Ms Kerryn Riseley
Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
East Melbourne VIC 3002
vplrc@parliament.vic.gov.au

9 November 2007

Dear Ms Riseley,

Re: Submission on Alternative Dispute Resolution Discussion Paper

We applaud the work of the Law Reform Committee in issuing its comprehensive discussion paper on Alternative Dispute Resolution. It will stimulate greater interest in this important and developing area of practice within the context of the justice system and in society generally.

We are legal researchers and educators from the Faculty of Law at Monash University whose collective interests could be described broadly as ‘non-adversarial.’ Non-adversarial justice is a focus in both the civil and criminal contexts upon non-court dispute resolution or on processes used by courts which adopt a problem-solving approach\(^1\) (it has also been termed ‘comprehensive law’).\(^2\) Theories of non-adversarial justice emanate from multiple disciplines and include Alternative Dispute Resolution (and its component processes such as mediation, evaluation, negotiation, conciliation and arbitration), therapeutic jurisprudence, restorative justice, participatory justice, preventative law, collaborative law, diversion, shadow of the law theory, problem-solving courts, managerial justice and multi-door courthouse theory.

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Non-adversarial techniques and processes have been employed in fields as diverse as native title negotiations, criminal cases, disputes over telephone bills or banking, negotiations over work conditions, family law disputes over children after separation, decisions about where to locate hazardous materials sites and in truth and reconciliation commissions.

While these various non-adversarial approaches and practices developed in disparate contexts they actually have a great deal in common. We believe that it is now time to comprehensively assess these practices on a broad scale across many sectors of the legal system.

Our submission is written from this broad, non-adversarial perspective. We have some general comments and some that are specific to question 11 on referral to ADR by legal advisors.

**General Comments**

This section of our comments are directed not so much at any specific question raised in the discussion paper’s summary of questions but to an issue raised on page 8 of the paper. There the Committee rightly points out that there is an overlap between restorative justice and therapeutic jurisprudence. In the criminal context, both use practices that endeavour to promote healing, that seek to resolve issues underlying the legal problem.

There is also an overlap between therapeutic jurisprudence, restorative justice and appropriate or alternative dispute resolution (ADR) processes: all seek to promote the voice, validation, respect and self-determination of the parties involved. Further, some forms of ADR – such as transformative mediation – seek to promote the kind of changes envisaged by therapeutic jurisprudence and restorative justice. Also, even within the context of a court, judges and magistrates will at appropriate times and in suitable cases engage the parties in discussion to see whether a settlement may be reached; they undertake more of a conciliatory than an adjudicative role.

Our point is that restorative justice, ADR and therapeutic jurisprudence are part of a wider change that is happening within justice systems and societies around the world. This development has been described as the growth of non-adversarial approaches to justice or the “comprehensive law movement”. These approaches generally seek to promote a more comprehensive and psychologically optimal way of resolving conflict in whatever context in which it arises – civil, criminal or family.

Other approaches forming part of this development include collaborative law (referred to by the Committee), preventive law, creative problem solving, holistic law, therapeutic approaches to legal practice, diversion and problem solving courts.

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3 The philosophy behind transformative mediation is that conflict is an opportunity for personal growth. It is not a settlement focused process. Transformative mediation aims to empower parties to define the issues and decide the terms of settlement themselves, as well as to achieve better understanding the other party’s perspective: see Robert Baruch Bush and Joseph Folger, *The Promise of Mediation: Responding to Conflicts Through Empowerment and Recognition* (1994) 12, 81.

Policy decisions concerning the use of ADR and restorative justice and certainly education and training needs should be considered in light of this overall development. A narrow focus may miss the wider implications of this development in terms of both practice and theory and the interrelationship between these approaches.

For example, there is no reason why a court applying therapeutic jurisprudence should not also use restorative justice. Thus, some problem solving courts applying therapeutic jurisprudence will order an offender to take part in victim offender mediation. A lawyer who is acquainted with the range of options open to a client in resolving a legal problem may decide not to recommend a referral to mediation but engage in a creative problem solving exercise with the client to produce a solution that may be acceptable to all parties.

