

# JOURNAL OF JUDICIAL ADMINISTRATION

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## EDITORIAL

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## ARTICLES

**Non-Adversarial Justice: An Evolving Paradigm – Warren Brookbanks**

The article surveys recent developments in non-adversarial justice (NAJ). It commences with a discussion of the relationship between adversarial and non-adversarial models of justice, as exemplified in the anecdote involving Justice John Holt, suggesting their complementarity. It then examines the broad parameters of the non-adversarial approach, as reflected in the concepts of therapeutic jurisprudence, restorative justice, collaborative law and procedural justice. A range of contemporary practices are considered, including sex offence trials, the role of Mental Health Review Tribunals and the coronial jurisdiction. A brief account of the vexed question of mental wellbeing in the legal profession prefaces a claim that the recent developments in NAJ reflect the emergence of a new subjectivity in approaches to legal problem-solving and a greater movement towards participatory inquiry and the exploration of social relationships in problem-solving generally. .... 222

**Constructions of Impartiality in Mediation – Susan Douglas**

Impartiality is a core principle of decision-making within Australia’s common law system of justice. This article reports on an empirical study of the meaning of impartiality in mediation. The study is set against changes to the National Mediator Accreditation System in 2015, which saw removal of neutrality as an ethical requirement of practice. Prior to the 2015 amendments, mediators were required to demonstrate an understanding of “neutrality and impartiality”. The requirement to demonstrate understanding of impartiality was retained in the 2015 revisions. The past requirement that mediators understand both neutrality and impartiality suggests that these two concepts are separate and distinct. Yet while some scholars distinguish between them, others treat them as synonymous. The study reported here sought to further understanding of impartiality by gathering data from practising mediators about what meaning they ascribe to impartiality and how they translate it into their practice. The results challenge existing constructions of impartiality that are framed from a purely legal perspective and suggest multidisciplinary influences consistent with non-adversarial justice approaches. .... 232

**Therapeutic Jurisprudence and Due Process – Consistent in Principle and in Practice – Nigel Stobbs**

In light of recent criticisms in the US and Australia, this article considers the risks involved in the ongoing perception of tension or conflict between therapeutic jurisprudence and due process, especially in the context of the problem-solving courts. It analyses the nature of these criticisms and unpacks some invalid assumptions implicit in them. It argues that a criminal proceeding in which there are breaches of constitutional, statutory or common

law principles of due process is inconsistent with either a therapeutic design of law or a therapeutic application of law, or with both. As with their mainstream counterparts, individual therapeutic-focused courts and programs can, and sometimes do, breach due process by failing to adhere to rules and standards by which they are regulated and on which they are modelled. But these breaches are not a manifestation of any fundamental incompatibility between therapeutic jurisprudence and the role of a team-oriented judge or lawyer on the one hand, and due process principles and the constitutional or ethical obligations of that same judge or lawyer on the other. The conceptual basis of the therapeutic jurisprudence method, articulated in a form describe here as the “TJ imperative”, together with the procedural protections it demands, preclude any such incompatibility. .... 248

**Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility – Felicity Gerry and Penny Cooper**

This article explores recent international developments in judicial case management for vulnerable accused persons in adversarial trials. The authors discuss the definition of “vulnerable” and include examples of adaptations to the traditional adversarial process and appellate decisions. The authors emphasise the importance of specialist legal representation. They conclude that not only is it necessary for there to be bespoke, procedural adjustments in appropriate cases but also for there to be a fundamental review of laws which may be inappropriately criminalising certain vulnerable accused persons. .... 265

**Non-Adversarial Approaches to Domestic Violence: Putting Therapeutic Jurisprudence Theory into Practice – Rachael Field and Hon Eugene M Hyman**

This article analyses therapeutic jurisprudence (TJ) informed approaches to domestic violence (DV). Part I of the article considers ways in which the adoption of such approaches in DV contexts can be positive for the parties involved, while Part II explores some of the caveats. This analysis leads to four key recommendations for the safe management of TJ informed approaches to DV. First, comprehensive screening protocols are necessary to ensure that only appropriate offenders who have the capacity to participate effectively are screened in to TJ informed programs. Secondly, given the complex nature of DV and the need for multi-disciplinary and multi-agency responses, information across these disciplines and agencies must be shared. Thirdly, extensive training is needed for first responders such as police and community groups, as well as for judges and program facilitators. Finally, it is important to adopt practices that allow processes and protocols to be perceived as procedurally fair to all parties. .... 275

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