THE ONLINE MEDIATION FISHBOWL: LEARNING ABOUT GENDER AND POWER IN MEDIATION

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In this paper, the authors discuss a design for the teaching of gender concerns in mediation through the use of online learning. The authors describe and discuss e-learning approaches they have used to assist students to understand how issues of gender and power can impact on negotiation in mediation. A blended learning design is suggested to allow students to learn theory and skills in both face-to-face and online contexts. The design allows students to consider complex theoretical issues, such as those relating to gender and power, in a self-paced manner through the use of an online fishbowl role-play. In this design students jump 'in' and 'out' of role online and concurrently debate role-players' choices and interventions in a threaded discussion board. The teacher moderates participation and also can jump into roles allowing for the modelling of 'best practice' for the mediator and the legal representative.

I. INTRODUCTION

The increased utilisation of mediation as an adjunct to our court and tribunal systems and the continued rise of mediation as a conflict resolution option in business, community and interpersonal contexts reflects the wide adoption of this dispute resolution option in Australia.[1] Legal students and practising lawyers[2] need to understand about the various options in alternative dispute resolution (ADR),[3] including mediation, and the various contexts of practice. For example, family law practitioners need to understand about the wide range of family dispute resolution options, including mediation, in family law parenting disputes, given the prioritising of family dispute resolution over litigation.[4] Mediation is important as it is now one of the most widely accepted ADR options and has been institutionalised in the Australian legal system. However, in our eagerness to embrace many of the benefits of mediation we are sometimes slow to address the difficulties that it poses.[5] These include such issues as standards and ethics,[6] mediator liability,[7] the desirability of mandatory mediation,[8] issues relating to justice and fairness[9] and mediation

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1 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) ch 1.

2 Charles Brabazon and Susan Frisby, 'Teaching Alternative Dispute Resolution Skills' in Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (1999); Chiara-Marisa Caputo, 'Lawyers' Participation in Mediation' (2007) 18 *Australasian Dispute Resolution Journal* 84.

3 There are a number of ADR options, including: facilitative processes, i.e. negotiation, facilitation, partnering, conferencing and mediation; advisory processes, i.e. conciliation, neutral evaluation, case appraisal, dispute counselling and expert referral; and determinative approaches, i.e. expert determination, independent fact-finding and mini-trial, arbitration: Tania Sourdin, *Alternative Dispute Resolution* (2nd ed, 2005) 20. Arguably, this list would now include the recent process of collaborative law: see Anne Ardagh and Guy Cumes, 'The Legal Profession Post-ADR: From Mediation to Collaborative Law' (2007) 18 *Australasian Dispute Resolution Journal* 205.

4 See Donna Cooper and Mieke Brandon, 'How Can Family Lawyers Effectively Represent their Clients in Mediation and Conciliation Processes' (2007) 21(3) *Australian Journal of Family Law* 288. In family law, there are now a wide range of ADR processes used. See Donna Cooper, 'The Family Law Dispute Resolution Spectrum' (2007) 18 *Australasian Dispute Resolution Journal* 234.

5 For example, sometimes ADR, and in particular mediation, may not be appropriate to deal with a conflict. This may be for a range of reasons, for instance, when violence is part of the relationship between disputants — a severe imbalance of power. There may also be a need to provide a legal precedent to set norms in society. A matter may need to be litigated in order to debate a contentious issue in the public arena, rather than pushing a concern into a private ordering option: Astor and Chinkin, above n 1, 9-10.

6 See for example Rachael Field, 'A Mediation Profession in Australia: An Improved Framework for Mediation Ethics' (2007) 18 *Australasian Dispute Resolution Journal* 178.

7 National Alternative Dispute Resolution Advisory Council (NADRAC), *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters* (2006).

8 Ibid.

accreditation and training.[10] Many of these issues are interlinked. It is the important issue of gender and power, a subset of issues relating to justice and fairness,[11] and the concern of teaching about gender and mediation in universities[12] that will be the focus of this discussion. In particular, the authors explore utilising online learning as one possible method of teaching about gender, power and mediation.

Online education is increasingly being adopted in university education[13] and one option in e-learning is blended learning,[14] where parts of a course are taught face-to-face and other parts are delivered online. In the teaching of ADR, or similar content courses, blended learning has been used by some teachers through the adoption of online negotiation simulations, generally undertaken in combination with face-to-face classes.[15] Strategies have included web-based negotiation simulations, including negotiating with participants from other countries,[16] using web-based streaming video to provide visual cues,[17] and using email or instant messaging to conduct the negotiation.[18] Some benefits of these strategies include the opportunity to:

- plan strategy by meeting with similar role-players in a private electronic chat room;
- reflect prior to action in the simulation;[19]
- trace back the moves in the negotiation through the printing and review of a transcript of the simulation;[20]
- reflect upon cultural and communication approaches in negotiation in an online environment (where many negotiations are now carried out);[21] and
- access the role-play at times convenient to the participant due to the asynchronous nature of the negotiation. The negotiation can be held in specified periods of time or be synchronous to avoid delays in completing the task.[22]

In the context of teaching about mediation, online mediation role-plays, which seek to explore theory issues such as gender concerns in mediation,[23] are one way to approach this

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9 According to a report from the National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution, Discussion Paper* (1997), these include issues relating to gender, minority cultural groups in Australian society, age, disabilities, minority sexual preference, geographic location and socio-economic power differences.

