity may be needed so that instead of 'masters of discourse, we may become apprentices of listening'. She also noted an article by Altobelli in the *ADR Bulletin* in which he said the three most important things a mediator could do were: 1. listen; 2. listen; 3. listen.

Ms Coburn is using an interpretive phenomenological analysis approach developed by Smith from Birkbeck College, London to analyse her data. She has conducted semi-structured interviews with mediators engaged in both facilitative and transformative mediation. Her early findings from this research indicate that mediators often focus on creating a listening environment. It was notable that no one has spoken of listening for interests which we suspect would be a focus for facilitative mediators.

Stressors and Coping, What do Mediators say? Patricia Marshall, The University of Melbourne

Inspired by the finding of Deborah Kolb in 1994 that the mediator's task was 'inherently stressful', this research has explored the potential stressors confronting mediators, and the resources they use to cope. Discerning the demands, challenges, and stressors involved may enable clearer delineation of the skills and attributes necessary to handle the task, and the strategies that will help mediators to cope effectively.

The theoretical foundations of the research were threefold: the transactional theory of stress and coping involving the appraisal of a situation as a threat or challenge, and the adequacy of resources to cope; the conservation of resources theory, which proposes that individuals conserve their resources to guard against loss; and, finally, role theory, as it applies to identity, role conflict, role pressure and role strain.

The 'mixed methods' study involved 43 experienced mediators, mostly from Melbourne, of whom 23 participated in one of three focus groups, and 20 in in-depth interviews. Approximately even numbers applied to gender and whether mediators

worked as sole practitioners or in agencies. The majority had had some experience of co-mediation, although they mostly worked alone. Their professional backgrounds varied: the law; therapies, particularly psychology; education; business; and science, engineering and building.

The key question in each focus group was: 'If you were to design the mediation from hell, what would it look like?' The groups identified the sorts of situations which might produce role pressure or role strain. The individual interviews then explored 10 of these scenarios, and examined individuals' experience with stress and their methods of coping.

As well, the 43 participants completed two inventories, one on their usual coping strategies and one on emotional competence. Given the emotional nature of mediating, it could be expected that productive coping strategies and emotional competence might be key resources.

Overall, role pressures appeared to evolve from the need to balance requirements. For example, there were tensions involved in being both empathic and objective; in refraining from giving advice, yet having the professional experience to do so; in not being interventionist, yet balancing the power between the parties and controlling the meetings so that they were perceived as fair. However, as opposed to pressures, role strain was associated with the intensity of the emotions exhibited, and then dealing with these in a way which respected parties' distress, while maintaining the integrity of the process, and the mediator's own well-being.

Mediators spoke of the volatility arising from strong emotions such as anger, grief and loss; and of parties' violent or intimidating reactions, towards each other and the mediator. Mediator reactions included fear, of either the parties or of their own sense of not doing a good enough job; uncertainty, particularly when the mediator could not ascertain what was driving the dispute; frustration when one party seemed to be capitulating through being railroaded by the other; extreme sadness, and in some cases traumatisation, at the stories heard; and physical, emotional and intellectual exhaustion.

However, of the 10 interview scenarios, the most commonly identified as a potential stressor was: 'Your co-mediator is cutting across your line of questions which you thought were getting somewhere'. Twelve of the 20 interviewees identified this as the most concerning, despite the fact that co-mediation was seen by all as being a valued resource when it worked well. The next most commonly identified scenario was, 'You find yourself being so irritated with one party that you start to doubt your ability to be impartial.'

Indeed, when asked to name the 'big issues' in mediation, mediators referred most commonly to the issue of impartiality. There appears to be a difference between the rhetoric and the reality of mediation. While impartiality is an ideal, in reality it is tested in almost every encounter; and the emotional effort required in maintaining it contributes significantly to the perceived level of stress. As well, while the philosophy of mediation accentuates 'self determination', most mediators have a sense of 'justice', so an agreement which does not seem fair strains this imperative.

