



THE UNIVERSITY OF
NEWCASTLE
AUSTRALIA

**9th ADR Research Network Round Table and Civil
Justice Research Conference**
1-2 February 2021
CONFERENCE PROGRAM



9th ADR Research Network Round Table and Civil Justice Research Conference 1-2 February 2021

All times are in the Sydney summer time zone – AEDT

Morning Session, Monday 1 February (Chair John Woodward)

08:00-08:55	Virtual Coffee
08:55-09:00	Welcome & Acknowledgments of Country (Lisa Toohey)
09:00-10:00	Charlie Irvine, “Lay People’s Justice Reasoning” (Commentator Olivia Rundle)
10:00-10:30	Amy Cohen, “The Rise and Fall and Rise Again of Informal Justice and the Death of ADR”
10:30-11:00	Tina Hoyer & Peter Raffles, “The experience of the mediation model utilised under the Queensland Small Business Commissioner for lessors and lessees impacted by COVID19”
11:00-11:30	Greg Swensen, “Visas and family and domestic violence. Could a FDR model of mediation fill in the gaps?”
11:30-12:00	Ummey Sharaban Tahura, “Evaluation of ADR in Access to Justice in Bangladesh”
12:00-12:30	Claire Holland and Rikki Mawad, “Opportunities and Obstacles: Practitioner Reflections on Compulsory Mediation”
12:30-1:30pm	Virtual Lunch

Afternoon Session, Monday 1 February (Chair Becky Batagol)

1:30-2:00	Sonya Willis, “Is Civil Dispute Resolution all about how best to balance competing objectives?”
2:00-3:00	Peta Spyrou, “Considering the adequacy of ADR in disability discrimination complaints regarding the education of compulsory aged students with disability-induced problem behaviour” (Commentator Jackie Weinberg)
3:00-3:30	S. I. (Stacie) Strong, “Legal Reasoning Across Commercial Disputes: Comparing Judicial and Arbitral Analyses”
3:30-4:00	Jonathan Crowe and Rachael Field, “Intuition and Artistry in Mediation: Implications for Mediator Ethics”
4:00-4:30	Alysoun Boyle, “Evaluating Mediators - stepping off the beaten track”
4:30-5:30	Virtual Drinks

9th ADR Research Network Round Table and Civil Justice Research Conference (continued)

Morning Session, Tuesday 2 February (Chair James Metzger)

08:00-09:00	Virtual Coffee
09:00-09:30	Masood Ahmed, "Time for a more principled approach to compulsory ADR within the English civil justice system?"
09:30-10:00	Bryan Clark and Tania Sourdin, "The Singapore Convention: a solution in search of a problem?"
10:00-10:30	Tayne Redman, "A technological trade-off: the reduction of human-connection for faster, more remotely accessible outcomes in civil dispute resolution"
10:30-11:00	Genevieve Grant, "Lawyers' experiences of online hearings"
11:00-11:30	Joe McIntyre, "Civil Courts and the Role of Digital Justice Technology After COVID-19"
11:30-12:30	Margaret Castles, "Exploring presumptions underlying mediation practice" (Commentator Jonathan Crowe)
12:30-1:30pm	Virtual Lunch

Afternoon Session, Tuesday 2 February (Chair Lisa Toohey)

1:30-2:00	Bridgette Toy-Cronin, "Telephone Mediations in Rent Arrears Applications"
2:00-2:30	Robert Angyal, "Is Party Self-Determination a Concept Without Content?"
2:30-3:00	Lola Akin Ojelabi, "Reality testing in mediation"
3:00-3:30	Jacqueline Weinberg and Jennifer Lindstrom, "Teaching family dispute resolution in clinical legal education"
3:30-4:00	Christina Platz and Kathy Douglas, "Online Fishbowl Pedagogy Using Video Conferencing: Developing Reflexive Legal Practice"
4:00-5:00pm	ADR Research Network Meeting & Venue for next conferences

PRESENTER BIOS (IN ALPHABETICAL ORDER BY SURNAME)

Masood Ahmed is an Associate Professor at the University of Leicester Law School and a member of the Civil Procedure Rule Committee in the UK. Prior to academia, Masood qualified as a solicitor at an international law firm in London and specialised in dispute resolution.

