

# THE REALITY OF NON-ADVERSARIAL JUSTICE: PRINCIPLES AND PRACTICE

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*The growth, development and institutionalisation of alternative dispute resolution (ADR) processes in Australia have paved the way for a changing legal culture. Whilst the adversarial process underpins the Australian legal system, the theory and practice of ADR has allowed a broadening of attitudes towards conflict resolution. In Victoria, collaborative rather than adversarial approaches to justice have been put into practice in ‘problem-solving courts’. This development evidences an institutional shift from adversarial justice towards the greater inclusion of non-adversarial dispute resolution processes. Contemporary best practice lawyering demands recognition and acceptance of this change. Legal educators and regulators must also act on the new reality of lawyering.*

## I INTRODUCTION

In concluding his second reading of the Legal Profession Bill to the Victorian Legislative Assembly on 16 November 2004, the Attorney-General, Robert Hulls, quoted Robert F Kennedy as follows:

Just because we cannot see clearly the end of the road, that is no reason for not setting out on the essential journey. On the contrary, great change dominates the world, and unless we move with change we will become its victims.<sup>1</sup>

Mr Hulls used the quotation to illustrate how the changes made by the Bill to the regulation and business structures pertaining to the legal profession are forward looking, yet the market for legal services may change in the future. The Attorney-General’s remarks and those of Robert Kennedy are cogent as they highlight both the need for change and the reality of change. The

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<sup>1</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2004, 1549.

comments also draw attention to the necessity for legal practitioners to recognise change, adjust to change and accept its uncertainty.

In recognition of positive moves towards non-adversarial methods of conflict resolution overseas, Mr Hulls noted that '[w]e need to think smart when it comes to attempting to solve disputes, and the courts should be a place of last resort'.<sup>2</sup> This comment underscores the Victorian government commitment to ADR,<sup>3</sup> as evidenced by the May 2008 multimillion dollar State budget package aimed at positive initiatives in dealing with the 3.3 million disputes in Victoria each year. Strategies for improving dispute resolution services include expansion of mediation programs in all jurisdictions, including the Supreme Court of Victoria and the County Court of Victoria, and upgrading ADR facilities in regional Victoria.<sup>4</sup> The comment also suggests that adjudicative court process should be a last resort for conflict resolution, because legalism fails to take into account the needs and interests of disputants. Disputes originating within the substantive context of human relations, are translated, by legal rules and court procedures, into generic categories of rights, entitlements and duties. This process can be a deficient conflict resolution mechanism because it effaces what is human in disputing - the needs and interests, values, beliefs and commitments of the participants.

This article discusses recent shifts of direction in the theory and practice of law. It identifies the starting point for transformation as the ADR movement, and examines the various trends in lawyering and the legal institutions that have developed as a result of ADR practice. Broadly put, the changes considered in this article reflect 'collaboration and connection rather than adversarialism and separation'.<sup>5</sup>

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<sup>2</sup> Melissa Fyfe, 'Judgement Day Looms for Overloaded Legal System', *The Sunday Age*, (Melbourne) 4 May 2008, 11.

<sup>3</sup> The National Alternative Dispute Advisory Committee (NADRAC), in its *Dispute Resolution Terms* (2003) 4, defines ADR as 'an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them'.

<sup>4</sup> Although scholars such as Tania Sourdin advance the idea that mediation defies codification (see Tania Sourdin, *Alternative Dispute Resolution* (3<sup>rd</sup> ed, 2008) 52), NADRAC in 2003 defined mediation as 'a process in which parties to a dispute with the assistance of a neutral third party (the mediator), identify disputed issues, develop options, consider alternatives and endeavour to reach agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.' See NADRAC above n 3, 9. The NADRAC definition underlies a facilitative model of mediation although other models (evaluative, settlement, therapeutic, transformative) exist.

<sup>5</sup> Michael King, 'What Can Mainstream Courts Learn From Problem-Solving Courts?' (2007) 32(2) *Alternative Law Journal* 91, 95.

## II LEGAL EDUCATION

The foundation for change in the way lawyers practise law can often be traced back to values and models of lawyering transmitted to law students in law schools.

Since the naissance of clinical legal education programmes in 1981, and their subsequent receipt of Commonwealth government funding,<sup>6</sup> practice-based courses have grown in Australian university curricula, in keeping with the notion that a law school must teach more than theory.<sup>7</sup> A good legal education should also teach students what lawyers actually do in practice.<sup>8</sup> The Australian Law Reform Commission (ALRC), referring to the MacCrate Report,<sup>9</sup> advocates the ‘hands on’ approach to legal education and recognises that the ‘emerging trend in Australia has been toward the teaching of generic “professional skills” – that is, skills which will be needed in any subsequent legal practice, but would be equally valuable in a range of other occupations and professions’.<sup>10</sup> Consequently, ALRC Recommendation 2 states that ‘[i]n addition to the study of core areas of substantive law, university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards’.<sup>11</sup>

The ALRC recommendation underscores the unbreakable link between professional skills, professional ethics and professional responsibilities. Whilst the ALRC view is based on a resources argument, it also recognises the importance of non-adversarial forms of dispute resolution in contemporary Australian legal practice. The ALRC perspective on legal education presents an interesting interface with the multi-disciplinary approach of problem solving courts, the various skills sets that lawyers practising in these courts are required to possess, and the complex range of ethical and professional responsibility matters that arise in non-adversarial legal practice. These interrelated issues are discussed below.

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<sup>6</sup> Mary Anne Noone and Stephen A Tomsen, *Lawyers in Conflict* (2006) 208-209.

<sup>7</sup> Mary Anne Noone and Judith Dickson, ‘Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers’ (2004) 4 *Legal Ethics* 127, 127.

<sup>8</sup> Judy Gutman, Tom Fisher and Erica Martens, ‘Teaching ADR to Australian Law Students: Implications for Legal Practice in Australia’ (2008) 19 *Australasian Dispute Resolution Journal* 42, 45.

<sup>9</sup> American Bar Association Legal Education and Professional Development, *An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap)* (1992) cited in Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* Report 89 (2000) [2.20] and [2.21].

<sup>10</sup> *Ibid* [2.19].

<sup>11</sup> *Ibid* [2.89].

More recently, the Carnegie Report<sup>12</sup> and the Best Practices for Legal Education document,<sup>13</sup> both emanating from the United States, endorsed the ALRC position, concluding that best practice legal education involves more than teaching substantive law subjects and problem-solving techniques aimed at training law students to ‘think like lawyers’. Traditional knowledge of the law is important, but so too is the development of legal skills that encourage students to be mindful individuals,<sup>14</sup> capable of exercising good judgment, guided by solid ethical principles and committed to professional responsibilities.