10 Many of these issues are addressed in the new national voluntary mediator accreditation system: see generally, Australian National Mediation Standards, *Practice Standards: For Mediators Operating Under the National Mediator Accreditation System* (September 2007); Australian National Mediation Standards, *Approval Standards: For Mediators Seeking Approval Under the National Mediator Accreditation System* (September 2007); Tania Sourdin, *Australian National Mediator Accreditation System: Report on Project* (September 2007).

11 An issue is the promotion of understanding of marginalised 'others' in dispute resolution, such as Indigenous groups: see National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management* (2006).

12 For a discussion of the teaching of ADR in law school and the effect upon students' approach to conflict, see Judy Gutman, Tom Fisher and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students Part 1: Past and Current Practices and Some Unanswered Questions' (2006) 16(1-2) *Legal Education Review* 125; Tom Fisher, Judy Gutman and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students Part 2: An Empirical Survey' (2007) 17(1-2) *Legal Education Review* 5. This area is also taught in social science and business courses: see Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 469.

13 Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2007) 17 *Legal Education Review* 1, 15-16.

14 Charles R Graham, 'Blended Learning System: Definition, Current Trends, and Future Directions' in Curtis J Bonk & Charles R Graham (eds), *Handbook of Blended Learning: Global Perspectives, Local Designs* (2005) 3-21.

15 Melissa Conley Tyler and Naomi Cukier, 'Nine Lessons for Teaching Negotiation Skills' (2005) 15 *Legal Education Review* 61.

16 Robert B McKersie and Nils Olaya Fonstad, 'Teaching Negotiation Theory and Skills Over the Internet' (1997) 13 *Negotiation Journal* 363.

17 Scott Peppet, 'Teaching Negotiation Using Web-Based Streaming Video' (2002) 18 *Negotiation Journal* 271.

18 Joshua Weiss, 'A View Through the Bubble: Some Insights from Teaching Negotiation Online' (2005) 21 *Negotiation Journal* 71.

19 For example students might produce a negotiation plan: Tina Cockburn and Tracey Carver, 'Online Skill Development for Generation Y Students' (2007) 13(12) *International Journal of Education* 81, 85.

20 Weiss, above n 18.

21 Brooks C Holtom and Amy L Kenworthy-U'Ren, 'Electronic Negotiation: A Teaching Tool for Encouraging Student Self-Reflection' (2006) 22 *Negotiation Journal* 303.

22 Ibid 310.

area. However, role-plays of this kind, and many negotiation simulations online, can be time consuming and suffer from the difficulty of occasional tardy responses from role-players. Potentially, the approach of an online mediation fishbowl role-play addresses these concerns by ensuring a swift-paced unfolding of the scenario, with volunteer students progressing the storyline and thereby avoiding the difficulty of non-responsive students delaying completion of the learning task.

In this paper, the authors explore gender concerns in mediation and highlight the need for students to understand mediation practice that engages with concerns relating to gender and power. The strategy of using an online mediation fishbowl role-play in the teaching of ADR, or similar content courses, in universities is canvassed in order to promote understanding of issues relating to gender and power. This learning and teaching approach can also be utilised to teach about other marginalised groups such as indigenous[24] or cultural minorities. [25] Notably, women may experience a combination of identity issues, such as for an indigenous woman involved in negotiation.[26] The online component is undertaken contemporaneously with face-to-face classes, thereby utilising a blended learning design. After reading and discussing articles dealing with gender concerns, students jump 'in' and 'out' of an online fishbowl in turn and therefore engage in active learning. The students have the opportunity to consult relevant literature before deciding upon mediator interventions — an option not generally available in face-to-face role-plays. Concurrently, other students in the class debate the role-players' choices and interventions in a threaded discussion board online. The online mediation fishbowl role-play is an authentic learning[27] activity that has the benefit of allowing students to witness the modelling of appropriate mediation and legal practice by the teacher, who can also jump into role to demonstrate 'best practice' in dealing with gender issues. This modelling is generally not available in the more widely adopted strategy of online negotiation simulations.

This paper has a design focus, outlining relevant educational theory and options for using an online mediation fishbowl role-play. As such, it does not include an evaluation of this learning and teaching strategy. The following section of this paper provides detail relating to gender concerns and mediation. The next section discusses the e-learning theory used in developing the online mediation fishbowl, focusing on blended learning and Diana Laurillard's 'conversational framework'.[28] The last section of this paper provides a number of design issues for consideration when implementing the online mediation fishbowl.

II. GENDER AND MEDIATION

There are many potential benefits for women and other groups when utilising mediation in conflict situations, including the opportunity for party empowerment and storytelling.[29] However, the experience of women in the mediation process may differ from the experience of men.[30] Mediation may present particular difficulties for some women and these difficulties can sometimes result in women entering into agreements that are not in

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23 For a discussion regarding the training of mediators and the use of online learning, including four possible models of online role-plays, see Kathy Douglas, 'Mediator Accreditation: Using Online Role-plays to Teach Theoretical Issues' (2007) 18 *Australasian Dispute Resolution Journal* 92.