Political pressures exist as well. For example, the new Family Law Act has changed the role of the mediator to that of an adviser, an educator, even an advocate; thus, role ambiguity exists for the mediator trained in the 'pure' model. Then, both state and private organisations, which pay for the service, seem to equate success with agreement. But the goal espoused by these mediators is that people achieve greater understanding and clarity, not necessarily agreement.

Fortunately, coping strategies were reported. When compared with other groups in the community, for example, these mediators were more likely to report that they: focus on solving the problem and on the positive; are willing to seek professional and social support, and engage in social action and relaxing diversions, including the use of humour. They tend not to rely on unproductive strategies such as keeping the problem to oneself and self-blame. The latter are significant given that the nature of the work is mostly solitary. Debriefing was considered useful, but only if it was immediate, respectful, non-judgemental, and involved a listener who would allow unburdening to occur without interrupting with solutions.

The following social and emotional competencies emerged in this order of significance: emotional self awareness; independence; interpersonal relations; empathy; and assertiveness. Further, regression analyses revealed that the use of productive coping strategies was associated with assertiveness, happiness, interpersonal relations and independence.

Finally, another significant resource was 'meaning': the sense of making a difference in people's lives and seeing their circumstances change for the better. But a salutary note of warning was sounded by one:

> *You are not superman or superwoman; you are a mediator with certain skills, and you should not think that you can do more than you can in other people's lives. You can feel more powerful and more grandiose than you are, and the other side of that is that you can take on too much responsibility*.

In summary, the research indicated both the need for balance, but also the tensions involved in maintaining that balance.

RESEARCH PANEL 4 : ADR in the Family Law Context

Long-term satisfaction with and Durability of Family Mediation Outcomes, Andrew Bickerdike, Relationships Australia

Mr Andrew Bickerdike describes himself as a practitioner/researcher. His presentation was based on a Relationships Australia (RA) study of mediators and clients. RA regularly requests feedback, and since 2004, has received about 1,000 mediation responses. This selection is fairly representative. They request mediation parties to agree to a follow-up 12-18 months later.

Sent follow-up questionnaires to 118 clients (47.1 per cent response):

- Satisfaction level – had it changed?
- Agreements themselves – had there been changes, had it fallen over
- Has communication improved/parenting skills
- Suggestions for RA improvement

Are agreements still working?

- 23 per cent yes all
- 38 per cent most
- 23 per cent some
- 15 per cent none.

Negative answers may be explained by the fact that some agreements were no longer practical, (e.g. someone moved, new partner etc).

Other questions asked included:

- Mediation helped me move on with life (41 per cent mostly, 12 per cent somewhat, 33 per cent a little)
- Did they learn skills to resolve other conflicts? (23 per cent mostly, 25 per cent somewhat, 35 per cent a little)
- Did they avoid high legal costs? (43 per cent mostly, 18 per cent somewhat, 20 per cent a little)
- Helped reduce ongoing conflict (17 per cent mostly, 23 per cent somewhat, 23 per cent a little)
- Assisted to communicate better as parents (10 per cent mostly, 26 per cent somewhat, 38 per cent a little)
- Accurate information or advice (50 per cent mostly, 31 per cent somewhat, 15 per cent a little)
- Approximately half of the sample reported that further information and advice from the mediator may have been helpful (the other half thought the degree of information and advice provided was appropriate).

Family Dispute Resolution: Predictions from Procedural Justice Ratings and Conflict Resolution Orientation, Jill Howieson, University of Western Australia

Ms Jill Howieson's PhD thesis examined the situation that arises when a family lawyer's approach to dispute resolution is different from the client's. Her work was based on empirical research – questionnaires and multi-variate analysis. She examined: family lawyers' dispute resolution orientations on a continuum of adversarial, and conciliatory and cooperative; clients' personal conflict resolution styles, emotional responses to the divorce process and perceptions of the lawyer; and, how the interaction between the lawyer and the client might influence dispute resolution decisions and outcomes. She used procedural justice theory as a theoretical framework for the study and predicts that if the client perceives that the lawyer has arrived at decisions regarding how to resolve the matter fairly, then the client will be more likely to accept and follow the lawyer's advice. Conversely, if the client perceived that there was a level of procedural unfairness in the advice of the lawyer,

then the client might turn to another procedure as a means of ensuring fairness, for instance, the Family Court.