Currently, most law schools teach ADR as part of the law school curriculum,<sup>15</sup> although the impact of the collaborative problem-solving approach taught in ADR units is normally overshadowed by what Riskin terms the ‘lawyers’ standard philosophical map’ underpinned by the adversarial model taught in most ‘black letter’ law subjects.<sup>16</sup> New directions in legal education point to the humanisation of the discipline with ‘human nature as the new guiding philosophy’<sup>17</sup> underscored by Justice Cardozo’s mantra ‘love the law, and treat it as an honourable profession’.<sup>18</sup>

Changes in legal education pave the way for new trends in legal practice. These developments include a move away from adversarial approaches to justice and a move towards non-adversarial strategies, transfers from a rights and legal entitlements model to a paradigm that values stakeholders’ underlying interests, de-emphasising lawyer intervention and stressing client empowerment, eliminating narrow legalism and embracing a holistic and interdisciplinary problem-solving approach to law. The trends and practices examined in this article herald the present track of Australian legal practice which, as Daicoff aptly argues, seeks to harness the ‘rights plus’ potential of law and law’s inherent ability to act as an agent for constructive change, both

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<sup>12</sup> William M Sullivan et al, *Educating Lawyers: Preparation for the Profession* (2007).

<sup>13</sup> Roy Stuckey et al, *Best Practices for Legal Education* (2007).

<sup>14</sup> Craig Hassed et al, ‘Enhancing the Health of Medical Students: Outcomes of an Integrated Mindfulness and Lifestyle Program’ (2008) *Advances in Health Science Education: Theory and Practice* <<http://dx.doi.org/10.1007/s10459-008-9125-3>> at 7 February 2009.

<sup>15</sup> See Judy Gutman, Tom Fisher and Erika Martens, ‘Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions’ (2006) 16 *Legal Education Review* 125, 136.

<sup>16</sup> Leonard Riskin, ‘Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses’ (1998) 50 *Florida Law Review* 590, 607.

<sup>17</sup> Lawrence S Krieger, ‘Human Nature as a New Guiding Philosophy for Legal Education and the Profession’ (2008) 47(2) *Washburn Law Journal* 247, 247.

<sup>18</sup> Paula A Franzese, ‘The Good Lawyer; Choosing to Believe in the Promise of our Craft’ in Marjorie A Silver *The Affective Assistance of Counsel* (2007) 513, 514 quoting Justice Cardozo’s advice to the first graduating class of New York University Law School.

for individuals and the community.<sup>19</sup> The contours of the new legal practice landscape add yet another facet to legal professional responsibility. According to MacFarlane, the 'evolution of legal practice' values litigation but privileges ADR.<sup>20</sup> The role of the 'new lawyer' is not limited to the traditional functions of officer of the court and client champion; it extends to encompass that of conflict resolution advocate.<sup>21</sup> These developments signal an era where both legal practitioner<sup>22</sup> and client satisfaction are expected to increase and where positive outcomes for dispute stakeholders and the administration of justice are promoted

### III THE ASCENDANCY OF ADR

Non-curial methods of dealing with conflict have been described since biblical times.<sup>23</sup> Astor and Chinkin argue that what we now label as ADR has for a long time been the dominant method of resolving disputes worldwide, originating as a tribal customary method of resolving conflict.<sup>24</sup> Without challenging the historicity of ADR, judicial determination of disputes, according to rules of evidence and procedure, has been the conventional mode of conflict resolution in western cultures in modern times. Because of this tradition, dispute resolution processes outside the courts have been perceived as innovative and labelled as 'alternative'.<sup>25</sup> However, this perception of ADR processes as 'alternative' can now be challenged because of the mainstreaming of ADR processes such as mediation, conciliation, arbitration and conferencing, which are all accepted dispute resolution processes within, outside and beside the formal legal system. In the contemporary context, it is

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<sup>19</sup> Susan Daicoff, 'Law as a Healing Profession: The Comprehensive Law Movement' (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1, 4.

<sup>20</sup> Julie Macfarlane *The New Lawyer; How Settlement is Transforming the Practice of Law* (2008) 16.

<sup>21</sup> *Ibid* 22.

<sup>22</sup> Michael King 'Exploring the Therapeutic Scope of Jurisprudence' (2006) 80(5) *Law Institute Journal* 48, 51. Kathy Douglas, 'Steering Through Troubled Waters' (2007) 81(5) *Law Institute Journal* 30, 31.

<sup>23</sup> Robert Baruch Bush, 'Mediation and Adjudication, Dispute Resolution and Ideology: an Imaginary Conversation' (1989-1990) 3 *Journal of Contemporary Legal Issues* 1, 17.

<sup>24</sup> Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2<sup>nd</sup> ed, 2002) 5.

<sup>25</sup> See Gutman, Fisher and Martens, above n 15, 126.

more fitting and realistic that the A in ADR now stand for ‘assisted,’ ‘adjunct,’ ‘additional’ or ‘appropriate’ rather than ‘alternative’.<sup>26</sup>

The entrenched and accepted nature of ADR processes within most Australian jurisdictions, both at inferior and superior court levels is indisputable, but the reasons for the rapid, unfaltering growth and favourable reception of ADR within legal institutions are not entirely clear. There are several plausible explanations for the rise of ADR. The first is based on criticisms of the adversarial adjudication system. Court backlogs lead to frustrating delays in hearings. Litigation is time consuming, anxiety-producing and very expensive.<sup>27</sup> Reliance on procedural and evidentiary rules confines disputes to narrow legal parameters, ignoring the human element of most disputes. Layers of legal positions can often be peeled back to reveal disputants’ needs, wants, and concerns that do not necessarily fit into the confines of legally accepted categories of disputing.

Often, litigants who feel that they do not ‘own’ their disputes experience feelings of alienation and powerlessness.<sup>28</sup> Stakeholder dissatisfaction with the litigation process and litigated outcomes is rife and justified.<sup>29</sup> Similarly, in the criminal justice context, both victims and offenders are dissatisfied with the traditional criminal justice paradigm. Moreover, the narrow rights-based framework does not address the complex social context of crime. Sentencing options such as incarceration do not necessarily reduce recidivism.<sup>30</sup> Whilst, theoretically, one aim of the criminal law may be to rehabilitate offenders, this goal cannot be achieved by sentencing options that do not address the multifaceted nature of criminality.

Another reason for ADR’s success derives from the inherent strengths of ADR processes. In contrast to litigation, ADR is cheap, quick and encourages stakeholders to participate in the process, these factors leading to increased stakeholder satisfaction. Bush and Folger refer to the ‘satisfaction story’<sup>31</sup> of ADR - namely that due to ‘... its flexibility, informality ... consensuality...’<sup>32</sup>

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<sup>26</sup> Sourdin, above n 4, 3. Interestingly, the Victorian Attorney General, Mr Hulls refers to ADR as ‘appropriate dispute resolution’. See Jason Gregory, ‘Changing the Face of Justice’ (2008) 82(12) *Law Institute Journal* 18, 18.

<sup>27</sup> See David Rood, ‘Justice out of Reach, says Hulls’, *The Age* (Melbourne) 10 June 2008, 1.

<sup>28</sup> See Nils Christie, ‘Conflicts as Property’ (1977) 17 *British Journal of Criminology* 1, 1.

<sup>29</sup> See John Kleinig, *Ethics and Criminal Justice* (2008) 208.

<sup>30</sup> Richard Edney and Mirko Bagaric, *Australian Sentencing Principles and Practice* (2007) 45.

<sup>31</sup> Robert Baruch Bush and Joseph Folger, *The Promise of Mediation* (revised ed, 2005) 9.