24 Loretta Kelly, 'Elements of a "Good Practice" Aboriginal Mediation Model: Part 1' (2008) 19 *Australasian Dispute Resolution Journal* 198.

25 Morgan Brigg, 'Mediation, Power and Cultural Difference' (2003) 20 *Conflict Resolution Quarterly* 287.

26 Astor and Chinkin, above n 1, 133-134.

27 Anthony Herrington and Jan Herrington, 'What is an Authentic Learning Environment?' in Anthony Herrington and Jan Herrington (eds) *Authentic Learning Environments in Higher Education* (2006).

28 Diana Laurillard, *Rethinking University Teaching: A Framework for the Effective Use of Learning Technologies* (2nd ed, 2002).

29 See, eg, Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley's Law Journal* 39. See also Marsha Lichtenstein, 'Mediation and Feminism: Common Values and Challenges' (2000) 18 *Mediation Quarterly* 19; Janet Rifkin, 'Mediation from a Feminist Perspective: Promises and Problems' (1984) 2 *Law and Inequality* 21.

30 Trina Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Journal* 1545.

their best interests.[31] To some extent, women's experiences of mediation are tied to their experience of society generally. Historically, the law has discriminated against women in particular areas, such as the right to contract and hold property and areas such as rape and domestic violence.[32] Additionally, the law discriminates against some women because of its failure to see the world from a woman's point of view. Instead, the law will often begin any discussion of rights and obligations under our legal system with the perception of the male experience as the norm.[33] Similar to the discrimination experienced by women in the law is the discrimination possible in the mediation process. Specific areas of dispute commonly mediated that can relate to women include equal opportunity, sexual harassment and disputes relating to the family. Some writers maintain that women can be disadvantaged in the mediation process due to the socialisation of male and female roles in our society, whilst others argue that it is important not to 'essentialise' women and other groups.[34]

Power is often a key issue when considering the difficulties women may face in mediation and is important in deciding whether mediation is appropriate for the dispute, the way that the mediation is conducted and the possible need to terminate the mediation due to imbalances in power.[35] Issues of power in mediation occur between participants and also between the participants and the mediator. At play in a mediation is not only the details of the conflict that has brought the parties to the mediation table but also wider societal discourses that affect the way that the stories of conflict are constructed.[36] Conflict is a by-product of the types of power in our modern society, including gender and culture.[37] According to Hilary Astor, mediation is a storytelling process where dominant narratives may colonise alternative narratives.[38] Mediators can act reflexively to address power issues in the mediation to ensure the hearing of diverse voices in the process. Dale Bagshaw argues that reflexive practice requires mediators to reflect regarding their own personal and political history and their interaction with the parties.[39] The issue of power affects many women but also many marginalised or 'othered' groups such as indigenous groups, cultural groups that are not part of the dominant Anglo-Celtic group, those with a disability and those with a differing sexual orientation to the dominant heterosexual norms.[40]

Of particular concern to women is the issue of violence and mandatory mediation. Under s 60I of the *Family Law Act 1975* as amended by *Family Law Amendment (Shared Responsibility Act) 2006* (Cth), family dispute resolution (which includes mediation) is now compulsory prior to litigation in matters dealing with children. Victims of domestic violence are exempt from attending mediation, although screening processes may fail to identify some women who have experienced violence and, thus, women in this situation may still end up sitting opposite the perpetrators of the violence against them. These women may not notify the system that they are victims of violence due to feelings of shame and due to the fact that they may fear the high cost of litigation.[41]

Power imbalances in mediation can be engaged with by employing a number of strategies. Some strategies relate to the organisation of mediation within our justice system

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31 In the context of family law, see Rachael Field, 'Using the Feminist Critique of Mediation to Explore the Good, the Bad and the Ugly: Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20 *Australian Journal of Family Law* 45.

32 Regina Graycar and Jenny Morgan, *Hidden Gender of Law* (2nd ed, 2002).

33 Ibid.

34 Dale Bagshaw, 'Self Reflexivity and the Reflective Question: Broadening Perspectives in Mediation' (2005) 24(2) *The Arbitrator and Mediator* 1; See NADRAC, above n 9, 53-60, for a discussion of the disadvantages some women may experience.

35 Hilary Astor, 'Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner' (2005) 16 *Australasian Dispute Resolution Journal* 30.

36 John Winslade and Gerald Monk, *Narrative Mediation* (2000).

37 Ibid 41.

38 Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social & Legal Studies* 221.