On-line dispute resolution and family disputes, Mark McPherson

Mr Mark McPherson reported on research conducted with Melissa Conley Tyler. He noted that on-line dispute resolution (ODR) incorporated substantial use of electronic processes/digital technology, creation of virtual space, a range of tools. There are now 148 ODR services/sites worldwide and more than 3 million disputes settled on-line. ODR resolves geographical issues and also avoids some of the risks associated with face-to-face meetings. The on-line environment can help discussion re family/child issues. The research examined 9 on-line family dispute resolution providers in Australia and overseas. The results show that software can minimise non-verbal interaction, can store lots of family information and often facilitate negotiation (sometimes using artificial intelligence, or tradeoffs).

Collaborative Law: More than another ADR tool for legal practice? Marilyn Scott, University of Technology Sydney

Ms Marilyn Scottt noted that collaborative law was akin to a frame of mind, drawing an analogy with Stu Webb's 'settlement atmosphere'. Clients needed legal advice and support in mediation. Mediation has the potential to set aside tensions of legal court process and negotiation. Collaborative law is based on the client-centred problem solving model. Nancy Ross notes that clients need more support, people who could provide this not involved in the process, important social, emotional and relationship issues, impact on the children, transition to next stage. There was a need for a change in mind set in clients and personalised service. Collaborative law provides a dynamic facilitative/evaluative/advice mix. It is an interest-based approach in rights framework. It takes into account the broader context for divorce, e.g. family business, tax etc. It is an amalgam of negotiation and mediation models, and problem solving/legal analysis. It uses a specialist team approach , i.e., psychologists, counsellors etc. Her study is based on training collaborative practitioners.

RESEARCH PANEL 5 : Inter-Organisational Uses of ADR

Consulting in conflict: Employer views on the emerging profession, Bernadine Van Gramberg, Victoria University

Associate Professor Bernadine Van Gramberg noted that the notion of ADR is not foreign to employers who have utilised industrial tribunals for over 100 years in Australia under the federal *Conciliation and Arbitration Act* 1904 (now the *Workplace Relations Act* 1996 as amended 2005). Private ADR, however, is a new phenomenon and the growth of this phenomenon was the focus of the presentation. Two surveys were conducted on HR managers in Melbourne and Sydney in 2002 and again in 2007. The results of the survey showed that private ADR practitioners are not a feature of workplace dispute resolution. Rather, most mediation is performed by the firm's own HR Managers. The most frequently used private mediators tended to be those from Employer Associations, law firms and Unions. A survey of 1,700 private ADR practitioners found that practitioners from different backgrounds focused on certain types of dispute resolution:

Lawyers – unfair dismissal
Psychologists/Mediators – therapy
Employers – facilitative and conciliation
Unions – more adversarial.

Use of private ADR practitioners is still relatively low and employers responses were mixed when asked if they intend to use private providers in the future. Most HR managers reported that the Australian Industrial Relations Commission should be empowered to deal with these disputes. Others, who opted for private ADR practitioners, then indicated that they were reluctant to pay for their services.

What is happening in our own backyard? Universities as dispute resolvers, Hilary Astor, University of Sydney

Professor Hilary Astor is in the process of reviewing university involvement in litigation and case studies of conflict resolution processes in universities. She has conducted a survey of litigation over the period 1985-2006 – court and tribunal hearings – involving universities. She noted that this has been a period of immense change for Australian universities. In the 1980s there is very little litigation involving universities. There was much more litigation after 1995. Of the 39 universities in Australia, on average, each university will be involved in one case per year. Factors influencing the increase:

1. The changing shape of the sector – was found not to explain the increase
2. The changing size of the sector must have contributed – but does not account for all of the increase
3. Reporting practices and the ability to access unreported cases
4. Increase in level of regulation
5. The changing culture of universities and the marketisation of higher education

Disputes involving students:
1985-2006: 83 cases: 50 undergraduate; 33 postgraduate
1998 was a year of significant increase:
1989: HECS introduced
1996: Major changes to HECS, three-tier system/full fee-paying students
1996 not a year of significant change – but would be a delay in processing cases.