<sup>32</sup> *Ibid.*

and non-reliance on legal rules, ADR can expand the parameters of a dispute and satisfy the human needs associated with conflict and disputing.<sup>33</sup>

The foregoing explanations for the growth of ADR processes underpin a third and, arguably, the most important reason for ADR's successful incorporation into the legal system, namely judicial and government support. For example, the 'Report of the Chief Justice of the Supreme Court's Policy and Planning Committee on Court Annexed Mediation' stated:

Mediation is much cheaper than litigation ... It has been said that the mediation of a commercial dispute by the Australian Commercial Disputes Centre costs 5% of the costs of litigating or arbitrating the same matter.<sup>34</sup>

Similarly, the former Chief Justice of the Supreme Court of Victoria, John Harber Phillips, endorsed ADR as follows:

It should be stressed that mediation is not an inferior type of justice. It is a different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements.<sup>35</sup>

The importance of ADR within the Australian legal framework is recognised by former Chief Justice Gleeson of the High Court in his 'State of the Judicature' address:

Both within and outside the court system, there is an increased emphasis on various forms of alternative dispute resolution. Arbitration has long been an important alternative to litigation, and has certain advantages, especially as a form of resolution of commercial disputes. Other procedures, such as mediation, conciliation, and early neutral evaluation, are also widely used. The courts have never had the capacity to resolve by judicial decision all, or even most, of the civil cases that are brought to them. Most legal disputes never come before courts; and most court cases are resolved by agreement between the parties rather than judicial decision.<sup>36</sup>

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<sup>33</sup> Ibid.

<sup>34</sup> New South Wales Chief Justice's Policy and Planning Committee Subcommittee on Court Annexed Mediation, *Report of the Chief Justice's Policy and Planning Subcommittee on Court Annexed Mediation* (1991).

<sup>35</sup> Supreme Court of Victoria, *Mediation* (2007)

<<http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Support+Services/Mediation/>> at 7 February 2009.

<sup>36</sup> Chief Justice Murray Gleeson, *State of the Judicature*, Presented at the 35th Australian Legal Convention (Sydney, 25 March 2007), <[http://www.hcourt.gov.au/speeches/cj/cj\\_25mar07.pdf](http://www.hcourt.gov.au/speeches/cj/cj_25mar07.pdf)> at 20 January 2008.

The government response to ADR at both State and federal level mirrors the judicial comments above. The Commonwealth government promotes the role of Family Dispute Resolution Practitioners in the new and widely distributed Family Relationship Centres (FRCs),<sup>37</sup> as well as in the practice of collaborative law within the Family Court of Australia.<sup>38</sup> Best practice in both areas regards litigation as a last resort unless special circumstances obtain. Section 601 of the Family Law Act 1975 (Cth) mandates lawyers to advise clients to attend family dispute resolution prior to the commencement of litigation and requires disputing parents to attend family dispute resolution and make a bona fide attempt to resolve the dispute.<sup>39</sup>

The FRCs emphasise mediation, conciliation and counselling rather than litigation. They focus on the interests of affected children and on the parties' shared goals. Other key elements are the voluntary and free exchange of information, interest-based negotiation, legal advice directed towards speedy, cost-contained, fair and just outcomes for both parties, and a commitment to the best interests of children.<sup>40</sup>

The grafting of ADR onto the family law mainstream process coincided with the use of ADR processes in other areas of law such as environmental law, discrimination law and industrial law. Soon after this, statutory schemes and tribunals adopted ADR to increase their repertoire of dispute resolution methods.<sup>41</sup>

Robertson and Giddings make the point that currently there is a shift in Australia towards clients (consumers) contributing to the provision of their

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<sup>37</sup> Attorney-General's Department, *Family Dispute Resolution* (2008) <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(4341200FE1255EFC59DB7A1770C1D0A5\)~family-dispute-resolution.DOC/\\$file/family-dispute-resolution.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(4341200FE1255EFC59DB7A1770C1D0A5)~family-dispute-resolution.DOC/$file/family-dispute-resolution.DOC)> at 20 January 2008.

<sup>38</sup> Family Law Council Sub-Committee for Consultation, *Draft Best Guidelines for Collaborative Family Law Practice* (2006) <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(89F1F6C871DBA8C45DA2DCE598C20BF8\)~DRAFT+guidelines+for+consultation+\(June+2006\).pdf/\\$file/DRAFT+guidelines+for+consultation+\(June+2006\).pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(89F1F6C871DBA8C45DA2DCE598C20BF8)~DRAFT+guidelines+for+consultation+(June+2006).pdf/$file/DRAFT+guidelines+for+consultation+(June+2006).pdf)> at 24 February 2009. See also, Donna Cooper, 'The Family Dispute Resolution Spectrum' (2007) 18 *Australasian Dispute Resolution Journal* 234, 234. See also, Anne Ardagh and Guy Cumes, 'The Legal Profession Post-ADR: From Mediation to Collaborative Law' (2007) 18 *Australasian Dispute Resolution Journal* 205, 209.

<sup>39</sup> Linda Fisher and Mieke Brandon, *Mediating with Families* (2<sup>nd</sup> ed, 2009) 13.

<sup>40</sup> See Ardagh and Cumes, above n 38, 209.

<sup>41</sup> David Purnell, 'Mediation Theory and Practice: A Practitioner's Reflections on Developments in Mediation' (2005) 7(10) *ADR Bulletin* 183, 184.

own legal services,<sup>42</sup> and that this trend is transforming legal service delivery.<sup>43</sup> For example, the authors note the Family Court of Australia's promotion of mediation<sup>44</sup> and the 'unbundling' of the legal full-service delivery model.<sup>45</sup> Including the client's input in the legal service undermines the lawyer's control but empowers the client.

Although Robertson and Corbin describe the dynamic between lawyer and client as 'the client delegator seeking the lawyer reliever',<sup>46</sup> the authors recognise a variety of permutations and combinations of lawyer and client characteristics that alter the passive/active hypothesis.<sup>47</sup> In addition, the authors note from their empirical study a strong belief among lawyers that clients should be involved in decision making, particularly regarding settlement issues.<sup>48</sup> The finding is consistent with professional conduct rules that require legal practitioners to assist clients in understanding the issues pertaining to their case, thereby enabling clients to give proper instructions, particularly in connection with any compromise of the case.<sup>49</sup>

Recent comments by the Commonwealth Attorney-General, Robert McClelland, suggesting an end to native title litigation, signpost the Federal Government's preference for collaborative processes to resolve land and ownership issues. Processes such as negotiation and mediation are considered by the government to be preferable to current practices in the area, which centre on narrow legalistic approaches involving multimillion dollar court hearings and expensive expert reports.<sup>50</sup> The Attorney-General suggests interest-based negotiation as the starting point for native title claims instead of existing procedures which begin with an expert report pertaining to the claimants' connection to the land.<sup>51</sup> In describing the way forward for native

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<sup>42</sup> Michael Robertson and Jeff Giddings, 'Legal Consumers as Coproducers: The Changing Face of Legal Service Delivery in Australia' (2002) 40 *Family Court Review* 63, 63.