39 Bagshaw, above n 34, 3.

40 See NADRAC, above n 9.

41 Grillo, above n 30, 1600-1607; Astor and Chinkin, above n 1, 345.

and in the community generally, for instance, the provision of a lawyer to attempt to address issues of power[42] or the screening of participants for domestic violence[43] prior to the commencement of mediation. Some strategies can be utilised by the mediator in the mediation process, ranging from advising parties to obtain advice to actively advocating one party's position or employing shuttle mediation.[44] In relation to concerns over the mediators' impact upon mediation and whether he or she can adversely affect women's interests in the mediation, strategies can be utilised by mediators to reflect upon their performance and the possibility of co-mediation can be explored. [45]

The kinds of strategies that mediators are prepared to utilise can well depend upon their view of mediator neutrality in the mediation process. Many mediators take the view that neutrality requires mediators to be objective in their conduct of the mediation process.[46] Like judges, they must be capable of an unbiased approach to the process. However, there is a difference between a mediator who attempts to be 'neutral' and a mediator who is able to keep the dynamics of mediation even.[47] Critics of the concept of neutrality state that we are never able to be truly neutral,[48] that our backgrounds and personal biases will affect our choices as mediators.[49] Some mediators, acknowledging the inability of a mediator to be neutral in the objective sense, will be more open to intervention strategies.[50] Other practitioners adhere to the concept of neutrality and value the legitimacy that this supposed attribute of mediation provides.[51] An attempt at even-handedness can always be made to try to ensure the participation of all parties in the mediation process.[52] It may be a question of which model of mediation is adopted, as some models[53] may better meet feminist concerns regarding mediation and allow the benefits of party empowerment and storytelling to be enjoyed by women. Focusing upon the mediator interventions does not address institutional issues relating to mediation,[54] but it does arguably allow women to enjoy the benefits of mediation while minimising the dangers. Mediators wield the potential for enormous power, through suggestion, through private meetings, through the setting of agendas, summarising, reframing and various other strategies. If women are to

42 Field, above n 31. For a detailed discussion of the role of the lawyer, see Rachael Field, 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants Who are Victims of Domestic Violence' (2004) 20 *Australian Feminist Law Journal* 65. See also Rachael Field and Johnathan Crowe, 'The Construction of Rationality in Family Dispute Resolution: A Feminist Analysis' (2007) 27 *Australian Feminist Law Journal* 97.

43 Screening is provided in family relationship centres (FRCs) and other providers of family dispute resolution: Family Relationship Centre, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~Screening+and+Assessment+Framework+-+July+2008.PDF/$file/Screening+and+Assessment+Framework+-+July+2008.PDF> at 27 November 2008.

44 Rachael Field and Mieke Brandon, 'A Conversation about the Introduction of Compulsory Family Dispute Resolution in Australia: Some Positive and Negative Issues for Women' (2007) 18 *Australasian Dispute Resolution Journal* 27.

45 Ibid.

46 See Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Part 1' (2000) 10 *Australasian Dispute Resolution Journal* 73.

47 See Janet Rifkin, Jonathon Millen and Sara Cobb, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9 *Mediation Quarterly* 151.

48 Martha Fineman, 'Dominant Discourse, Professional Language and Legal Change in Child Custody Decision-making' (1988) 101 *Harvard Law Review* 727.

49 See David Greatbatch and Robert Dingwall, 'Selective Facilitation: Some Observations on a Strategy Used by Divorce Mediators' (1989) 23 *Law and Society Review* 613.

50 More interventionist models eschew the notion of neutrality and the process/content distinction that is often espoused by practitioners when mediating with a belief in neutrality. New models of mediation, such as the storytelling, narrative and transformative models utilise interventions that acknowledge the active participation of the mediator in the unfolding story of the mediation: Kathy Douglas and Rachael Field, 'Looking for Answers to the Mediation Neutrality Dilemma in Therapeutic Jurisprudence' (2006) 13 (2) *Murdoch University Electronic Law Journal* 177.

51 Astor, above n 46, deconstructs and then reconstructs neutrality and values the use of the concept to guide practice. She advocates a philosophy of maximising party control.

52 Sara Cobb and Janet Rifkin, 'Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation' (1991) 11 *Studies in Law and Politics* 69.

53 For example, the narrative model specifically addresses issues relating to women through a number of interventions. These include the mediator sending a message that violence will not be tolerated, naming sexist remarks and attempts to intimidate, externalising the problem, mapping, use of advocates and support people and shuttle mediation: see generally Winslade and Monk, above n 36.

54 See Richard Abel, 'The Contradictions of Informal Justice' in Richard Abel (ed), *The Politics of Informal Justice* (1982).

be given the benefits of mediation, they need a well-trained and thoughtful mediation practitioner to ensure the fairness of the process[55] and a legal representative that understands gender concerns.[56] In particular, in the context of negotiations where there has been a history of domestic violence between the parties, a woman may need a legal representative that understands the need for an advocate who can empower and protect them in the mediation process.[57]

Legal subjects dealing with ADR will often include mediation.[58] Many will deal with the issue of gender in the third-party facilitation of conflict.[59] There are a range of feminist views regarding the impact of gender upon negotiations[60] and to effectively teach about gender and mediation there is a need for a learning and teaching design that incorporates the diverse range of theories in this area and provides the opportunity for student reflection.