Lola Akin Ojelabi is an Associate Professor of Law at La Trobe Law School in Melbourne.

Robert Angyal is a Senior Counsel, Barrister, Mediator and Arbitrator in Sydney. He has been mediating since 1992 and frequently writes about, speaks about and teaches mediation and mediation advocacy.

Alysoun Boyle has extensive practical, policy, and research experience in mediation and ADR, as well as in training mediators and other DR practitioners. She is a Director of National Mediation Conferences, as well as Co-Chair (with Maureen Abbott) for NMC2021, and is a founding member of ADRAC. She is a member (and Secretary) of the national Management Committee for the Australian Citizen Science Association, and continues to be the Call-Out Officer for her local fire brigade. Alysoun has recently attained a PhD at Newcastle Law School.

Margaret Castles is a Senior Lecturer at Adelaide Law School, where she manages the Clinical Legal Education program, and teach CLE, Evidence and Advocacy, Legal Ethics, and Alternative Dispute Resolution. She also practices as a solicitor within the clinical program, and as a mediator.

Bryan Clark is a Professor of Law and Civil Justice at the University of Newcastle in the United Kingdom.

Amy Cohen is a Professor of Law at UNSW Sydney. Amy has held visiting professorships at Harvard Law School, Osgoode Hall Law School, the University of Turin, Faculty of Law, and the West Bengal National University of Juridical Sciences, and she has held fellowships from the Radcliffe Institute for Advanced Study at Harvard University, the American Institute of Indian Studies at the University of Chicago, the Fulbright Program, and the Collegio Carlo Alberto.

Jonathan Crowe is Professor of Law at Bond University and a regular Visiting Scholar at the University of Texas at Austin. His research examines the philosophical relationship between law and ethics. He is a founding Co-Director of Rape and

Sexual Assault Research and Advocacy, an Australia-wide initiative working to shape community responses to sexual violence.

Kathy Douglas is the Dean of the Graduate School of Business and Law at RMIT in Melbourne.

Rachael Field is a Professor in the Bond Law School, Co-Director of the Bond Dispute Resolution Centre and Bond's Centre for Professional Legal Education. Rachael is an Australian Learning and Teaching Fellow and a Senior Fellow of the Higher Education Academy. Rachael has volunteered at Women's Legal Service in Brisbane since 1993 and has been president of the Service since 2004.

Genevieve Grant is Associate Professor at Monash Law School and Director of the Australian Centre for Justice Innovation.

Claire Holland is a Lecturer in the Conflict Management and Resolution Program at James Cook University.

Tina Hoyer is a Senior Lawyer at the ATO. Over the past 10 years, Tina has gained extensive experience in conflict management as an internal mediator for the Australian Taxation Office, and in her role as a Dispute Resolution Manager with the Australian Defence Force, as part of her duties in the RAAF Specialist Reserves (Legal). Tina is also a member of the mediator panel for the Queensland Civil and Administrative Appeals Tribunal.

Charlie Irvine is a Senior Teaching Fellow, University of Strathclyde, Glasgow and doctoral candidate, Queen Margaret University, Edinburgh.

Jennifer Lindstrom is the Legal Practice Manager and Principal Lawyer at Monash Law Clinics (Melbourne). In 2020, Jenn founded the inaugural Lawyer-Assisted Family Dispute Resolution at Monash Law Clinics.

Rikki Mawad is a sessional lecturer at James Cook University and the University of Tasmania and an experienced conflict resolver, facilitator, communicator and conflict coach.

Joe McIntyre is a Senior Lecturer in law at the University of South Australia and the Research Degree Coordinator (Law). His research looks at Judicial Theory, and its application in related fields of Judicial Studies - including the implications for civil justice.

Christina Platz a lecturer in law in the Graduate School of Business and Law RMIT and teaches Negotiation and Dispute Resolution. She is an accredited mediator.