<sup>43</sup> *Ibid* 64.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*. Robertson and Giddings adopt Mosten's description of 'unbundled legal services' whereby clients 'can be in charge of selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly'.

<sup>46</sup> Michael Robertson and Lillian Corbin, 'To Enable or to Relieve? Specialist Lawyers' Perceptions of Client Involvement in Legal Service Delivery' (2005) 12(1) *International Journal of the Legal Profession* 121, 140.

<sup>47</sup> *Ibid* 121.

<sup>48</sup> *Ibid* 122.

<sup>49</sup> See, eg, *Professional Conduct and Practice Rules 2005* (Vic) r 12.2.

<sup>50</sup> Nicola Berkovic, 'End Native Title Litigation, Says A-G' *The Australian* (Sydney), 7 March 2008, 30. Attorney-General the Hon Robert McClelland (Speech delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008) 14.

<sup>51</sup> *Ibid* 34.

title claims, Mr McClelland asserts that improved outcomes would emerge from avoiding the ‘winner takes all’<sup>52</sup> results derived from adversarial judicial proceedings and ‘...resolving land use and ownership issues through *negotiation*, because negotiation produces broader and better outcomes than litigation’.<sup>53</sup>

The Attorney-General’s remarks highlight the ‘zero-sum game’<sup>54</sup> characteristic of the traditional adversarial contest, as well as the nature of lawyers’ work in the adversary system. In litigation, one side’s gain necessarily means a loss for the other side.<sup>55</sup> It is argued that academic and professional training<sup>56</sup> and practice in competitive legal work, combined with lawyers’ personality traits<sup>57</sup> and the overarching goal of winning, reduce the ability of lawyers to empathise with clients. This promotes chronic negative emotional responses in lawyers such as demoralisation, anxiety, anger, and sadness,<sup>58</sup> which lead to marital problems, mental illness and substance abuse.<sup>59</sup> These factors compound to damage lawyers’ health and well being and also foster low public opinion of the legal profession.<sup>60</sup> This negatively impacts on the workings and administration of the justice system.

The importance of lawyers to the operation of the legal process is recognised by the *Legal Profession Act 2004* (Vic). The Victorian Attorney-General, in the second reading speech of the Bill, described the legal profession as being the ‘principal source of legal assistance’ and therefore as playing ‘an important role in the way justice and the rule of law are delivered and perceived’.<sup>61</sup> Mr McClelland’s preference for negotiation over litigation should be based not only on the positive results achieved for dispute stakeholders and the community, but also on transformations to lawyers’ well-

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<sup>52</sup> *Ibid* 22.

<sup>53</sup> *Ibid* 26.

<sup>54</sup> Martin E P Seligman, Paul R Verkuil and Terry H Kang, ‘Why Lawyers are Unhappy’ (2005) 10(1) *Deakin Law Review* 49, 60.

<sup>55</sup> *Ibid* 61.

<sup>56</sup> Riskin describes the traditional adversarial training in the black letter law subjects as the ‘lawyer’s standard philosophical map’. See Leonard L Riskin, ‘Awareness in Lawyering: A Primer on Paying Attention’ in Marjorie A Silver, *The Affective Assistance of Counsel* (2007) 47, 47. For a discussion on teaching ADR in law schools, see Gutman, above n 15, 136.

<sup>57</sup> Susan Daicoff, ‘Lawyer Personality Traits and their Relationship to Various Approaches to Lawyering’ in Marjorie A Silver, *The Affective Assistance of Counsel* (2007) 79, 80.

<sup>58</sup> Seligman above n 54, 61.

<sup>59</sup> Daicoff, above n 19, 56; Michael Hunter Schwartz, ‘Humanizing Legal Education: An Introduction to a Symposium Whose Time Came’ (2008) 47 *Washburn Law Journal* 235, 235.

<sup>60</sup> Daicoff, above n 19, 56.

<sup>61</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2004, 1541 (Robert Hulls, Attorney-General).

being resulting from job satisfaction derived from non-adversarial practice,<sup>62</sup> which may have positive outcomes for the administration of justice.

#### IV VICTORIAN INITIATIVES

The Victorian Law Reform Commission, in its draft summary of civil justice reform proposals,<sup>63</sup> suggests legislative intervention to increase active judicial case management by ‘encouraging disputing parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure’.<sup>64</sup> In keeping with this proposal, Victorian government policy concerning the acceptance of ADR theory and practice is similar to that of the Federal Government, as evidenced by the therapeutic<sup>65</sup> and restorative jurisprudential approaches taken in problem-solving courts throughout the State. Problem-solving courts ‘seek to use the authority of the courts to address the underlying problems of individual litigants, the structural problems of the justice system and the social problems of communities’.<sup>66</sup> The consensus-seeking model<sup>67</sup> is endorsed by the Victorian Government in the *Attorney-General’s Justice Statement 2*,<sup>68</sup> where the promotion of ADR is seen as the way ahead for legal services delivery in Victoria because of ADR’s ability to ‘minimise costs, maintain relationships and “truly resolve disputes rather than just have them determined”’.<sup>69</sup>

According to Mr Hulls’ comments at the March 2007 Restorative Justice forum, the growing emphasis on specialisation across various jurisdictions - for example the Sexual Assault List in the County Court of Victoria - ‘demonstrates our collective acknowledgement that we *must* infuse greater compassion and understanding of the human experience into the arid air of the court’.<sup>70</sup> It appears that the Victorian Attorney-General is not only looking at the practical advantages of non-adversarial justice such as cost and time

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<sup>62</sup> Daicoff, above n 19, 56.

<sup>63</sup> Victorian Law Reform Commission, *Civil Justice - Second Exposure Draft* (2007).

<sup>64</sup> *Ibid* [1.2.1].

<sup>65</sup> King, above n 22, 51.

<sup>66</sup> Arie Freiberg, ‘Managerialism in Australian Criminal Justice; RIP for KPIs?’ (2005) 31(1) *Monash University Law Review* 12, 35.

<sup>67</sup> Macfarlane, above n 20, 188.

<sup>68</sup> Robert Hulls, *Attorney-General’s Justice Statement 2 - October 2008* (2008).

<sup>69</sup> Gregory, above n 26, 18.

<sup>70</sup> Workshop 1, Talking Justice Forum, 21 March 2007, Neighbourhood Justice Centre, Collingwood. See also Rood, above n 27, 1.

savings and decreased court backlogs. His support for specialist problem-solving courts is also based on an appreciation of the human costs of litigation and the strong link between legal and social issues. As Sir Anthony Mason remarked,

to treat the law as a discrete set of principles in a vacuum and without a context is to misconceive its dynamic and ubiquitous nature and, more importantly, to undervalue or even to overlook the manner in which it contributes to the fundamental fabric of modern society.<sup>71</sup>

Problem-solving courts rely on principles of restorative justice theory and therapeutic jurisprudence, the two movements sharing similar approaches to victims and offenders.<sup>72</sup> Notwithstanding that the term ‘restorative justice’ may be difficult to define,<sup>73</sup> Umbreit describes the core of restorative justice as: elevating victim and community participation in crime response; holding offenders accountable to victims; restoring losses; promoting dialogue between victims, offenders, family and community; encouraging offenders to take responsibility for their acts; persuading offenders to make amends; and facilitating offender up-skilling and reintegration into society.<sup>74</sup> Group conferencing is the most common restorative justice process.<sup>75</sup> The model emerged in the 1980s<sup>76</sup> and was the prototype adopted by Anglicare in devising the first Victorian Family Group Conferencing pilot in 1995.<sup>77</sup> The program was expanded to country and metropolitan services in 2003.<sup>78</sup>

The kernel of Wexler’s definition of therapeutic jurisprudence focuses on the role of law as a therapeutic agent, rather than on the anti-therapeutic impact of court decisions.<sup>79</sup> Within the parameters set by principles of justice, law needs

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<sup>71</sup> Sir Anthony Mason, Chief Justice of Australia, 19 February 1991, at the Inauguration of the Law Faculty, University of Wollongong, quoted in Stephen Bottomley and Simon Bronitt, *Law in Context* (3<sup>rd</sup> ed 2006) 2.