For some offenders, restorative justice may not be appropriate. Traditional court based approaches may also not be appropriate. For example, some people with entrenched substance abuse problems may not be psychologically strong enough to deal with the possible shame and other emotions arising from restorative justice approaches and traditional court processes may have simply perpetuated the problem in the past by failing to address underlying issues. They may well be better served in the therapeutic, team based environment of a drug court where they can focus on their rehabilitation under the intense supervision of the court. The evidence suggests drug courts are a cost-effective mechanism to address substance abuse related offending.

Thus, in considering the issue of what is the best way of resolving conflict one may have to consider innovative alternatives within the justice system as well as those outside of it. It then becomes a question of identifying which approach is best suited to addressing the particular problem.

We note that the Committee’s terms of reference are limited in terms of the kind of approaches to resolving disputes it is to consider:

(a) the reach and use of alternative dispute resolution (ADR) mechanisms, including Government established ADR schemes and restorative justice schemes, so as to improve access to justice and outcomes in civil and criminal court jurisdictions and to reduce the need, where possible, for contact with the court system, particularly in marginalised communities;

(b) whether a form of Government regulation of alternative dispute resolution providers is appropriate or feasible so as to ensure greater consistency and accountability for Victorians wishing to access alternative dispute resolution.

Notwithstanding the limitations in the terms of reference, we suggest that a consideration of objectives such as improving “access to justice and outcomes in civil and criminal court jurisdictions” cannot be comprehensive without examining the other approaches such as therapeutic jurisprudence referred to above and the general trend towards more comprehensive, less harmful methods of dispute resolution.
Response to Question 11—Referral to ADR by Legal Practitioners

In the discussion paper the Committee notes the importance of lawyers having a working knowledge of ADR (page 34). The Committee asks whether lawyers currently have sufficient understanding of ADR processes to refer their clients. The Committee also refers to the 2006 reforms to the federal Family Law Act 1975 which require family lawyers to refer most of their clients to ADR.

We wish to caution against an introduction of a similar mandatory referral regime for legal practitioners’ clients to ADR. Lawyers must be able to direct their clients towards whichever processes are most suitable and in their clients’ best interests. Mandatory referral may simply create another step in the legal process, increasing the cost and time taken to achieve satisfactory resolution. It appears that the recent reforms to the Family Law Act were enacted on the assumption that lawyers are wedded to adversarial dispute resolution methods, that they foment conflict and do little to encourage their clients to settle or use ADR processes.5

In contrast to official rhetoric, studies of lawyer behaviour, at least in the family law context, identify a ‘settlement culture’ amongst legal aid and private family lawyers. Settlement was believed by solicitors to be best for clients, in clients’ economic interests, for the benefit of children and better for long term family relationships.6 In fields of practice beyond family law, at is clear that a cultural change is taking place in relation to use of ADR by the Australian legal profession. West Australian academic Archie Zariski examined a range of studies of the legal profession in Australia and internationally and found that particularly amongst the younger generation of lawyers, there is an increasing acceptance of and orientation towards ADR processes (although this varies between fields of practice).7 Zariski argues that with the ‘attrition of those who hold disappearing beliefs and follow declining practices’ there will be increasing use of ADR by the Australian legal profession.

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5 A federal government November 2004 Discussion Paper on the family law reforms states: “To help prevent joint sessions with a parenting adviser becoming adversarial, it is proposed that lawyers not be present during those sessions. Parents would still be able to consult a lawyer if they wished, but the lawyer would not be part of the process at Family Relationship Centres.” Australian Government, A New Approach to the Family Law System: Implementation of Reforms — Discussion Paper (2004) 6. In 2003, the Every Picture Tells a Story report (that led to the introduction of compulsory dispute resolution) depicted family lawyers as encouraging conflict at great emotional and financial cost to their clients: “It seems that the present system can do nothing about one party dragging the other through drawn out and repeated court battles for purely vindictive reasons. Many within the legal fraternity appear to exacerbate this by their adversarial approach. This experience becomes extremely expensive (over $200,000 for one witness) and the process seems to destroy families and escalate disputes. . . . The committee’s objective is to devise a system where the involvement of lawyers is the exception rather than the rule.” House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation (2003) [4.4], [4.47]


As tertiary educators, it is our belief that the key method of increasing the capacity of lawyers to refer appropriate cases to ADR and other comparable non-adversarial processes is through high quality legal education. The emergence of ADR, restorative justice, therapeutic jurisprudence and the other aspects of the comprehensive law movement has significant implications for legal education. It suggests that law students should not only be educated as to statute and case law in diverse subjects, but also in the different approaches to resolving conflict.