Peter Raffles is a Principal at Conflict Solutions Pty Ltd and a post-graduate lecturer in Negotiation, and Dispute Resolution, at the University of Technology Sydney and Workplace Conflict Management at James Cook University. For over 30 years Peter has been assisting government agencies (domestically and internationally), businesses and individuals work through the tensions and uncertainty that precedes change to establish the structures and dialogue necessary to achieve transition.

Tayne Redman is a Lawyer at The Accessible Justice Project, a not-for-profit law firm established by the University of Adelaide and Lipman Karas. He is also a current Master of Laws postgraduate student and a member of the Law Society of South Australia's Justice Access Committee.

Peta Spyrou is a Doctoral candidate at Adelaide Law School. Before commencing this research, Peta worked part-time in the Parliament of South Australia, first as a Research Officer to Standing Committees with the House of Assembly, and later as Legal Research Officer in the South Australian Parliament Research Library. In addition, Peta has over eight years experience as a support worker to a young person with disabilities.

S. I. (Stacie) Strong is an Associate Professor of Law at the University of Sydney.

Tania Sourdin is the Dean of the Newcastle Law School at the University of Newcastle Australia.

Greg Swensen graduated from the College of Law's Family Dispute Resolution program in December 2020 and has worked in a number of roles in health and community service settings.

Ummey Sharaban Tahura is a Member of the Bangladeshi Judicial Service and a PhD candidate at Macquarie Law School.

Bridgette Toy-Cronin is a Senior Lecturer in the Faculty of Law and leads the programme of research into civil justice at the University of Otago, New Zealand.

Jacqueline Weinberg is the Academic Director of the Springvale Monash Legal Clinic and an academic in the Law Faculty at Monash University. Her areas of research include dispute resolution, student wellbeing and the links between technology and the law in enhancing access to justice.

Sonya Willis is a senior lecturer at Macquarie Law School. Sonya researches and teaches primarily in civil procedure and private international law. Sonya is currently engaged in researching the potential for an online litigant vulnerability assessment tool. Sonya has maintained a NSW Practising Certificate for over 20 years and was a senior associate in commercial dispute resolution at Blake Dawson (now Ashurst) prior to becoming an academic.

ABSTRACTS (IN PRESENTER ORDER)

Charlie Irvine, “Lay People’s Justice Reasoning”

A great deal has been written about mediation’s relationship to the justice system. Commentators express concern about a process that is confidential, informal, not subject to appeal, and which places decision-making power in the hands of individuals and businesses. Yet little is known about the criteria such people apply in arriving at mediation settlements. This paper presents findings from a doctoral study shedding new light on this issue.

Building on his recent article “What do ‘lay’ people know about justice? An empirical enquiry,” Charlie Irvine drills down into data from his qualitative study of court-referred mediation in Scotland. The first section considers participants’ responses to direct questions about the fairness and justice of mediation outcomes. Responses indicate divergence from and similarities to legal rules. The second explores sources of normative guidance for participants, including mediators, legal advisers, the court and their own understanding. The paper concludes by considering the implications for theories of justice and their capacity to conceptualise mediation.

Amy Cohen, “The Rise and Fall and Rise Again of Informal Justice and the Death of ADR”

Today the field of alternative dispute resolution (ADR) is often conceptualized and taught as an apolitical, institutional practice designed to enhance the effective and efficient settlement of legal disputes. But this wasn’t always the case. In the 1970s, scholars imagined ADR as a technique of social and political transformation: as a practice that might enable people to resolve disputes without reproducing the inequalities that shaped the society in which they lived—a view that, in the 1980s, prompted a rich, critical debate among sociolegal scholars. That view of ADR has almost completely disappeared from the American legal academy. But as this article shows, it has not disappeared entirely. Outside the legal academy, prison and police abolitionists are turning to the tools of dispute resolution as an important mechanism of social change. This article embeds today’s movement for transformative justice in a longer genealogy of informal justice, and it revitalizes a sociolegal perspective that uses micro-level conflict as a critical framework through which to analyze macro political and social transformations. The presentation ventures that this sociolegal perspective can help respond to the disciplinary crisis that currently faces the field of ADR in American legal education and reveal ADR as a powerful tool for thinking through both the mechanisms and the difficulties of emancipating social change.