What were students litigating about? There were very few cases about educational standards. Fifty per cent were about discrimination. But close examination shows that they were not about discrimination as defined by law but about perceived unfairness. Students had a very low success rate. Many had attempted internal dispute resolution processes. Significant numbers of cases involved law students, students with mental illness or were complex or difficult cases.

Transformative and Facilitative Mediation case studies: Improving relationships and providing solutions to interpersonal workplace conflict, Carolyn Manning, Carolyn Manning Consultancy Services

A total of 17 case studies of workplace conflict were examined, in which the author was the sole mediator. A combination of transformative and facilitative techniques were used within the same mediation framework (i.e. pre-mediation, joint mediation sessions etc) across all of the case studies.

This approach provided participants with an opportunity to reframe their negative perceptions of each other and to shift their interpersonal dynamics into more favourable territory. Furthermore, most of the parties cited in these cases were able to generate practical solutions which addressed both parties' underlying needs. However not all transformative shifts noted by the mediator were included in the agreements reached between the parties.

In cases that were followed up, the following findings were reported:

- 2 weeks later, 15 agreements were still in place.
- 4 weeks later, 12 agreements were still in place.
- Over 12 months later, 3 agreements were still in place.

In conclusion, anecdotal feedback suggested that both the participants and their respective employers were satisfied with the outcomes that were generated via the mediation process.

RESEARCH PANEL 6 : ADR in the Workplace: Examples from Client Service Based Industries

Considerations in negotiating Information Technology outsourcing agreements, Subha Chandra, Victoria University

Ms Subha Chandra's presentation is based on her ongoing PhD thesis. Ms Chandra noted that a large proportion of IT outsourcing agreements tend to fail or at least fail to achieve intended outcomes. This appears to be mostly because of poorly drafted or negotiated contracts. IT differs from other industry sectors as it evolves rapidly and is highly volatile. IT outsourcing agreements are long-term, ongoing relationships that need specific negotiation techniques. When negotiation is not done properly, e.g., there is lack of clarity on scope, inflexibility, lack of transparency of costs, these can lead to a breakdown in the relationship. Negotiations currently tend to focus on price rather than outcomes for mutual gain (interests). ADR mechanisms and planned renegotiation of terms and conditions are rarely discussed. Switching to another supplier or termination of contract can have serious adverse effects on the business or organisation as a whole. A framework is to be developed for negotiating IT outsourcing agreements.

Utilising a mediation model for the disclosure of adverse events in a hospital setting, Melinda Shirley, Queensland University of Technology

The disclosure of adverse medical events is necessary but difficult. It is inevitable because of ethical obligations, legal duties and open disclosure standards (pilot in Australian hospitals). However, there is natural resistance relating to the need for an apology, factual explanation, possible consequences and the difficulties in managing the event and preventing its reoccurrence. Legal barriers include the different laws in each state relating to whether apology (see article by Prue Vines) can be used in litigation, fear of increased litigation, physician barriers (culture of infallibility, not culture of discussion of mistakes). However, the potential benefits of disclosure include developing a system like that of airlines in which disclosure is systemic; there is an investigation and results are widely disseminated.

Department of Justice Alternative Dispute Resolution Strategy Project, Paul Myers

Mr Paul Myers' work is part of the Victorian Government's commitment to providing Victorians with more opportunities to resolve legal disputes at less cost. ADR is one way of meeting this commitment and challenges facing the justice system. It is a strategic priority for Department of Justice (Victoria). The Department of Justice has published three research reports: the history and issues for ADR in Victoria; a survey of ADR suppliers; and, a survey of dispute in the Victorian community. Findings include: 3.2 million disputes in the last 12 months, most

resolved without assistance; $2.7 billion cost to Victorians of attempts at dispute resolution; over 1 million contacts with ADR suppliers in the last 12 months; plus, 31,000 mediations and 102,000 non-court determinations.