<sup>72</sup> Arie Freiberg, ‘Non-Adversarial Approaches to Criminal Justice’ (2007) 16 *Journal of Judicial Administration* 205, 214.

<sup>73</sup> Clare Cappa, ‘The Social, Political and Theoretical Context of Drug Courts’ (2006) 32(1) *Monash University Law Review* 145, 165.

<sup>74</sup> Mark Umbreit, *The Handbook of Victim Offender Mediation* (2001) 306.

<sup>75</sup> Douglas, above n 22, 32. See also Lawrence Boulle, *Mediation: Principles, Processes, Practice* (2<sup>nd</sup> ed, 2005) 127-8.

<sup>76</sup> Peter Condliffe, ‘Putting the Pieces Together: the Opportunity for Restorative Justice in Victoria’ (2005) 79(8) *Law Institute Journal* 54, 55.

<sup>77</sup> Peter Condliffe, *Victim Offender Dispute Resolution Manual* (2004) 21.

<sup>78</sup> *Ibid.*

<sup>79</sup> Douglas, above n 22.

to be constructed to serve more effectively as a therapeutic driving force<sup>80</sup> that assists in clients' overall wellbeing.<sup>81</sup>

Douglas remarks on the rapid introduction of problem-solving courts into Victoria,<sup>82</sup> which can be explained by qualitative and quantitative evidence showing that therapeutic and restorative paradigms of justice have led to many benefits, including promotion of participant wellbeing,<sup>83</sup> reduced recidivism,<sup>84</sup> decreased costs and increased compliance with court orders.<sup>85</sup> The non-adversarial model, when used in the criminal law context, also provides both victim and offender with more satisfaction than the mainstream criminal justice system.<sup>86</sup> Harris describes the sentencing process in Victorian Koori Courts as 'sentencing conversations'. In stark contrast to sentencing in traditional Magistrates' Courts, 'Koori Courts have created a space where the stories behind the offences can be told and the important part of community in the life of the defendant can be recognised'.<sup>87</sup> This empowering 'satisfaction story' may also be due to the rejection, by problem-solving courts, of the 'one size fits all' approach taken by mainstream courts in applying rules of evidence and procedure in an adversarial context. Freiberg cogently explains the interface between problem-solving courts and therapeutic justice as 'the integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behaviour, multi-disciplinary involvement, and collaboration with community based, and government organizations'.<sup>88</sup>

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<sup>80</sup> David Wexler, 'Therapeutic Jurisprudence and the Criminal Courts' (1993) 35 *William and Mary Law Review* 279, 280.

<sup>81</sup> Douglas, above n 22.

<sup>82</sup> *Ibid.*

<sup>83</sup> King, above n 5.

<sup>84</sup> See, eg, Mark Harris, "A sentencing conversation": *Evaluation of the Koori Courts: Pilot Program: October 2002 - October 2004* (2006) at Department of Justice <[http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebb369085925f87/Evaluation\\_of\\_the\\_Koori\\_Courts\\_Pilot\\_Program.pdf](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebb369085925f87/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf)> at 9 February 2009. This provides data relating to reduced levels of recidivism among Koori defendants who were sentenced in Victorian Koori Courts.

<sup>85</sup> King, above n 5.

<sup>86</sup> See Lawrence Sherman and Heather Strang, *Restorative Justice: The Evidence* (2007) The Smith Institute <[http://www.smith-institute.org.uk/pdfs/RJ\\_full\\_report.pdf](http://www.smith-institute.org.uk/pdfs/RJ_full_report.pdf)> at 9 February 2009; see also Heather Strang et al, 'Victim Evaluations of Face-to Face Restorative Justice Conferences: A Quasi-Experimental Analysis' (2006) 62(2) *Journal of Social Issues* 281, 281.

<sup>87</sup> Harris, above n 85, 14.

<sup>88</sup> Arie Freiberg 'Therapeutic Jurisprudence in Australia; Paradigm Shift or Pragmatic Incrementalism?' (2003) 20(2) *Law In Context* 6, 11.

Even though the first problem-solving court established in Victoria - the Children's Court - was created in 1906, it was not until early in the twenty first century that most of Victoria's problem-solving courts were set up. Examples are the Dandenong Drug Court (2002), the Koori Court (2002), the Koori Children's Court (2005), the Family Violence Court (2005)<sup>89</sup> and the Collingwood Neighbourhood Justice Centre (2007).<sup>90</sup> The last of these is a multi-jurisdictional court, committed to providing simplified access to the justice system and applying therapeutic justice and restorative justice philosophies to the administration of justice.<sup>91</sup> The Collingwood Neighbourhood Justice Centre was the first type of court of its kind to be opened in Australia.<sup>92</sup>

Historically, all problem-solving courts in Victoria were specialist Magistrates' Courts. The status quo changed in November 2008 with the establishment of a pilot program for a Koori County Court, another Australian first,<sup>93</sup> which sentences indigenous offenders, after a finding of guilt, for serious offences excluding sexual offences, in a setting and environment that is culturally sensitive to their aboriginality, and using non-adversarial justice principles.

## V IMPLICATIONS FOR LEGAL PRACTICE

Although traditional alternative dispute resolution practices such as mediation, conciliation and arbitration, can and often do involve practitioners from a variety of disciplines, lawyers play a key role for several reasons. The first reason touches on aspects of a legal practitioner's professional obligations. Lawyers, in their client advocate role,<sup>94</sup> negotiate settlements of

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<sup>89</sup> Magistrates' Court of Victoria, *Family Violence Court Division* <<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Specialist+Court+Jurisdictions-Family+Violence+Court+Division?OpenDocument&1=40-Specialist+Court+Jurisdictions~&2=50-Family+Violence+Court+Division~&3=~>> at 9 February 2009.

<sup>90</sup> See *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 1. See also David Fanning, 'Neighbourhood Justice' (2007) 81(3) *Law Institute Journal* 26, 26.

<sup>91</sup> See *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 1.

<sup>92</sup> See Fanning, above n 91, 26, and Douglas, above n 22, 31.

<sup>93</sup> Carol Nader, 'Koori Court won't Hear Sex Charges' *The Age* (Melbourne), 6 May 2008, 6.