Tina Hoyer & Peter Raffles, “The experience of the mediation model utilised under the Queensland Small Business Commissioner for lessors and lessees impacted by COVID19”

The COVID-19 Emergency Response Act 2020 and the Retail Shop Leases and other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 set out Queensland’s arrangements for small to medium-sized enterprise commercial leases affected by the COVID-19 emergency. This legislation implemented the National Cabinet Mandatory Code of Conduct – SME commercial leasing principles during COVID-19 in Queensland. The main purpose of the legislation was to mitigate the devastating effects of the COVID-19 pandemic on landlords and tenants under affected commercial and retail leases and to establish a process for resolving small business tenancy and affected lease disputes. The legislation significantly alters the parties respective rights and obligations under leases and provides that both parties must co-operate and act reasonably and in good faith when negotiating. In this presentation, the authors will outline their experiences in conducting mediations between landlords and tenants over the last 6 months and highlight some key points of interest.

Greg Swensen, “Visas and family and domestic violence. Could a FDR model of mediation fill in the gaps?”

The paper is concerned whether the family dispute resolution (FDR) model of mediation, as established under the provisions of Part VII of the Family Law Act 1975, could be adapted for establishing non-court based pathway for temporary visa holders experiencing intimate partner violence (IPV). The Part VII sets out options for mandated out-of-court process for co-parenting agreements and financial settlement disputes, as an alternative to having such disputes dealt with by the Family Court. There is a compelling body of research which has identified that IPV can be facilitated through the leverage and control that sponsoring partners have in relation to holders of Australian partner visas.

It is argued a FDR-like statutory system would have the potential to redress this inherent imbalance power between sponsors and visa holders, justifies the development of a mediation-like setting. This proposal in the first instance, unlike an adversarial court setting, would also articulate social and cultural values that may otherwise be marginalised in these disputes. The paper explores if there is scope for the development of a system modelled on some of the principles of the FDR model, such as those embodied in therapeutic mediation approach, which ‘uses a systems perspective... to help change the patterns between disputing family members, so that they can negotiate an outcome and maintain a functional relationship.

Ummey Sharaban Tahura, “Evaluation of ADR in Access to Justice in Bangladesh”

After two decades of formal introduction, Alternative Dispute Resolution (ADR) has not achieved mass popularity among the litigants as a mode of dispute resolution in Bangladesh. As a consequence, the rate of disposal through ADR is very low. The ego-centric mentality of litigants, lack of wide circulations of ADR advantages, absence of incentives cause lawyers’ disinclination, time-constraint of judges, the possibility of unfair solution due to unequal position of the parties, and non-binding effect were found as the primary occasions of low disposal rate through ADR. This paper investigates whether the existing format of ADR, transplanted from the western legal system, positively impact on litigation cost and accelerate the administration of justice. Finally, this paper argued why ADR might not be a solution to reduce litigation costs and ensure access to justice in Bangladesh based on empirical findings.

Claire Holland and Rikki Mawad, “Opportunities and Obstacles: Practitioner Reflections on Compulsory Mediation”

The aim of this paper is to contribute to literature on the critical success factors in a compulsory mediation as well as systemic, party or conflict context barriers. This is important in terms of updating legislative requirements, particularly in light of the NMAS 2021 review, practitioner process guidelines, fee structures and changing the efficacy and impact of these schemes. Through reflective practice on the authors experience working in compulsory mediation contexts in Tasmania and Queensland, the authors will share case study experiences of enablers and barriers to an effective mediation. The authors will reflect on experience of systemic challenges and opportunities to a successful facilitated intervention, factors and variables that relate to individual parties as well as specific conflict dynamics that also affect the process and outcome.

Some reflections include systemic barriers and challenges working within legislatively prescribed time constraints for such processes, capped fee arrangements for practitioners, reduced capacity for intake and rapport building as well as challenges around a lack of integrated case management for parties with multiple presentations in different agencies/interventions. This paper will also review many existing qualitative and quantitative feedback data that has been collected by the referring (mediation) bodies ie QCAT/Queensland Attorney General’s Division and the Office of the Education Registrar/Department of Education in Tasmania.