RESEARCH PANEL 7 : Theoretical and Practical Integration of ADR to Legal Practice

An alternative for who? The relationship between successful ADR and socio-economic status, Tania Sourdin, La Trobe University

Professor Tania Sourdin noted that there are significant issues with access to ADR. There are surprises in terms of who is accessing ADR and what they are doing. Major issues relate to geographical limits and gender patterns. Survey design: experts assist. Start with objectives of the system. (Hard to identify who's not accessing the system; who's dropped out of the system). Methodology is to access files, survey/interviews of staff and stakeholders. One finding of interest is that the system's need for things to be in writing impacts on 25 per cent of the population.

Fomentors of strife? Lawyers and family dispute resolution in Australia, Becky Batagol, Monash University

Ms Becky Batagol examined the role of family law solicitors around family dispute resolution. Her insights were based upon observations of a number of family mediation sessions and examining family policy in the 'pre-reform' context. However, her findings are also relevant to the role of family lawyers at Family Relationship Centres after the 2006 reforms. She has identified the marginalisation of family law solicitors as part of the Federal family policy. Despite the adversarial stereotype, there is some evidence that family lawyers can have a positive role in the resolution of family disputes. The study consisted of 22 case studies with detailed information from various participants before and after mediation.

Findings:

- Distrust of legal profession a big factor in deciding whether or not to participate in mediation
- Uncertainly about the law played a part in mediation. (Reasons for uncertainty: law was discretionary/vague, law was complex, many hadn't seen solicitor before mediation)
- Uncertainty about the law created fertile ground for disagreement about what law was and exploitation of this for bargaining which also led to sidelining of law; a lack of protection for vulnerable parties.
- Mediators encouraged participants to seek legal advice
- We should be aiming to encourage, not diminish, the use of legal advice around FDR. This should be part of the policy framework of FDR.

Lawyers post-ADR: Mediation and collaborative law, Anne Ardagh and Guy Cumes, Charles Sturt University

Associate Professor Anne Ardagh's work with Guy Cumes was based on theoretical research and aims to critically reflect on developments. They asked where mediation is now situated and defined, and whether collaborative law is better suited to both lawyers and the community? Three main eras were identified:

- Pre-ADR (pre-1980s)
- Growth ADR (1980s) – non-legal process, outcomes, practitioners
- Post-ADR (21st century) – ADR methods accepted as normal and becoming institutionalised

They found that the meaning of 'mediation' is unclear to lawyers and surmised that the practice of collaborative law may be more comfortable for legal practitioners. Collaborative law has its origins in the United States. Is it needed in Australia? Are its processes suitable given legal and cultural differences? Evaluation is needed about this new practice, its benefits, costs and the models that are being developed.

The divergence of court-connected mediation practice from theoretical attributes of mediation, Olivia Rundle, University of Tasmania

Ms Olivia Rundle's research included a literature review and a case study of Supreme Court of Tasmania mediations. She asked why court-connected mediation diverges from the theory. She focused on legal parties and what they think the purpose of mediation is. Ms Rundle has interviewed 42 lawyers and the 4 mediators who conduct the mediation process in the Supreme Court of Tasmania. She has also conducted post-analysis observations to confirm her analysis. She found that the court-connected mediations tend to be lawyer-driven, and open to much criticism in the legal system. She expected to find some diversity as most lawyers are not trained in ADR. She found few prescriptions for practice and an absence of clearly articulated institutional guidelines/policies. She is looking at the ideological underpinnings for lawyers' impressions of mediation, including Folger and Bush's categories of Satisfaction/Equality/Transformative.

Victim-Offender mediation France/Australia, Deborah McFarlane, Victoria University

Ms Deborah McFarlane's presentation was based on her PhD thesis. Ms McFarlane noted that the young male profile of prisoners, largely with disadvantaged backgrounds, is increasing in numbers. She noted that in France where 45,000 Victim-Offender (V/O) mediations are conducted each year, there are much lower imprisonment rates. She looked at V/O 'mediation' – dispute/power imbalances – restorative justice. She noted that there are a large number of V/O programs now in Australian states. However, in France it is nationwide and reform less piecemeal. The Australian situation is costly. Each separate pilot program evaluated individually. All states have different legislation. She is undertaking further empirical study, both quantitative and qualitative.