<sup>94</sup> See, eg, Ian Ramsay, 'Ethical Perspectives on the Practice of Business Law' (1992) 30(5) *Law Society Journal* 60, 61; Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49, 56.

disputes as champions of their clients' legal positions.<sup>95</sup> Whilst the duty of lawyers to advocate their clients' viewpoints and act in their clients' best interests is irrefutable, lawyers also have an ethical responsibility to act as officers of the court in furtherance of the integrity of the legal process. The legal practitioner's duty to put the client's case in its most favourable light<sup>96</sup> is tempered by the practitioner's higher duty to the court which requires the practitioner to independently exercise forensic judgments.<sup>97</sup> The duality of these duties, played out in mainstream adjudicative court processes, creates an ethical tension for many practitioners.

Dal Pont suggests that by proposing ADR to a client, lawyers are acting out their role as officers of the court,<sup>98</sup> because ADR is perceived as a positive streamlining, cost-cutting mechanism, assisting the efficiency of the court infrastructure with conflict resolution management.<sup>99</sup> Whilst this notion is consistent with MacFarlane's idea of the 'new lawyer' who is committed philosophically and pragmatically to conflict resolution,<sup>100</sup> the concept also raises the potential for conflict with the traditional role of the lawyer as zealous champion of the client's legal rights and positions.

Whether advising clients on ADR is based on a lawyer's duty to act in the clients' best interests or on their duty to the legal system, it is clear that negotiating settlements on behalf of clients and advising clients on how to settle matters without resorting to litigation is part of current best legal practice.

Spencer asserts that it is a component of legal professional responsibility for lawyers to advise their clients on ADR options.<sup>101</sup> This view is endorsed by the Australian Law Reform Commission,<sup>102</sup> the Law Council of Australia and in the Model Rules of Professional Conduct and Practice (2002),<sup>103</sup> which

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<sup>95</sup> Melissa Conley Tyler and Naomi Cukier argue that negotiation is a key skill for legal practice. See, eg, Melissa Conley Tyler and Naomi Cukier, 'Nine Lessons for Teaching Negotiation Skills' (2005) 15(1 & 2) *Legal Education Review* 61, 61.

<sup>96</sup> See *Professional Conduct and Practice Rules 2005* (Vic) r 12.1.

<sup>97</sup> See *Professional Conduct and Practice Rules 2005* (Vic) r 14.1.

<sup>98</sup> Gino Dal Pont, 'Ethics: A Duty to Encourage Settlement' (2005) 79(1-2) *Law Institute Journal* 80, 80.

<sup>99</sup> Boule, above n 76.

<sup>100</sup> Macfarlane, above n 20, 22.

<sup>101</sup> David Spencer, 'Liability of Lawyers to Advise on Alternative Dispute Resolution Options' (1998) 9 *Australian Dispute Resolution Journal* 292, 299.

<sup>102</sup> Australian Law Reform Commission, above n 9.

<sup>103</sup> Rule 12.3 states that: A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of

have been adopted by the representative bodies of legal practitioners in most Australian jurisdictions.<sup>104</sup> In Victoria, Rule 12.3 of the *Professional Conduct and Practice Rules 2005* (Vic) states that:

A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the clients' best interests in relation to the litigation.

The integration of ADR concepts into legal practice and legal professional conduct regulation introduces an added layer of ethical challenges for the practitioner. These challenges arise from the non-adversarial, partnership approach of problem-solving courts, which rely on teamwork strategies devised not only by legal professionals, but by other professionals from a range of backgrounds.<sup>105</sup> How does the ADR approach of collaborative problem solving fit in with the competitive strategy of the adversarial system? Will the ADR approach jeopardise a client's chance of 'winning' the case and therefore ethically compromise the lawyer, or will it lead to a 'better' outcome?<sup>106</sup> What does 'better' mean? Does it mean 'better' in terms of a client's legal rights or does it mean 'better' in the holistic sense of taking into account the personal needs, wants, desires and concerns of the individual client, their family, all dispute stakeholders and the community?

Simon explores the multi-layered conundrums that arise in defence counsel's role in representing their clients in the therapeutic, community-centred milieu of the drug court. First, as zealous protagonist and guardian of a defendant's legal rights, how does a defence lawyer best represent the best interests of the client as the client perceives these interests? Second, how does the defence lawyer reconcile the interests of the client with that of the community which is a key stakeholder in problem-solving courts? Furthermore, how does defence counsel best advise clients with respect to privacy issues and the possible erosion of the client's rights when the client enters into treatment programs and makes commitments to undergo screening and various other procedures and interventions into their life? Finally, Simon asserts that

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those alternatives as to permit the client to make decisions about the clients' best interests in relation to the litigation.

<sup>104</sup> For example, Victoria, New South Wales, South Australia, Australian Capital Territory and Northern Territory.

<sup>105</sup> Freiberg 'Non-Adversarial Approaches to Criminal Justice', above n 73, 216.

<sup>106</sup> Scott R Peppet, 'ADR Ethics' (2004) 54 *Journal of Legal Education* 1, 72-8.

problem solving courts actually put defence lawyers in the position where they co-operate and collude with the state.<sup>107</sup>

If Simon's last mentioned assertion has merit, a real tension arises between ethical tenets laid down by the Victorian legislature in its delegated legislation governing professional conduct and the nature, composition and processes of problem-solving courts. Defence counsel have traditionally been expected and even encouraged to robustly advocate for their clients, putting their client's position in the best possible light before the court. In Victoria, rule 12.1 of the *Professional Conduct and Practice Rules 2005* states that

[a] practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law including these rules.

The Victorian Bar Rules echo these principles of professional conduct<sup>108</sup> which are founded on the recognition of the power imbalance that necessarily exists when defendants confront the mighty resources of the state and the serious consequences associated with criminal conviction. Similarly, cases such as *Tuckiar v The King*<sup>109</sup> underline the unique nature of the criminal defence lawyer's duty to the client, including the duty of confidentiality. In *Tuckiar*<sup>110</sup> a majority of the High Court of Australia held that defence counsel was not entitled to divulge to the court a communication by the client including the confession of guilt to a murder charge. Clearly, these common law and legislative principles are at odds with the open, non-adversarial team-based approach taken in problem-solving courts.

Running parallel to the rise of ADR is the erosion of the traditional paternalistic role of professionals generally in relation to their clients/patients. Whereas, historically, professionals such as lawyers and doctors were empowered by their expertise and perceived status to conduct professional practice in an authoritarian manner, in recent times there has been a marked cultural shift. The culture of consumerism and the demands of litigation brought by clients/patients against professionals have contributed to

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<sup>107</sup> William H Simon, 'Criminal Defenders and Community Justice: The Drug Court Example' (2003) 40 *American Criminal Law Review* 1595, 1603.

<sup>108</sup> Victorian Bar, *Practice Rules: Rules of Conduct & Compulsory Continuing Legal Education Rules* (2005) pt 11.

<sup>109</sup> (1934) 52 CLR 335 (*Tuckiar*).