Sonya Willis, “Is Civil Dispute Resolution all about how best to balance competing objectives?”

Stakeholders in civil disputes often find themselves between a rock and a hard place. The most efficient solutions lack procedural protections and the fairest solutions come at a cost which makes them unjust or just plain unavailable. This paper suggests that the key to optimising civil dispute resolution lies in acknowledging and accepting the underlying conflicts to enable proper focus on improving outcomes for disputants. To improve the services that lawyers, mediators, arbitrators, courts and other stakeholders are offering disputants, involves accepting that civil dispute resolution can't be "just, quick and cheap" simultaneously, that ADR is efficient but at a procedural cost and that the optimal format for resolving civil disputes will vary depending on a large number of factors which are often conflicting in their nature. This paper will discuss 4 key conflicting imperatives of civil dispute resolution: (1) efficiency and due consideration; (2) certainty and flexibility; (3) privacy and openness; and (4) autonomy and control. The paper will then consider how understanding these conflicts can enable optimal resolution of civil disputes through both ADR and litigation. "

Peta Spyrou, "Considering the adequacy of ADR in disability discrimination complaints regarding the education of compulsory aged students with disability-induced problem behaviour"

The compulsory education of students with disability-related problem behaviour produces a unique clash of interests between the child, often represented in disputes by their parents, and the school, representing the interests of staff and other students. While limited rights exist for students with disability to access education free from discrimination, there is limited legal guidance about what constitutes an appropriate balance for these clashes. When disputes arise, statutory bodies turn to Alternative Dispute Resolution ('ADR') to try to resolve these complex issues, which may be highly emotionally driven and involve critical community safety issues.

Based on empirical and anecdotal research, including interviews of recent past complainants and professional stakeholders, my doctoral research investigates the outcomes and satisfaction levels regarding these disputes from the Commissions in South Australia, Victoria and federally.

This paper discusses the ADR findings of my textual analysis. It does so by comparing the ADR models and processes prescribed in the relevant statutes, as well as key advantages and disadvantages of ADR. It also hypothesises what my empirical research will find.

This paper highlights the finding that the Victorian Commission uses different ADR model and processes, compared to the other two Commissions. It also argues that the potential vulnerability of parent advocates; the unique clash of interests for these disputes; and the lack of legal guidance make these difficult matters to resolve.

S. I. (Stacie) Strong, “Legal Reasoning Across Commercial Disputes: Comparing Judicial and Arbitral Analyses”

This presentation provides important insights into how judges and arbitrators resolve complex commercial disputes in both national and international settings. The presentation discusses a study that used an innovative combination of three different research methodologies to ensure that the analysis bridged evidence of perception, behaviours, and outcomes amongst judges and arbitrators. Using three different methodologies not only allowed for unsurpassed depth and breadth of information, it also allowed for immediate triangulation of results, thereby providing a useful and immediate double-check of the research outcomes.

The methods included a series of semi-structured interviews of judges and arbitrators; a large-scale international survey of judges and arbitrators; and a quantitative (statistical) study of written decisions and awards. Although the empirical techniques are firmly grounded in sociological inquiry, the goal of the research was to test longstanding theories about the nature of legal reasoning in judicial and arbitral settings and to understand how legal reasoning actually operates in practice. In particular, the study compared legal reasoning across the judicial-arbitral divide, the domestic-international divide and the common law-civil law divide. The findings have been recently published in a book (*Legal Reasoning across Commercial Disputes*) put out by Oxford University Press.

Jonathan Crowe and Rachael Field, “Intuition and Artistry in Mediation: Implications for Mediator Ethics”

Mediation is one of the most common methods of resolving legal and social disputes in Australia. It is therefore important that mediators not only meet minimum standards of competence but attain higher levels of expertise. This paper draws on social scientific research on intuitive decision making and flow states to cast light on the nature of artistry in mediation. We argue that this research has important implications for how mediators respond to ethical dilemmas. Specifically, we propose a guided framework for mediation practice that leaves room for mediators to exercise and enhance their capacity for ethical judgment. This framework allows mediators to utilise a contextual ethical method to guide their practice while avoiding the charges of indeterminacy that such methods sometimes confront.