If legal students are to understand and respond to women's issues and concerns in mediation, they must fully appreciate theoretical issues relating to women. Arguably, what we want from any learning experience is to engender a thoughtful legal practitioner who is able to appreciate the nuanced issues relating to gender. Therefore, it is necessary not to teach in such a way that a student can leave at the conclusion of a course having heard of the negative experiences of women in mediation, but not understood the feminist theories which explain these experiences or learned the mediator and legal practitioner strategies and skills to ensure that mediated outcomes for women are fair and just.

Paul Ramsden notes that 'learning is applying and modifying one's own ideas'.[61] In the context of teaching about gender and mediation, lecturers would wish students to come to know about feminist issues and mediation. Ideally, students would learn how to identify and analyse situations involving inequality in power relating to women, assess proposed intervention strategies critically, recognise the style and persuasiveness of concepts relating to feminist literature and be able to apply these ideas as a mediator or understand these issues as a lawyer representing a client in mediation. There would be an expectation that students would reflect on and, if necessary, change their interpretation of the world through their understanding of feminist theory as it relates to mediation. The learning and teaching strategy of using an online mediation fishbowl aims to bring about this understanding in students through participation in online learning.

In the next section of this paper, the authors discuss the e-learning theory that has assisted in the design of the online mediation fishbowl role-plays: blended learning and Laurillard's 'conversational framework'.

III. SELECTED E-LEARNING THEORY

There is a range of choices when considering which technology to incorporate in teaching and learning strategies. For instance, computer tutorial programs can be utilised or developed to assist student learning. These programs provide problem-solving opportunities, with the student's answer compared with a model answer and discrepancies reported back to the student. Multimedia[62] can be used to allow for self-directed learning, usually by development of CD-ROM packages, with the student travelling through a world of information and interacting with carefully constructed activities. A virtual classroom

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55 See Douglas, above n 23.
56 Field, above n 42.
57 Ibid. See generally, regarding legal practice that empowers clients: Andrea Kupfer Schneider, 'Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes' (2000) 5 *Harvard Negotiation Law Review* 114.
58 See, eg, the course at La Trobe University, entitled *Dispute Resolution*; Fisher et al, above n 12, 70.
59 See Carrie Menkel-Meadow, 'Teaching about Gender and Negotiation: Sex, Truths, and Videotape' (2000) 16 *Negotiation Journal* 357.
60 Deborah Kolb, 'More than Just a Footnote: Constructing a Theoretical Framework for Teaching about Gender in Negotiation' (2000) 16 *Negotiation Journal* 347.
61 Paul Ramsden, *Learning To Teach in Higher Education* (2nd ed, 2003) 111.
62 Multimedia can include audio and video, can link in with the internet, and can incorporate modelling and microworlds. For an analysis of the attributes of various media, see Laurillard, above n 28, ch 7.

can be adopted where all the material and teaching and learning occurs online or in adjunct mode. However, this choice of pedagogy allows for only limited integration of the online learning with the rest of the material delivered in a subject.[63] In contrast, another option, which has been adopted in this learning and teaching strategy, is blended learning. This option combines two or more learning mediums. More specifically it is the integration of online teaching and learning with the face-to-face classroom experience.[64] The best medium for achieving a particular learning objective should direct how the learning modes are blended. If the pedagogical implications of blended learning are not thought through, it risks incorporating the worst aspects of each of the learning mediums utilised, the opposite of the intended outcome.[65] Face-to-face environments may be the best for spontaneous interaction, however where 'control of pace' is beneficial to the learning goal — for instance, where theory is being introduced into practice — an online learning experience will arguably offer a better environment.

One major benefit of an online discussion environment is that it allows greater time for reflection during the discussion process. As Charles Graham notes, when engaged in an online interaction, 'learners have time to more carefully consider and provide evidence for their claims and provide deeper, more thoughtful reflections'.[66]

In a blended learning design for teaching mediation, students can develop and transfer skills between different parts of the process. Communication skills such as active listening and mediator interventions such as reframing are developed through role-plays in the face-to-face classes. The greater time for reflection that the online environment offers means that theoretical concerns may be better learnt online through the active learning option of an electronic role-play.

A theorist who explores methods of ensuring 'deep' learning in the online environment is Diana Laurillard.[67] Her work provides us with a framework to utilise when teaching online and developing online role-plays. It is dialogue with a student that allows a teacher to ensure deep learning in the online environment. There is no certainty that utilising rhetoric will produce learning, but it is a principled approach that provides the best opportunity to give birth to learning. A 'conversational framework', which is best carried out on a one-to-one basis between tutor and student, provides the opportunity for dialogue that gives descriptions of the second-order nature of learning that is academic learning, and involves a partnership of learning. This approach rejects didactic approaches to teaching where there is little opportunity for student input or for the teacher to listen to what students are saying and to check on their understanding of concepts. Laurillard offers a 'conversational framework' of four parts to help us teach with technology. These parts are described as discursive, adaptive, interactive and reflective. Drawing directly from Laurillard's work, she describes these elements in the following manner:

Discursive

- teacher's and student's conceptions are accessible to the other and the topic goal is negotiable;
- students must be able to generate and receive feedback on descriptions appropriate to the topic goal;
- the teacher must be able to reflect upon students' descriptions and adjust their own descriptions to be more meaningful to the student;

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63 Ibid ch 3.
64 Graham, above n 14.
65 Ibid.
66 Ibid 18.
67 Laurillard, above n 28.