<sup>110</sup> *Ibid.*

professional practice being increasingly sensitive to notions such as ‘shared decision-making’.<sup>111</sup> Dal Pont considers that the rise of consumerism has ‘heralded ... a marked decrease in client loyalty and a willingness to question the once unquestionable’.<sup>112</sup> Using Hodges’ Foucaultian discourse paradigm, there is a sense that the lawyer/client relationship discourse is shifting from a lawyer-driven discourse to one which is client-driven.<sup>113</sup> The trend accords with the client empowerment model that underlies ADR theory and practice<sup>114</sup> and is exemplified by legal practice realities such as the ‘unbundling’ of legal services described above.

Problem-solving courts challenge traditional stereotypes of legal representation.<sup>115</sup> Their nature, composition, workings and theoretical bases raise practice issues for legal practitioners. Douglas argues that therapeutic justice practices blur the boundaries between the healing and welfare professions and the legal profession.<sup>116</sup> For example, in the Drug Courts the overlap between the court process, mental health concerns and substance abuse issues is palpable. In this holistic context, how competent are legal practitioners in representing their clients when representation includes negotiating outcomes based on improving the health and social function of their client, the drug user?

Fiss, writing in the 1980s, during the ADR insurgence into the judicial institutions of the USA, dismisses proponents of ADR on the basis of a spurious argument that settlement of disputes through ADR processes is not ‘preferable to judgment’ and therefore should not be ‘institutionalised on a wholesale and indiscriminate basis’.<sup>117</sup> Fiss’ analysis of ADR-prompted settlement and the adjudicative process is flawed as it fails to adequately distinguish between adjudication and ADR. Fiss argues that settlements reached by parties through ADR processes are akin to plea bargaining. That is, ADR settlements are prompted by coercion. In making this assertion, Fiss fails to consider a basic distinguishing feature of ADR, namely that ADR disputants are responsible for the outcome of the dispute. This empowering characteristic is important in both disputant compliance and satisfaction with

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<sup>111</sup> See Judy Gutman, ‘The Right Not to Know: Patient Autonomy or Medical Paternalism’ (2000) 7 *Journal of Law and Medicine* 286, 290.

<sup>112</sup> Gino Dal Pont, *Lawyers’ Professional Responsibility* (3<sup>rd</sup> ed, 2006) 12.

<sup>113</sup> Brian Hodges, ‘Medical Education and the Maintenance of Incompetence’ (2006) 28(8) *Medical Teacher* 690, 691.

<sup>114</sup> Boule, above n 76, 224.

<sup>115</sup> Andrew Goldsmith, Mark Israel and Kathleen Daly (eds), *Crime and Justice: A Guide to Criminology* (3<sup>rd</sup> ed, 2006) 455.

<sup>116</sup> Douglas, above n 22.

<sup>117</sup> Owen M Fiss, ‘Against Settlement’ (1984) 93(6) *The Yale Law Journal* 1073, 1075.

settlements reached via ADR processes.<sup>118</sup> Further, Fiss ignores the all-important roles of the third party in both adjudication and ADR. In adjudication, the outcome is determined solely by the adjudicator according to legal rights and rules of procedure and evidence. By contrast, the ADR neutral third party has input into the ADR process only as facilitator. The content and outcome of the dispute, including the settlement, belong to the disputants.<sup>119</sup> The facilitative mediation process is based on the philosophy of party self-determination which is enhanced by the problem-solving focus of the process.<sup>120</sup>

Fiss generalises about ADR, failing to distinguish between the various processes that comprise the ADR spectrum. This generalisation leads him to come to over-simplistic and uninformed conclusions. The kernel of Fiss' argument is based on the erroneous assertion that ADR processes are settlement-driven and, consequently, that ADR processes necessarily lead to settlements that may result in poor socio-legal outcomes.<sup>121</sup> This point of view does not take into account how the costs and stresses associated with litigation can drive parties to settle on inequitable terms. This fundamental error, and Fiss' defective reasoning in bundling all ADR processes together, detract from the validity of his criticisms of ADR.

Another of Fiss' criticisms of ADR is based on power imbalance. Whilst it is acknowledged that disputant inequalities based on socio-economic grounds, culture, gender, geography and education affect power dynamics in ADR processes, these factors are serious issues in traditional dispute resolution processes also. Access to justice remains a key issue in the justice system overall.<sup>122</sup> Speedier outcomes, the lower costs associated with ADR, and its less formal, less rigid and less legalistic format enhance the potential for access to justice and thereby diminish, rather than exacerbate, problems caused by power imbalances.

Another practice concern goes to the very heart of the many and varied duties of the lawyer, duties whose fulfilment is a measure of responsible professional practice. Central among these duties is the practitioner's duty to engage in

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<sup>118</sup> See Strang et al, above n 89, 291. See also, 'Four Stories of the Mediation Process' referred to by Baruch Bush and Folger, above n 33, 9 and Baruch Bush, above n 25, 1.

<sup>119</sup> Donna Cooper and Rachael Field, 'The Family Dispute Resolution of Parenting Matters in Australia (2008) 8(1) *Law and Justice Journal* 158, 165.

<sup>120</sup> *Ibid.*

<sup>121</sup> For example, settlement is not the goal of the transformative mediation model.

<sup>122</sup> See Australian Government Commission of Inquiry into Poverty, *Law and Poverty in Australia: Second Main Report* (1975).

legal practice in a competent manner. The legal practitioner's professional responsibility originates from threefold obligations<sup>123</sup> founded on contract law,<sup>124</sup> tort law<sup>125</sup> and the law of equity in relation to fiduciary duties.<sup>126</sup> Competence is an implied term in the retainer for legal services between lawyer and client. The notion of competence in legal practice is enshrined in the *Legal Profession Act 2004* (Vic) which provides an inclusive definition of unsatisfactory professional conduct and professional misconduct.<sup>127</sup> In connection with legal practice, unsatisfactory professional conduct includes conduct falling short of the standard of competence and diligence expected by a member of the public. Professional misconduct includes failure to reach or maintain a reasonable standard of competence. Similarly, the *Professional Conduct and Practice Rules 2005* (Vic) are prefaced by the underlying principle that '[p]ractitioners should serve their clients competently and diligently'. The importance of competency is again underscored by the introductory principles to the *Advocacy and Litigation Rules* (Vic) which state that '[p]ractitioners ... should act with competence, honesty and candour' and the general principles of professional conduct spelt out in the Victorian Bar rules. Here, rule 3 states that:

A barrister must act honestly, fairly and with competence and diligence in the service of a client *and should accept instructions and a retainer to act for a client only when the barrister can reasonably expect to serve the client in that manner and attend to the work required with reasonable promptness.*

The standard of competent legal practice is determined by peer professional opinion as set out in legislative provisions that do not consider legal practice specifically, but pertain to professional practice generally.<sup>128</sup> Practice standards are measured by yardsticks set by a significant number of respected practitioners in the field.<sup>129</sup> In the context of legal professional practice, 'the relevant standard of care is that of ... a qualified, competent and careful lawyer in the given circumstances in the practice of'<sup>130</sup> their profession. This would mean 'that a lawyer is expected to possess the knowledge held by the reasonably competent lawyer of well-settled principles of law and the relevant procedures and rules of court applicable to the client's needs'.<sup>131</sup> A lawyer

<sup>123</sup> Mary Anne Noone, 'Lawyers as Mediators: More Responsibility?' (2006) 17 *Australasian Dispute Resolution Journal* 96, 101.