Alysoun Boyle, “Evaluating Mediators - stepping off the beaten track”

This presentation will focus on large group discussion. Initially, it will report briefly on the key outcomes of a major analysis of empirical studies of mediation using a metaresearch framework whose purpose was to confirm what is known about mediator effectiveness. The outcomes suggest that very little is known about mediator effectiveness, and that, in the absence of significant changes in research approach and design, there is unlikely to be any

increase in what is known - including about what mediators do in mediation, how they might influence what happens during mediation and how they might influence the achievement of mediated outcomes and their content. The analysis outcomes also suggest that research in this area is constrained by a range of gaps in the fundamental approaches to empirical investigations. These outcomes have ramifications for mediation research as well as for mediation practice.

The presentation will focus on large group discussion informed by an overview of potential future approaches to research in this area, drawing on relevant work in other fields. The overview will canvass options for filling identified gaps and removing existing constraints including identification of relevant theoretical frameworks; building collaborative research networks (that include stakeholder and other non-researcher members); developing innovative research approaches and methods; and reviewing the processes for reporting and publication of research results. Consideration will also be given to potential leadership roles for bodies such as this Network.

Masood Ahmed, “Time for a more principled approach to compulsory ADR within the English civil justice system?”

Although successive English civil justice reforms have embraced alternative dispute resolution (ADR) as an important aspect of the civil court process, the issue of whether the courts possess the power to compel non-consenting litigating parties to engage with ADR has been a controversial one. The orthodox judicial approach has been to dismiss the notion of compulsory ADR on the grounds that it would unduly restrict the constitutional rights of the parties to access the courts. However, a divergent judicial approach also has emerged which, although officially rejecting compulsory ADR, impliedly compels the parties to engage with ADR through the threat of cost sanctions. Consequently, the evolving ADR jurisprudence has been inconsistent, contradictory, and confusing. This paper critically considers judicial approaches to compulsory ADR and argues, in light of the current digitisation reforms, including the introduction of the Online Civil Money Claims, and recent landmark decisions of the Court of Appeal, that it is now time for the courts to reject the orthodox approach to compulsory ADR and to fully embrace their case management powers in making ADR orders. Ultimately, this will allow the senior courts to develop a consistent and coherent message for the courts, litigants, and the legal profession.

Bryan Clark and Tania Sourdin, “The Singapore Convention: a solution in search of a problem?”

This presentation explores the purpose and efficacy of the United Nations Convention on International Settlement Agreements Resulting from Mediation (‘Singapore Convention’ or ‘Convention’). The Convention’s genesis was premised on the notion of alleviating the enforceability issues that are annexed to settlement agreements arising from cross-border mediation (IMSA). While such enforceability issues are not entirely unfounded, the way in which the Convention has been drafted to address such issues has been the subject of

criticism. In view of such criticism, this presentation explores the empirical research upon which the Convention's introduction is based and queries whether the structure of the instrument heralds an unnecessary juridification of the mediation process. In particular, a close review of the research highlights the unintended consequences that can flow from the Convention's uptake, suggesting that the introduction of the Convention may lead to an increase in issues pertaining to IMSA enforcement. It is in this context in which this presentation submits that the Convention may be regarded as a solution in search of a problem.

Tayne Redman, "A technological trade-off: the reduction of human-connection for faster, more remotely accessible outcomes in civil dispute resolution"

The COVID-19 pandemic has demonstrated how Australian courts can facilitate justice through the adoption of internet-based systems. Although online systems degrade human connectivity, these systems extend justice to the entire population in a way that was not possible previously.

Technology can facilitate participation in the judicial systems. Greater participation means greater access to the protections, benefits and entitlements that the law offers, and should be providing. However, this is not always the case for low-income earners. The purpose of the paper is to evaluate where technology can be implemented to extend the functions of the court services, in particular, to enhance the pre-action protocols in dispute resolution for low-income earners. This focus includes enhancing compliance with pre-action claims and pre-action meetings via internet-based alternatives.

