COURTS IN CRISIS?

alrc inquiry into the adversarial system

The Australian legal system seems to operate under an ongoing and widespread perception that it is in a state of crisis. This perception has sparked calls for reform from everyone up to and including the current Chief Justice of the High Court, Sir Gerard Brennan. It has also prompted inquiries and reports from both houses of Federal Parliament, the Access to Justice Advisory Committee, the Trade Practices Commission and State Attorney-Generals' Departments and Law Reform Commissions across the country.

For many years this perceived crisis has also been a major focus of attention for the courts and legal profession. A huge amount of work has been invested in initiatives seeking to cope with the ever-increasing demands placed on the legal system. But the intractable problems of cost, delay and selective access to justice remain. If what has been done to date has not solved these problems, what will? Is the adversarial nature of our legal system to blame? **Dr Tania Sourdin** reports on the Australian Law Reform Commission's current inquiry.

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For the last year the Australian Law Reform Commission has been looking at the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction.

This inquiry arose from concerns that legal proceedings in Australia are excessively adversarial and that this is having a damaging effect. The aim of the inquiry is to assess whether any changes should be made to practices and procedures in federal proceedings to address those concerns.

This is a far reaching inquiry which requires the Commission to consider fundamental issues concerning the administration of justice through federal courts and tribunals. The end result may well be a restatement of the principles governing the roles of federal courts and tribunals in the Australian legal system, and new, detailed principles to guide their practices and procedures.

Our first task is to describe what is occurring in Federal Courts and Tribunals — who is litigating, in what cases, in which courts and tribunals, and what problems are being encountered. There are already many active and ongoing litigation reform measures under discussion or trial in Australia, but they have yet to be comprehensively described. This is necessary to allow a balanced assessment to be made of further reforms that are needed and the options that should be considered.

Once this comprehensive picture is obtained, we will seek comment upon reform initiatives and options. The final part of the inquiry will involve an analysis of potential reform measures and recommendations in relation to reform.

In particular, the inquiry will examine and make recommendations on

- the structure and objectives of Australia's federal legal system
- the practices and procedures in Australia's federal courts and tribunals that contribute to the adversarial aspects of the system
- how federal courts and tribunals should be linked or relate to mediation, arbitration and other processes that form part of dispute resolution in Australia
- the culture of Australia's legal system.

These recommendations will have implications for the day-to-day practice of Australian lawyers, courts and tribunals and for those involved as litigants, including individuals, businesses, insurers and government agencies.

The problems of an 'adversarial' system

The central point of reference for this inquiry is the 'adversarial' nature of the present system. In practice this focuses the inquiry more on a particular group of problems than on a particular type of legal system.

'Adversarial' does not have a precise meaning. In broad terms the 'present adversarial system' of conducting proceedings refers to a system in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for carrying the dispute forward. In its simplest form this system has a number of characteristics which have been criticised as being counter-productive or inefficient, for example:

- the system is about winning and losing — each party has responsibility for advocating its own case and attacking the other party's case; this puts an emphasis on confrontation
- the lawyer's role is strictly partisan — the lawyer has a duty to represent the interests of his or her client and is not ethically accountable for the client's goals or the means used to attain them, although the lawyer does have certain countervailing duties to the court and third parties — this gives lawyers an incentive (and perhaps even an obligation) to exploit any advantages the legal system allows for their clients
- the judge is responsible for ensuring that the proceedings are conducted fairly — this makes judges sensitive about limiting the issues and arguments raised by parties and putting other controls on proceedings in case that is considered biased or unfair
- the judge is not responsible for how much evidence is collected, how many different arguments and points are put to the court, how long the proceedings take or how much they cost
- the judge must adjudicate questions of fact and questions of law submitted to the court, but is not responsible for discovering the truth or for settling the dispute to which those questions relate.

These and other features of the adversarial system have been accused of contributing to (among other things) excessive costs and delays, overservicing, lack of accountability and an unduly confrontational approach to dealing with disputes.