Monash University's Faculty of Law has this year commenced teaching an undergraduate unit in Non-Adversarial Justice. (We have enclosed our unit outline for the Committee's consideration). While there are many courses in Australian law schools which teach ADR skills and theory, this is the first course in Australian to adopt a broadly non-adversarial approach and bring together concepts such as restorative justice, ADR and therapeutic jurisprudence that are part of a wider change that is happening within justice systems and societies around the world. The subject adopts a radically different approach to the study of law by focusing on forms of conflict management, dispute prevention and dispute resolution outside the court system or on processes used by courts which adopt a problem-solving approach. It examines new ways of lawyerly employing non-adversarial, psychologically beneficial, and humanistic methods to solve legal problems, resolve legal disputes and prevent legal difficulties. The course aims to introduce law students – future lawyers – to a range of non-adversarial practices and theories and to understand how these practices alter legal practice and the justice system now and into the future. Sixty students enrolled in the unit in 2007 and the response we received from them has been overwhelmingly positive. One student commented that she felt that it had opened up her view of what she could do with her law degree and what she could offer her clients as a legal practitioner. We believe that legal education, especially at undergraduate level but also as continuing education for the profession, has the potential to alter the processes that lawyers use, including increasing use of ADR processes.

There are also implications for the training of the judiciary and legal profession. Traditional legal education has prepared lawyers and judges to act in an adversarial context. The interpersonal skills necessary to engage in therapeutic, collaborative, team based and holistic processes have not been a part of their training. While courses in mediation and other forms of alternative dispute resolution have begun to emerge and to be undertaken by members of the legal profession, there has been no comprehensive approach to continuing legal and judicial education that includes all of the principal aspects of non-adversarial processes available today.
We thank you for the opportunity to make this submission. We would welcome further discussion of our submission with the Committee.

Yours sincerely

Professor Arie Freiberg, Dean
Dr Michael King, Senior Research Fellow
Mr Ross Hyams, Senior Lecturer
Ms Becky Batagol, Lecturer
Encl.
Non Adversarial Justice (LAW 4225)

6 credit points
3 hours per week - Clayton campus
2nd Semester 2007

Syllabus, Timetable and Reading Guide

Lecturers: Becky Batagol / Ross Hyams
Rooms: 235 / 234
Phone: 9905 5050 / 9905 3352
Email: becky.batagol@law.monash.edu.au/ ross.hyams@law.monash.edu.au

Classes:
Wednesday 9.00 – 10.30 a.m L5 Law Building
Thursday 9.00 – 10.30 a.m L5 Law Building

Objectives

This unit takes a radically different approach to the study of law by focusing on forms of conflict management, dispute prevention and dispute resolution outside the court system. It examines new ways of lawyering by employing non-adversarial, psychologically beneficial, and humanistic methods to solve legal problems, resolve legal disputes and prevent legal difficulties.

Upon completion of this unit, you should:

(a) be able to critically analyse the nature of the adversarial system, including its benefits and pitfalls;

(b) understand the nature of non-adversarial justice, the theories behind the movement and the reasons for the perceived need for non-adversarial processes;

(c) understand theories of interpersonal conflict, how disputes arise, conflict management and dispute prevention;

(d) understand and be able to explain the theoretical underpinnings and the nature of a range of non adversarial processes in civil and criminal and international law, including some that relate to criminal offences, disputes following separation/ divorce, workplace and industrial disputes, native title, neighbourhood disputes, environmental disputes, administrative and commercial law;
(e) be able to critically analyse each of the non-adversarial processes taught for their various strengths and weaknesses and be able to identify which non-adversarial processes may or may not be appropriate in particular cases;

(f) understand and evaluate the place of non-adversarial processes within an adversarial legal system;

(g) be able to appreciate the complexities of the relationship between law and non-adversarial processes;

(h) be able to explain how courts can apply principles of non-adversarial justice;