My presentation uniquely draws upon the adoption of technology in socio-legal business during the 2020 pandemic. This presentation includes my recent experience utilising artificial intelligence in client services, and my current research examining the use of the same technologies to support self-represented litigants in dispute resolution. I look forward to hearing the audience's experience using technology in dispute resolution, in particular for those who are digitally inept and forced to adapt as a consequence of the pandemic. Further, I would like to discuss where we can strike a balance between authentic and augmented human interaction in legal services. These perspectives are critical to establishing if there has been a change of attitude since the pandemic forced such a transition away from human interaction.

Genevieve Grant, "Lawyers' experiences of online hearings"

In Australia as elsewhere, the COVID-19 pandemic is having a significant bearing on civil justice systems. The rapid shift to remote hearings (phone and online) is impacting on all court users. Understanding how online hearings are experienced by users and shape proceedings is critical for courts evaluating the operation of emergency measures and

considering the extent to which these practices are retained into the future. This paper presents findings from interviews with Australian barristers and solicitors (n=37) about their experiences of remote hearings in civil matters. The interviews were conducted between May and September 2020, during Melbourne's 'second wave' 4-month lockdown. This presentation focuses on findings about the perceived efficiencies of remote hearings and the range of significant but less seen costs.

Joe McIntyre, “Civil Courts and the Role of Digital Justice Technology After COVID-19”

The last five years have seen significant developments in the use of digital justice technology globally. Australia has, in contrast, been relatively slow moving in embracing the use of such technologies to improve the efficiency and accessibility of its courts. The sudden shutdown required to respond to the 2020 global pandemic forced jurisdictions around the country to rapidly cobble together technological solutions to allow emergency access to the courts to continue. While the immediacy of that first response has faded, the discussion has begun to shift to the post-pandemic period. It appears that digital experience of 2020 has affected a cultural change within the judiciary and the legal profession, reducing the instinctive aversion to many technological options.

This paper will explore how that changed context may lead to a new willingness to embrace the innovations in digital justice technology. In doing so, it will articulate a taxonomy of digital justice technologies, and will highlight some of the relative strengths and comparative challenges - both technological and conceptual – faced by civil courts in using such technologies. It argues that to gain the greatest benefits of these technologies it will be necessary to adopt a broader conception of the role of courts. Moreover, it argues that a degree of regulatory flexibility may be necessary properly leverage the potential of automated 'advice' to increase access to justice.

Margaret Castles, “Exploring presumptions underlying mediation practice”

Mediation is a broad church, with a rich diversity of practices, styles, theories, and values. My work integrating awareness of Australian Aboriginal communication practices in interviewing practice with final year Clinical Law students has led me to critically evaluate the extent to which typical interview practice rests on a uniquely Western European knowledge system. Inevitably, this has spilled into other areas, and to consideration of whether there is a subtle but pervasive infusion of Western European culture and practice into the mediation domain, where both communication and dispute resolution process and theory meet.

This paper contrasts Anglo Australian approaches to communication, dispute resolution, investigation and fact finding with the cultural practices and preferences of Aboriginal people. The purpose of the paper is not to criticise either approach, but to open the door to discussion about what we as mediators and dispute practitioners can learn from Aboriginal

culture that might inform our own practice with diverse participants in ADR process. I will draw on work by Australian Aboriginal academics, linguists, philosophers, and other participants in the justice system to illustrate some of the observations being made. I hope that at the end of the presentation, there will be lively discussion from the audience sharing experiences and ideas from practice and theory.

Bridgette Toy-Cronin, “Telephone Mediations in Rent Arrears Applications”

In New Zealand, when a landlord wants to evict a tenant for rent arrears, almost all cases will initially be sent to a telephone mediation service rather than directly to hearing. The aim of the mediation service is to attempt to reach a payment plan between landlord and tenant and sustain the tenancy. This paper uses data from observations of 40 telephone rent arrears mediations, along with interviews of Tenancy mediators (n=4) to consider the advantages and disadvantages of this practice. It considers issues of power and consent, formalism, and privacy. In doing so it draws out lessons that might inform the design of civil justice processes more generally, particularly for high volume, low monetary value disputes.

Robert Angyal, “Is Party Self-Determination a Concept Without Content?”

