



Undergraduate - Unit

LAW4225 - Non-adversarial justice

6 points, SCA Band 3, 0.125 EFTSL

Refer to the specific census and withdrawal dates for the semester(s) in which this unit is offered, or view unit timetables.

Level Undergraduate

Faculty Faculty of Law

Offered Clayton First semester 2012 (Day)

Synopsis

This subject 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 adversarial system. It examines ways of lawyering that employ non-adversarial, psychologically beneficial, and humanistic methods of solving legal problems, resolving legal disputes and preventing legal difficulties.

Traditional legal education, with its focus on case law and judicial decision-making, tends to overstate the importance of both law and litigation in resolving disputes. This subject aims to equip law students with the knowledge they need to work with and think about non adversarial processes, an essential element of lawyering in the twenty-first century.

Non-adversarial justice is a focus on non-court dispute resolution or on processes used by courts which adopt a problem-solving approach. 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), participatory justice, therapeutic jurisprudence, preventative law, restorative justice, collaborative law, diversion, shadow of the law theory, problem-solving courts, managerial justice and multi-door courthouse theory. Non-adversarial techniques and processes have been

employed in fields as diverse as native title land negotiations, criminal cases, disputes over telephone bills or banking, negotiations over work conditions, disputes over residence of children after separation, decisions about where to locate hazardous materials sites and in truth and reconciliation commissions.

This subject starts by critically examining our adversarial legal system and how lawyers operate (and are perceived to operate) within it. We then explore the nature of non-adversarial justice, the various theories behind the movement and the reasons for the perceived need for non-adversarial processes. Students will learn about a range of non-adversarial processes and the theories behind them. A focus of student learning will be upon understanding when the use of such processes may be appropriate or inappropriate. The aim of teaching students this is to help them to understand the role that lawyers can play in preventing conflict and in providing non-adversarial means of conflict management or resolution. Students will be asked to reflect upon the role that lawyers can and do play in non-adversarial processes and upon the ethics of legal practice in such circumstances. Role plays may be used to assist with gaining understanding in this area.

As part of their assessment, students will be asked to observe a legal process such as a court hearing. They will be asked to take notes on what they see and evaluate the process from the perspective of participants and how it impacts upon them. Students will be expected to suggest changes to practice, policy or law that would improve the process. It is anticipated that this exercise will assist students to develop skills in observation and critical analysis of legal processes including making recommendations for change or law reform. In preparation for this exercise, students will be provided with information about how to conduct observations, how to analyse such information and on the law reform process.

A research essay will test students' research and analytical skills. Students will be encouraged to research an aspect of the syllabus in order to gain a deeper understanding of the interaction

between the theory and practice of non adversarial justice.

Examples of non adversarial processes that are employed in a range of different fields, include:

mediation (including some of the newer practices in the mediation field)

arbitration

conciliation

facilitation

negotiation

ombudsmen schemes;

managerial justice (case management)

restorative justice schemes

truth and reconciliation commissions

Examples of specific dispute resolution services or specialist

courts that may be studied include;

Community justice and dispute resolution centres (including the new Collingwood Neighbourhood Justice Centre)

The new Family Relationship Centres;

Drug Courts;

Family Violence Courts;

Children's Court;

Koori/Murri Courts;

Mental Health Courts;

The Family and Federal Magistrates' Courts;

Coroner's Court

Royal Commissions;

Administrative tribunals;

Group Conferencing schemes;

Victim/offender reconciliation/mediation programs;

Healing circles; and

Sentencing circles

Outcomes

Upon completion of this unit, students 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 and do their work with non-adversarial processes and appreciate the 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 changes or law reform.

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Assessment

Research essay or Placement Assignment (2500 words)- 50%

Take home exam (2500 words) - 50%

Chief examiner(s)

Mr Ross Hyams/Dr Becky Batagol

Contact hours

Three hours of lectures per week

Prerequisites

LAW1100 or LAW1101 and LAW1102 or LAW1104