<sup>124</sup> Ysaiah Ross, *Ethics in Law* (4<sup>th</sup> ed, 2005), 296.

<sup>125</sup> See *Hedley Byrne v Heller* [1964] AC 465.

<sup>126</sup> See *Astley v Austrust Limited* (1999) 197 CLR 1.

<sup>127</sup> Ss 4.4.2 and 4.4.3.

<sup>128</sup> *Wrongs Act 1958* (Vic) s 59.

<sup>129</sup> *Wrongs Act 1958* (Vic) s 59(1); *Twidale v Bradley* [1990] 2 Qd R 464, 482.

<sup>130</sup> Dal Pont, above n 113, 115.

<sup>131</sup> *Ibid* 116.

cannot contract out of the standard of care.<sup>132</sup> The standard of care cannot be reduced due to a lawyer's inexperience, their lack of specialisation, their acting pro bono or in a legally aided matter or because of the location of their practice.<sup>133</sup> Whilst problem-solving courts, relying on principles of restorative justice and therapeutic jurisprudence, require lawyers to appreciate the health and welfare ramifications of their client's case, how much knowledge and expertise relating to non-legal aspects of practice in problem-solving jurisdictions will be expected of the reasonably competent lawyer?<sup>134</sup> Arguably, the discourse of legal competence is changing.<sup>135</sup> Traditionally, peer professional standards applied to both the 'client warrior' and 'officer of the court' discourses. The 'new lawyer'<sup>136</sup> discourse, incorporating conflict resolution advocacy, consensus seeking, experimentation and innovation,<sup>137</sup> may be more applicable in the twenty first century, and accreditation standards relating to legal practitioners need to be modified accordingly.

Problem-solving courts also challenge traditional notions concerning the role of the judiciary as independent, impartial and neutral arbiters of disputes, and referees of the adversarial contest.<sup>138</sup> Fox remarks that specialist tribunals such as Drug Courts introduce the European civil law concept of 'magistrate as investigator' and he predicts that this judicial role will become 'increasingly attractive' in Australia.<sup>139</sup> Fox also notes the tensions exposed on the one hand by an inquisitorial magistrate in a problem-solving court and, on the other hand,

the doctrine of separation of powers and ... the importance attached by the High Court in the case of *Kable* to judges not being placed in the position of appearing to be doing the bidding of the executive arm of government.<sup>140</sup>

According to Simon, problem-solving courts are based on the shared interests and norms of all stakeholders.<sup>141</sup> The model accepted by personnel in these courts is one of collaborative 'team relationships'.<sup>142</sup> Defendants can expect

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<sup>132</sup> Ibid 118.

<sup>133</sup> See *Yates Property Corp v Boland* (1998) 85 FCR 84, 105.

<sup>134</sup> Dal Pont, above n 113, 115.

<sup>135</sup> See Hodges, above n 113, 691.

<sup>136</sup> See Macfarlane, above n 20, 22.

<sup>137</sup> Simon, above n 108, 1595.

<sup>138</sup> See Goldsmith, above n 116, 455. See also John Kleinig, *Ethics and Criminal Justice: An Introduction* (2008) 155.

<sup>139</sup> Richard Fox, 'New Crimes or New Responses?: Future Directions in Australian Criminal Law' (2002) 28 *Monash University Law Review* 103, 119.

<sup>140</sup> Ibid 119, citing *Kable v DPP (NSW)* (1996) 189 CLR 51.

<sup>141</sup> Simon, above n 108, 1596.

<sup>142</sup> Ibid.

leniency and welfare services. Judges are more active and ‘managerial’ and prosecutors and defence counsel are ‘less distant from the judge and each other’.<sup>143</sup> The expanded role of the judiciary in problem-solving courts seems to fly in the face of traditional notions of judicial independence that are central to the Australian democratic process and its institutions.<sup>144</sup>

Goldsmith compares the active approach of magistrates in problem-solving courts to that of coach.<sup>145</sup> In the problem-solving court process, judges ‘coach’ offenders to become law abiding citizens.<sup>146</sup> Because of the interventionist function of magistrates in problem-solving courts, these jurisdictions necessarily rely on judicial support and co-operation.<sup>147</sup> Interestingly, the more active role of the judiciary in problem-solving courts arguably ‘places more control on the judge [or other decision-maker]’ in the sense that the judge is in a position to coach the defendants and tell them what to do.<sup>148</sup> This feature runs counter to the disputant-empowerment model that comprises a vital thread running through the fabric of traditional ADR theory.

## VI CONCLUSION

The changes spearheaded by the growth and acceptance of ADR theory and practices in Australia, incorporating notions of restorative and therapeutic justice, have, in many areas of law and in many jurisdictions, necessitated changes to court processes and to the roles of lawyers and judges. The trend appears to be in the direction of non-adversarial, participatory court procedures, with judges having an expanded function. The traditional model of lawyering, the hired gun client advocate, is no longer appropriate in all courts and jurisdictions. Contemporary best practice lawyering recognises the important and ‘new’ role of lawyers as problem solvers, working collaboratively, often in a multidisciplinary environment. Their aim is to achieve consensus, an outcome that is beneficial to all stakeholders in the dispute, and a result that has a positive effect on both the legal profession and the community and also promotes confidence in the justice system. Although the ‘new’ roles of judges and lawyers have been lauded by state and federal

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<sup>143</sup> Ibid.

<sup>144</sup> See Michael C Dorf and Jeffrey A Fagan, ‘Problem-Solving Courts: From Innovation to Institutionalization’ (2003) 40 *American Criminal Law Review* 1501, 1509.

<sup>145</sup> Goldsmith, above n 116, 455. See also Daicoff, above n 19, 4.

<sup>146</sup> Goldsmith, *ibid.*

<sup>147</sup> Ibid.

<sup>148</sup> Seligman, Verkuil and Kang, above n 54, 62.

governments, the nuances of the associated ethical issues confronting Australian legal practitioners seem to have been overlooked by the reformers.

As Mr Hulls points out, again stressing the importance of recognising and adapting to change,

[p]eople generally realise that the reform train has well and truly left the station, and you are either on it, or you are left behind at the station, ... [a]nd most people want to be on the train.<sup>149</sup>

Whilst catching the train is certainly important, careful preparation for the journey ahead must not be ignored. The starting point for lawyers' groundwork necessarily involves the law school. Legal education needs to inculcate the new consensus-building framework of lawyering into law curricula, and provide students with the relevant knowledge and skills set.<sup>150</sup> Furthermore, legal regulators and accreditors as well as legislators must recognise the changing face of legal practice and cater for the challenges facing practitioners, especially those practising in problem-solving courts.

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<sup>149</sup> James Eyers, 'Vic Allots More Funds for Justice', *The Australian Financial Review* (Melbourne), 9 May 2008, 51.

<sup>150</sup> For a discussion of ADR in law schools see Gutman, above n 8. See also Kathy Douglas, 'Shaping the Future: The Discourses of ADR and Legal Education' (2008) 8(1) *Law and Justice Journal* 118, 118.