This paper is based on Robert's article in the current issue of The Newcastle Law Review at <http://classic.austlii.edu.au/au/journals/NewcLawRw/2020/4.html>

Party self-determination is a central concept in mediation theory, yet many basic questions about it remain unaddressed. Does it describe only how mediating parties, acting together, resolve their dispute or does it also describe how they act towards each other? If the former, the name of the concept is confusing and the concept itself adds little to the existing distinction between a dispute resolved by agreement of the parties and one where a result is imposed on the parties by an adjudicative decision-maker. If party self-determination describes how mediating parties act towards each other, it loses all content. The cause of the loss of content is misplaced concern that mediated agreements may be substantively unfair as a result of power imbalances between the parties. The concern is misplaced because a mediator cannot know whether a mediated agreement is substantively unfair and, for practical and legal reasons, cannot even up power imbalances. Next, does party self-determination purport to prescribe how mediation should be conducted or does it merely describe its conduct? If the former, there does not appear to be any authority for its prescriptions. If the latter, its description of mediation diverges widely from conventional Australian practice. Finally, party self-determination fails to explain the two central mechanisms that make mediation such an effective method of dispute resolution: The power of doubt and the terrible choice that mediating parties are forced to make during the “end game” of mediation. Given these deficiencies, the concept of party self determination should be abandoned as lacking utility.

Lola Akin Ojelabi, “Reality testing in mediation”

Reality testing in mediation involves assessing the limitations of options generated for settling a dispute but it is not, strictly speaking, a self-assessment. Rather, it is an assessment led by the mediator using questioning, framing and reframing, as well as summary and paraphrasing. It is, cautiously speaking, an assessment that helps a party distinguish between ‘fantasy’ and ‘reality’ in terms of what the possible outcome might be, the possibility of realising that outcome, and the impact of achieving that outcome. This paper explores the theory and practice of reality testing in mediation.

Jacqueline Weinberg and Jennifer Lindstrom, “Teaching family dispute resolution in clinical legal education”

Over recent years, family dispute resolution (FDR) has become an integral part of Australian family law practice. In a university law clinic, students are taught what lawyers actually do in practice, including ways in which to advise clients about options for resolving their disputes. In this paper, we show how the LAFDR (lawyer-assisted family dispute resolution) clinic within the Monash University Clinical Program gives students the opportunity to expand their knowledge of family law and FDR principles, processes and practices. Students are encouraged to think critically about contemporary and systemic issues in FDR and areas for law reform. In this paper, we will present the structure and steps taken to develop the LAFDR clinic and the ways in which the clinic is conducted. This paper will outline how the LAFDR clinic gives students the opportunity to develop communication, research, advocacy, professional and practical legal skills in order to become successful future lawyers.

Christina Platz and Kathy Douglas, “Online Fishbowl Pedagogy Using Video Conferencing: Developing Reflexive Legal Practice”

Authentic learning in ADR/civil procedure teaching is well researched in the literature due to the applied nature of these subjects and the potential to develop legal skills. With the wider use of online learning in law pedagogy (and in particular with the impact of COVID-19 on the need for online teaching) there is a need to explore new pedagogies which may be adaptations of f2f learning and teaching strategies.

Fishbowl pedagogy is a valuable learning and teaching option in both f2f and online modes as it provides the opportunity for students to jump in and out of role, observe others in role and reflect on their learning. There are a number of different pedagogical approaches and models that can be adopted and each has advantages, but the technology used has been text based (Douglas and Johnson 2009). With the widespread use of zoom and other video conferencing options due to the recent pandemic closing many f2f teaching campuses, there is the opportunity to use fishbowl pedagogy via video conferencing. For instance, using the technology of collaborate ultra in the learning management system of Canvas, means that students can virtually jump in and out of character and gain insights into legal skills practice through peer observation and interaction. This approach has the advantage of students being “active” in their learning online and they can also simultaneously discuss the role-play

through chat box. The chat box can aid reflection and develop critical discourse related to the fishbowl role-play. Students develop legal skills through scaffolded demonstration in their role-play but also can critic the actions of others from theoretical perspectives. An online fishbowl role-play of this kind can integrate theory and practice and better prepare students for the legal profession.