Adaptive

- the teacher can use the relationship between their own and the student's conception to set up and adapt a task environment for the continuing dialogue in light of the topic goals;
- the students must be able to use their existing conceptual knowledge to adapt their actions in the task environment in order to achieve the task goal;

Interactive

- the students can act within the task environment to achieve the task goal;
- they should receive meaningful, intrinsic feedback on their actions that relate to the nature of the task goal;
- something in the environment must change in a meaningful way as a result of their actions;

Reflective

- teachers must support the process by which students link the feedback of their actions to topic goal, i.e. link experience to descriptions of experience;
- the pace of the learning process must be controllable by the students, so that they can take the time needed to reflect on the task goal-action-feedback cycle in order to develop their conception in relation to the task goal.[68]

The next section of this paper provides detail of the design utilising the selected e-learning theory.

IV. THE ON-LINE MEDIATION FISHBOWL

There are three main parts to the design of the online mediation fishbowl and each will be discussed in turn. These are:

- the discussion board, where the theoretical issues such as gender and power imbalances are engaged with;
- the role-play simulation of the online fishbowl; and
- a reflective journal.

A. Discussion Board: Discursive and Adaptive Elements

The first element of the design, the discussion board, is discursive in that students and teacher are able to interact regarding gender issues through the discussion of a number of articles.[69] Discussion boards are a form of computer conferencing that allows for asynchronous discussion. Students, or participants, have the opportunity to read other people's contributions to a discussion and then (i) respond to a particular posting, or (ii) respond generally. There is the possibility of dialogue, but by text alone,[70] and because the conversation is asynchronous there is a gap in time between the contributions to the conversation. This kind of computer medium arguably facilitates the interactivity of a group. There is a shared topic focus, which gives each participant the opportunity to share ideas and reflect on those ideas. Due to the fact that discussion boards are independent of time and location, there is the chance to communicate over distance and at any hour of the day. It is possible to call up past as well as new contributions and thereby maintain a visual record of the discussion. During the discussion, participants can break into smaller groups

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68 Ibid 83-84.
69 Articles could include Bagshaw, above n 34; Astor, above n 38; Kelly, above n 24; Brigg, above n 25; Field, above n 31; Field, above n 42; Kolb, above n 60.
70 This kind of media is, of course, bereft of the kinds of facial and body language cues that occur in everyday conversations.

where appropriate, for example when subtopics are generated or where there are tasks set to complete.

The advantage of discussion boards over face-to-face learning can lie in the potential for more active learning to occur. In some face-to-face strategies the teacher can dominate the teaching and learning dynamic. Research into computer conferencing shows that the volume of teacher contributions is much lower than face-to-face teaching and there is the added benefit of high student-to-student interaction.[71] However, the potential for active learning can be very much linked to the skill of the teacher (or other) as moderator. The degree to which interactivity is facilitated can be crucial.[72] This therefore has implications for the time invested by a teacher into the discussion.[73]

The benefits of asynchronous discussion-board posting centre on the opportunity for reflection upon the dialogue. Students have the opportunity to consult relevant literature, they can respond at their own pace and there is time to compose a response of some length. When considering which medium to utilise for online learning, discussion boards are particularly appealing as they incorporate the opportunity for a discursive element. When combined with the reading of literature, such as articles relating to gender and power in mediation practice, there is the opportunity for participants to describe their understanding and articulate their views. The teacher can then take note of the postings and offer her views, so that there is a dialogue and a redescription of views through increased understanding. This part of the design meets the discursive element of Laurillard's 'conversational framework.'

An online discussion board does not of itself, however, provide enough interaction for students to have an optimal opportunity to learn through e-learning. It is not supportive of task-based activities. The only activity that it supports is the description and re-description of the students' views.[74] Arguably, a combination of learning activities best assists a student to learn in this environment. In the online mediation fishbowl, the discussion board is followed by the teacher developing and adapting the role-play scenario to meet the needs of the particular group engaged with the learning and teaching design. Particular issues, relating to power, such as concerns in mediation relating to abusive language or an imbalance of access to knowledge and resources, are highlighted to meet the needs and concerns of students. This part of the design meets the adaptive element of Laurillard's 'conversational framework'. The adapted scenario becomes the basis of the next element of the design, the interactive element, through the playing out of the simulation.

B. Role-play Simulation: Online Fishbowl — Interactive Element

Asynchronous role-plays can allow a better opportunity for participants to reflect on learning from relevant literature. Without being constrained by time, participants can play out the full potential of the role-play and consult the literature as issues arise, for example those relating to gender and power, and design and discuss possible intervention strategies. The design of the activity allows students to act as mediators, parties, support people, experts or lawyers, to the dispute via the fishbowl arrangement. Students jump 'in' and 'out' of roles on a self-selecting basis and can elect to act as mediators, a party, support people, experts or a lawyer, with the teacher acting as moderator to stagger roles. Students receive intrinsic feedback regarding mediator interventions through the responses of the parties in the role-play. These interventions and responses are discussed and debated by the other students on the discussion board in a separate thread. In face-to-face mediation role-plays, frequently the focus is on skill development, but observation[75] may also assist a

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71 Linda Harasim, 'Online Education: A New Domain' in Robin Mason and Anthony Kaye (eds), *Mindweave: Communication, Computers and Distance Education* (1989) 50.