(i) understand how lawyers can work with non-adversarial processes and appreciate the potential role that lawyers can play in directing clients towards non-adversarial processes in appropriate cases;

(j) understand and be able to critically comment on appropriate ethical standards of conduct for of lawyers and other professionals working with non-adversarial processes; and

(k) develop skills in observation and critical analysis of legal processes including making recommendations for change or law reform

Teaching

This unit will be taught on an interactive basis by two different lecturers, and a high level of class participation will be encouraged. In most classes, participatory exercises will take place. Lectures will be taped but listening online will be a very poor substitute for attendance at lectures. We know that you may miss an occasional lecture because of illness, car breakdown, parental responsibility, work commitments, etc. For these infrequent occasions, lectures will be taped to allow you to catch up. Regular use of the online recording service is not an acceptable substitute for attendance at classes.

We have invited a range of guest speakers for this course, including judges, leading academics and legal policy makers. It is highly unlikely that any of these lectures will be taped, as most guest lecturers dislike being recorded. The materials that these lecturers provide will be examinable to you must make a special effort to attend guest lectures.

Material may be handed out in class which will not necessarily be made available online. In order to participate effectively and to enjoy and learn from the unit you will need to take responsibility for your own learning by preparing for lectures.

Assessment

1. A 1,600 word “observation” assignment worth 20% of the final mark – due 4.00 pm on 13 August 2007.
2. A 3,200 word research essay worth 40% of the final mark – due 4.00 p.m on 21 September 2007

3. A final "take home" examination with a word limit of 3200 words, to be completed over a weekend period. This exam will be worth 40% of the final mark. It will be made available on Friday 9 November at 9.30 am and will be due in on Monday 12 November 2007 at 9.30 a.m.

Visit to the Neighbourhood Justice Centre

We plan to arrange a visit the Collingwood Neighbourhood Justice Centre. The Neighbourhood Justice Centre (NJC) is a three year pilot project of the Victorian Department of Justice and the first of its kind in Australia. The NJC provides:

- a court
- on-site support services for victims, witnesses, defendants and local residents
- mediation and crime prevention programs for the City of Yarra
- community meeting facilities.

We strongly encourage you to attend the visit although it is not compulsory.

Full details will be provided as soon as we can.

Neighbourhood Justice Centre
241 Wellington St
Collingwood VIC 3066
Tel: 03 9948 8777

Readings

Prescribed
a) Non Adversarial Justice Course Materials 2007, Legibook (available from week two)

Recommended

b) Astor and Chinkin Dispute Resolution in Australia (2nd edition, Butterworths, Sydney, 2002). ('Astor and Chinkin')
## Timetable

The following timetable acts as an approximate guide only for the topics of our lectures. Actual lecture topics each week may vary.