The adversarial system has also been criticised for its indirect effects. Strictly speaking, the adversarial system relates only to a small part of dispute resolution in Australia — trials in courts. However it has a wide ranging impact that can be seen in all other stages of proceedings in courts, the role and proceedings of tribunals, other dispute resolution procedures used by courts and tribunals, and other forms of dispute resolution outside courts and tribunals.

Solutions in practices and procedures

The simple form of the adversarial system does not apply in Australia. The Australian legal system is a blend of adversarial and non-adversarial elements as well as processes that do not fall easily into any particular category.

There is little practical benefit in debating whether a pure adversarial model is better than a pure inquisitorial model or any other ideal legal system. Few legal systems (if any) reflect a pure model and there are too many different kinds of processes, including blended processes, to be considered for any pure model to be of relevance to Australia.

The important issue is what problems and benefits of the kind attributed to the adversarial system result from a particular federal practice or procedure, either alone or in a broader context. The focus of the inquiry is on these problems and benefits and on any improvements that might be made by adopting different practices and procedures.

Outline of approach

This inquiry will examine and will make recommendations on the structure of the whole of Australia's federal legal system and, more broadly, on the other processes that form part of dispute resolution in Australia. The inquiry does *not* extend to criminal proceedings.

The Commission is interested in the practical impact of current practices and procedures on particular disputes and on the way litigation affects commercial and social relationships throughout the community. This includes, for example, the impact on

- costs, delay and complexity of proceedings
- the fairness and effectiveness of the legal system

- day-to-day business activities
- government administration and decision making
- disputes in families.

Many of these issues have been commented upon in Australia by a variety of individuals and groups in a range of reports and issues papers. This inquiry will seek to build upon that existing work and will also to look at reform options and initiatives that have not yet been the subject of Australian comment.

Options for reform

The Commission's research program will focus on clarifying options for reform. To illustrate the scope of the inquiry, the possible options for reform include:

- changing what courts and tribunals do
  - — limiting the types of disputes and issues dealt with by judges and tribunal members
  - — changing court adjudication and other dispute resolution procedures
  - — introducing a federal magistracy and changing the role of existing federal tribunals
- changing what judges do, for example by encouraging greater judicial intervention
- changing the way people are represented
  - — giving more assistance to litigants in person
  - — introducing new forms of representation, such as an Advocate General for public interest issues
  - — introducing new rules on when lawyers can be involved in proceedings
- changing the way evidence is collected and tested
  - — changing the way experts are used
  - — eliminating or further restricting discovery
- introducing new rules on how much is paid for legal proceedings.

Community Participation

There are many views to be heard on all these issues concerning the adversarial system. Judges, barristers, solicitors and court administrators all have views — sometimes quite divergent — that they have raised from time to time. So too do litigants and witnesses — often only heard when the depth of the trauma they have suffered drives them to speak out. Quieter rumblings can sometimes be discerned from those outside the system altogether, but who feel its impact on their business compliance systems or on their family and other social relationships.

The Commission wants to hear all these voices. To assist in the consultation process we will be releasing a series of publications for comment from March 1997. We will also be arranging specialist seminars, practitioner forums and other conferences. A preliminary report is expected in September next year with the final report due in September 1998. The Commission welcomes written and oral submissions on any matter relevant to the inquiry.

Issues papers and other publications

During the inquiry the Commission will release a number of issues papers and other publications for comment and as background information.

The timetable for these publications is as follows

Issues papers

- Federal civil litigation (March 1997)
- Family proceedings (April 1997)
- Training and education (April 1997)
- Administrative proceedings (May 1997)
- Courts and tribunals (November 1997)
- Appellate proceedings (March 1998)
- Alternative dispute resolution (March 1998)
- Courts and technology (March 1998)

Interim reports and discussion papers

- Federal civil litigation interim report (September 1997)
- Family proceedings discussion paper (February 1998)
- Administrative proceedings discussion paper (February 1998)

Research and background papers

- Description of federal jurisdiction (November 1996)
- Judicial and case management (November 1996)
- ADR and the multi-door court (November 1996)
- Litigants in person (November 1996)