72 Laurillard, above n 28, 169.

73 The issue of the investment of time would be an important issue for a lecturer's work plan.

74 Laurillard, above n 28.

75 Robert A Baruch Bush, 'Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation' (1987) *Journal of Legal Education* 46.

participant's learning. Observation of the online fishbowl role-play and discussion of interventions can be a powerful tool for learning about gender issues.

Players can include:

• mediator or co-mediators;
• parties;
• support people or 'experts'; and
• lawyers representing the parties.

Students are engaged actively in roles for short periods, but are constantly reflecting and debating about mediation practice and choices of the mediator on the discussion board. Students can experience different perspectives by changing roles. Their engagement is maintained by the potential for them to make the next intervention.

One of the benefits of this approach is the modelling of practice that the teacher can give by playing the role of mediator, or other roles such as the lawyer, for brief periods. In the context of mediation practice, the teacher can model reflexive practice that takes into account gender and power concerns in the mediation. The teacher might model strategies such as reiterating the ground rules where bullying behaviour occurs or including a support person or expert to provide advice.[76] The teacher might also draw from a variety of approaches, to mediation to model interventions. For example, she may model mediator interventions drawn from narrative mediation that include mapping the history of the dispute, curious questioning, externalising the problem and naming sexist behaviour in the mediation.[77]

Similarly, when dealing with the approach of lawyers representing women in mediation, the teacher can model 'best practice.' Where there has been a history of domestic violence, Rachael Field outlines an approach to legal representation in family mediation that ensures that the lawyer advocates for the women's interests. Field suggests three stages of support and assistance that the lawyer can provide: (i) in pre-mediation; (ii) in advocacy and support; and (iii) in post-mediation.[78] In the first stage, the lawyer can assess the risk posed by engagement with the mediation, ensure informed consent by education about process and power concerns, coach the woman regarding participation skills and strategies, and assist with consideration of options.[79] During the mediation, the lawyer can provide advocacy when required, assist with power concerns by providing legal advice, contextualising the perpetrator's claims as needed and asking for time out when her client is showing signs of distress. The lawyer can also provide a critical audience to the process and content, draw upon her formal authority, reality-check for her client and provide 'on the spot' assistance for the final agreement.[80] Post-mediation, the lawyer can ensure her client's safety as she is leaving, assist with post-legal issues and advise as to enforcement.[81]

The aim here is not for the teacher to dominate the interventions in the fishbowl role-play but to make a contribution when 'best practice' needs to be modelled. On many occasions, by consulting the set literature, students will be able to implement the relevant interventions in the role-play or suggest the strategies by engaging in the discussion board. The opportunity for students to develop appropriate professional interventions is provided by a combination of the reading of the literature, action, intrinsic feedback and reflective dialogue. A reflexive teacher will keep her contributions to a minimum to encourage students to engage actively with the learning task.

An additional feature of the online fishbowl, which promotes the development of appropriate professional interventions, is that individual students can be 'coached' by the

76 Field and Brandon, above n 44.
77 Winslade and Monk, above n 36, 37-47.
78 Field, above n 42, 85.
79 Ibid 86-88.
80 Ibid 88-90.
81 Ibid 90-91.

teacher via email. Many short courses and academic subjects in the area of mediation use coaches in conjunction with role-plays.[82] By utilising email, the teacher can coach during the role-play and may also coach students who post to the discussion board when discussing the role-play interventions.

C. Journal Writing: Reflective Element

Journal writing provides the opportunity for students to engage in the last part of Laurillard's 'conversational framework'; the reflective element. Students can be asked to e-mail the teacher with journal entries demonstrating reflection upon the online mediation and this journal can form part of the assessment for the course. They can link their actual experience with the topic goals and write of their insights garnered from both the discussion board and the role-play. Students can refer to the theory discussed in both parts of the exercise and comment upon the interventions that were tested in the role-play. They also can comment upon their experience of the learning process.

V. DESIGN OPTIONS

The use of online role-plays is not widespread in tertiary teaching, but this learning and teaching strategy has been successfully utilised in politics, economics, psychology, engineering, history and education.[83] Research into online role-plays in university settings points to the need for careful planning to ensure that learning objectives are achieved.[84] There is also a need to manage the threaded discussions as large amounts of postings can be distracting to students.[85] The teacher must be skilled in facilitation to manage disputes between students, briefing and de-briefing, providing advice and adjusting the simulation where appropriate.[86] Other concerns with online role-plays relate to: (i) assisting students with developing reflective practice from the online experience; (ii) the skills set that students bring to the task; and (iii) relationship-building in the online environment.[87] These last three concerns can be addressed by the use of face-to-face classes combined with the online simulation. To address these concerns, blended learning allows for the opportunity to have face-to-face interaction to support the online role-play where: (i) reflection upon practice can occur in face-to-face classes; (ii) mediation and legal skills can be developed in face-to-face classes and these skills can be utilised in the online environment; and (iii) relationships can be built in face-to-face classes that support the online simulation. However, there are a number of important issues relating to the way that the blending of the two mediums is achieved. The teacher needs to consider the following issues:

- placement;
- context; and
- length of activity and size of the group.