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<tr>
<th>Week</th>
<th>Date</th>
<th>Lecture Topic and Lecturer</th>
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<tr>
<td>Week 1</td>
<td>Commencing 16 July 2007</td>
<td>1.0 Introduction and The Role of Conflict (Hyams &amp; Batagol)</td>
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<td>Week 2</td>
<td>Commencing 23 July 2007</td>
<td>2.0 The Adversarial System (Hyams)</td>
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<td>Week 3</td>
<td>Commencing 30 July 2007</td>
<td>3.0 Theories of non-adversarial justice I (Batagol)</td>
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<td>Week 4</td>
<td>Commencing 6 August 2007</td>
<td>4.0 Theories of non-adversarial justice II (Hyams)</td>
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<td>Week 5</td>
<td>Commencing 13 August 2007</td>
<td>5.0 The Alternative Dispute Resolution movement (Batagol)</td>
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<td><strong>“Observation” assignment due 4 pm on 13 Aug</strong></td>
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<td>Week 6</td>
<td>Commencing 20 August 2007</td>
<td>6.0 Non Adversarial Justice in family law practice (Batagol)</td>
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<td><strong>Guest lecturers:</strong> Wed 22 August 9-10.30am</td>
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<td>Linda Dessau, Justice of Family Court of Australia</td>
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<td>Professor Thea Brown, Dept Social Work, Monash University</td>
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<td>Week 7</td>
<td>Commencing 27 August 2007</td>
<td>7.0 Non Adversarial Justice in criminal processes (Frieberg)</td>
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<td><strong>Guest lecturer:</strong> Thurs 30 August 9-10.30am: Michael King</td>
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<tr>
<td>Week 8</td>
<td>Commencing 3 September 2007</td>
<td>8.0 Non Adversarial Justice in civil matters (Hyams and Batagol)</td>
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<td><strong>Guest lecturer:</strong> Wed 5 September, David Yarrow, Lecturer Faculty of Law ‘Native Title Determinations’</td>
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<td>**Guest lecturer: Thursday 6 September, Toni Meek, ‘Community Engagement: Multi-party Environmental Mediation’</td>
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10
| Week 9 | Commencing 10 September 2007 | 9.0 Problem Solving Courts in Australia and overseas (Hyams)  
Guest lecturer: Wed 12 September 9-10.00am: Michael King |
|---|---|---|
| Week 10 | Commencing 17 September 2007 | 10.0 Lawyers and Non-Adversarial Justice (Batagol)  
**Research essay due 4 pm on 21 September** |
| Week 11 | Commencing 1 October 2007 | 11.0 The Role of Judges/ Redefining the Court’s Role (Hyams)  
Guest lecturer: Thurs 4 October 9-10.00 am, Jelena Popovic, Deputy Chief Magistrate Victoria |
| Week 12 | Commencing 8 October 2007 | 12.0 The future of Non Adversarial Justice (Hyams & Batagol) |
| Week 13 | Commencing 15 October 2007 | Revision and Exam Preparation (Hyams & Batagol)  
**Take home exam: Friday 9 November at 9.30 am and will be due in on Monday 12 November 2007 at 9.30 am** |

**Reading Guide**

Materials marked with an asterisk (*) are required reading. Other readings are optional but may be of benefit for you in exam revision or essay writing.

| Week 1 | Commencing 16 July 2007 | Introduction and the role of conflict |

1.1 Introduction

*Gandhi, Chapter XVI, Part II “Preparation for the Case” from An Autobiography or The Story of My Experiments with Truth (Navajivan Publishing House, Ahmedabad, trans Mahadev Desai, (1927) pages 121-124 Course Materials & unit webpage*

1.2 Conflict: Why, for what purpose? Types of Conflict.

Carrie Menkel Meadow ‘Conflict Theory’ in Menkel-Meadow et al, Dispute Resolution: beyond the Adversarial Model (2005) 6-10.

1.3 The role of law in resolving conflict


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<th>Week 2</th>
<th>Commencing 23 July 2007</th>
<th>The Adversarial System</th>
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2.1 Benefits and Criticisms of the Adversarial system


2.2 Alternatives to the Adversarial system


2.3 Lawyers in the Adversarial system: The Good, the Bad and the Ugly


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<th>Week 3</th>
<th>Commencing 30 July 2007</th>
<th>Theories of non-adversarial justice I</th>
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3.1 Holistic law


3.2 Therapeutic jurisprudence


3.3 The Role of Apology and Forgiveness in legal conflict


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<th>Week 4</th>
<th>Commencing 6 August 2007</th>
<th>Theories of non-adversarial justice II</th>
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4.1 Restorative justice


4.2 Preventive law

* Website of the National Centre for Preventive Law, Californian Western School of Law – at www.preventivelaw.org. See essay by Thomas D Barton: ‘Preventive Law for Multi-Dimensional Lawyers’

4.3 Procedural justice


4.4 The Comprehensive Law Movement

5.1 Introduction to the ADR Movement


5.2 Negotiation


Definition: Astor and Chinkin 82-83 and 105.

5.3 Facilitation

Definition: Astor and Chinkin 88-89

5.4 Mediation (incl. transformative mediation)

Definition and models: Astor and Chinkin 83-85 and 137-138.

5.5 Conciliation

Definition: Astor and Chinkin 85-88.

5.6 Arbitration

Definition: Astor and Chinkin 89-90

5.7 Contemporary Issues in ADR


Power in Mediation: Astor and Chinkin 160-163.