In considering the placement of the online mediation role-play in a subject, there is a need to consider how to blend the simulation with the rest of the course work. Student timetabling will be an issue as the teacher needs to ensure that students have the optimum opportunity to reflect through engaging in this learning and teaching strategy. Placement options include:

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82 Andrew Sharp, 'The Training of Potential Mediators' in Julie Macfarlane (ed), *Rethinking Disputes: The Mediation Alternative* (1997) 349.

83 Sandra Wills and Anne McDougall, 'Re-usability of Online Role-play as Learning Objects or Learning Designs' in Lori Lockyer, Sue Bennett, Shirley Agostinho and Barry Harper (eds), *Handbook of Research on Learning Design and Learning Objects: Issues, Applications and Technologies* (2008), 762-763.

84 Robert McLaughlan and Denise Kirkpatrick, 'Online Role-Based Learning Designs for Teaching Complex Decision Making' in Lori Lockyer, Sue Bennett, Shirley Agostinho and Barry Harper, *Handbook of Research on Learning Design and Learning Objects: Issues, Applications and Technologies* (2008) 306.

85 Ibid 306.

86 Ibid 308.

87 Ibid 306-308.

- online in tandem with face-to-face classes;
- online in between two intensive periods of the course; or
- online after an intensive.

In the first option there is the benefit of students being able to learn face-to-face skills in mediation and also legal skills and apply these in the online environment. Once the online component has begun, students attending weekly classes can discuss the online role-play and thereby blend the two approaches. Due to the time spent on online interactions, a reduction in face-to-face class time is desirable.

In the second approach, a substantial amount of the course is taught in intensive mode in day-long classes for three to six days. The online component may begin after the first two or three days of the intensive mode and continue for two or three weeks, and then the final days of the intensive can be undertaken by students. The advantages of this approach are that theoretical issues can be canvassed and assessed in the online environment and the focus of the face-to-face classes can be largely (but not exclusively) upon skills development. In the later part of the intensive mode, students can refer back to the online component, allowing for the greater blending of the two approaches.

The final option of undertaking the online fishbowl role-play after an intensive class provides students with an opportunity for engaging with theoretical issues after completing skills-focused face-to-face classes. In this option, there is no opportunity for the students to refer to the dynamics of the online role-play in class. However, it is possible for the students to reflect back upon the face-to-face class activities in their discussion board threads.

In all of the above placement options there is no suggestion that the face-to-face classes would solely deal with skills development as it is desirable for theory and practice to be integrated in the teaching of this area of study.[88] However, where specific issues that require deep reflection are a priority in the curriculum, such as gender and power issues in mediation, the online environment provides the opportunity for self-paced learning and student consultation with the literature during the course of a fishbowl role-play. Clearly, though, opportunities to learn about gender can also occur in the classroom and the teacher can model 'best practice' in the face-to-face environment.[89]

The next design choice relates to the context of the scenario used for the online mediation role-play. Teachers may use a variety of contexts, including commercial, family law and workplace contexts. One scenario utilised by the authors centred upon a dispute regarding a domestic building contract. The rationale for the use of online dispute resolution was the fact that the woman participant was living on the Mornington Peninsula and the male participant, the builder, had relocated to Queensland. In the scenario, students are asked to negotiate in relation to an allegedly faulty building of a family home.

The role-play activity has been conducted over 2-6 weeks, but potentially could be shortened for intensive courses. The group size for the fishbowl can be large, around 30, or small, around 10 in each group. This group size is important in terms of the teachers' time commitment to the various groups. Where there are numerous groups, students can be asked to review each other's threaded discussions to identify common issues and concerns. The role-play can be conducted through email, threaded discussions, or by using software such as the Fablusi role-play platform.[90]

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88 Jennifer Butler, 'Mediator Ethics: To Teach or Not to Teach' (2007) 18(2) *Australasian Dispute Resolution Journal* 119.
89 For a discussion of face-to-face strategies, see Elaine Landry and Anne Donnellon, 'Teaching Negotiation with a Feminist Perspective' (1999) 15 *Negotiation Journal* 21.
90 This software is available on the internet: see Fablusi, *The Online Role-play Simulation Platform* <http://www.fablusi.com/> at 27 November 2008.

VI. CONCLUSIONS

The online fishbowl mediation role-play described in this paper provides the opportunity for mediation teachers to use a blended learning design to teach about issues arising in mediation such as gender and power. In this paper, the authors have described a particular design that they have utilised and have offered the e-learning theory to support their approach. Design elements are provided and discussed to assist other teachers in this area to adopt and adapt those parts of the design that they may find helpful. E-learning is an important part of learning in university education and the online mediation fishbowl approach outlined in this paper offers one way to utilise this medium for teaching mediation theory and skills and the role of legal representatives in mediation.