Submit “observation” assignment by 4.00 p.m. on Monday 13 August
General

* Family Law Act 1975 (Cth) ss 10B, 10F, 10L, 60I, 60J, 63DA and 69ZN
Class Materials.

6.1 Family Dispute Resolution at Family Relationship Centres and community-based services (non court based services)


6.2 The Family and Federal Magistrates' Courts


6.3 Collaborative family law


Julie MacFarlane, *The Emerging Phenomenon of Collaborative Family Law: A Qualitative Study of CFL Cases* (Family, Children and Youth Section, Department of Justice, Canada, 2005).

### 6.4 Arbitration of Family Proceedings


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<th>Week 7</th>
<th>Commencing 27 August 2007</th>
<th>Non Adversarial Justice in criminal processes</th>
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**General Readings**

* Freiberg A 'Non-Adversarial Approaches to Criminal Justice' (2007) *Journal of Judicial Administration* 16, 205. **Course materials.**


### 7.1 Neighbourhood Justice Centre


### 7.2 Drug Courts


7.3 Children's Court

7.4 Koori/Murri Courts

7.5 Mental Health Courts

7.6 Family Violence Courts

7.7 Coroner's Court

7.8 Victim/offender reconciliation/mediation programs

7.9 Healing circles and sentencing circles

7.10 The informality and easing of traditional legal rules and protocols

7.11 New Directions in Offender Rehabilitation


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<th>Week 8</th>
<th>Commencing 3 September 2007</th>
<th>Non Adversarial Justice in civil matters</th>
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<td>Guest lecturer: Wed 5 September,</td>
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<td>party Environmental Mediation'</td>
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</table>
8.1 Royal Commissions

Scott Prasser, 'When should royal commissions be appointed?' (2005) 4 (July-October) Public Administration Today 57


8.2 Administrative tribunals


8.3 Commercial disputes


Chapter 4 'Alternative to Adversarial Advocacy' in Parker C & Evans A Inside Lawyers' Ethics (2007) Cambridge University Press


8.4 Ombudsmen schemes


8.5 Environmental and Community Disputes


8.6 Native Title Claims & Indigenous Issues in Dispute Resolution


9.1 Community Courts and Justice Centres

*Website of the Community Justice Centre, North Liverpool at www.communityjustice.gov.uk/northliverpool/

*Website of the Midtown Community Court, New York at www.courtinnovation.org

9.2 Healing circles


9.3 Indigenous courts & sentencing circles


9.4 Truth and reconciliation commissions


10.1 Can lawyers be Peacemakers as well as Gladiators?


10.2 Redefining the Role of Counsel


10.3 Can lawyers help prevent problems before they occur?


10.4 Lawyering Skills and Client/lawyer communications


Majorie Silver, ‘Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship’ in Stolle, Wexler & Winnick, 357-417
10.5 Lawyer Distress & Preventive Strategies

P. Schultz, 'On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession', 52 Vanderbilt Law Rev. 871 (1999).

Research essay due by 5:00 P.M. on 21 September

MID SEMESTER BREAK – 24 to 28 September

<table>
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<th>Week 11</th>
<th>Commencing 1 October 2007</th>
<th>The Role of Judges/ Redefining the Court’s Role</th>
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<td>Guest lecturer: Thurs 4th October 9-10.00 am, Jelena Popovic, Deputy Chief Magistrate Victoria</td>
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11.1 Managerial Justice


11.2 The role of a problem-solving judge and the separation of powers doctrine


11.3 The problem-solving judge and the role of “neutral arbiter”


Hanson R 'The Changing Role of a Judge and its Implications' (2002) 38 American Judges Association Court Review 10

11.4 The problem-solving judge and the executive branch’s correctional functions

11.5 The problem-solving judge and legislative policy
Roach Anleu S & Mack K ‘Australian Magistrates, Therapeutic Jurisprudence and Social Change’ in Transforming Legal Processes in Court and Beyond,(2007) AIJA, Melbourne, 173

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<th>Week 12</th>
<th>Commencing 8 October 2007</th>
<th>The Future of Non Adversarial Justice</th>
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12.1 Non Adversarial Justice as government policy

12.2 The separation of powers issue

12.3 The judiciary’s new role

12.4 Challenges for lawyers

Becky Batagol/Ross Hyams 2007