**Submission to the ALRC Review of the Australian Family Law System**

*The Need for an Inquisitorial System of Dispute Resolution*

*(Corrected Version submitted 14 May 2017 – Corrections Highlighted*

First I must apologise for the fact that I do not have the time or the resources to provide a comprehensive response to the ALRC concerning the potential reform of the Australian family law system.

However I did think it was worthwhile to make a brief (and very general) submission focusing on one major issue that in my view must be a central part of any reform.

That issue is the urgent need to abandon the remoteness and disinterest of the adversarial system in favour of a properly civilised, inquisitorial system of family law dispute resolution.

I should note: I am not opposed to the adversarial system per se.

I appreciate that when a judicial officer is free of the need to gather and test evidence, and become involved more generally in the presentation of a case, that officer may be better placed to give a scrupulously disinterested and fair decision in a matter.

The context of the dispute is also relevant. The adversarial system may not promote any injustice between (for example) two large and well-resourced corporate entities slugging it out over a commercial dispute.

Family law litigants, however, are generally not well resourced. They often earn average or less than average income, and have no spare money for lawyers. They often have fairly minor assets loaded with debt, or even substantial net debt. They often have had no prior experience of legal processes or instructing lawyers, and they are undergoing what is almost always a tremendously stressful and difficult time for them and for their families.

In my view it is inexcusable for a civilised society to subject such people to the complexity, remoteness, hostility and disinterest of the adversarial system. A system that was derived from trial by battle - which still calls its major process a trial, which still issues requests for documents *sub poena* - and which tends to increase the suffering and disorientation of people who are already suffering enough.

The inappropriateness of the adversarial system for the resolution of family law disputes is already well understood by courts and lawmakers in this area. This is evidenced by ongoing attempts to make family law dispute resolution “less adversarial”.

In my view, this tentative and half-hearted approach has only produced what might be called “stunted adversarialism” - an uncomfortable hybrid system that is in many ways worse than the system it replaces.

Take for example the “relaxation” of the ordinary rules of evidence in parenting proceedings.

A sensible approach would be for the strict rules of evidence not to apply, and for most evidentiary material to be dealt with in terms of relevance, and also its probative value or weight.

However (in WA at least) our hesitation in applying this approach has left us with the bizarre outcome that the rules of evidence might or might not apply depending on the circumstances.

So rather than have a robust and easily understood system of evidence, litigants are cast into an uncertain evidentiary environment where they won’t know until a late stage whether the rules of evidence will or won’t apply.

Stunted adversarialism produces other kinds of injustice.

A particular case arises when you have one party who is unrepresented.

In such a case the court is required by law to attempt to “level the playing field” so that the unrepresented party is not disadvantaged.

What this means in practice is that one party is given some or all of the benefits of an inquisitorial approach (being assisted by the judicial officer to identify issues, accumulate and submit their evidence, and identify/make submissions on issues of law) while the other party (who is already burdened with very expensive legal fees) languishes in adversarialism with no such help from the court.

All of this is in addition to the very well recognised opportunity given by adversarial procedures to an abusive party to use the complexity and hostility of adversarialism as a means of continuing their abuse of the other party.

The reason I have a particular interest in this issue may arise from the fact that along with being a practising family lawyer, I also sit as a presiding member of the Mental Health Tribunal of WA (“MHT”).

By means of a brief statutory provision - stating that the MHT is not bound by the rules of evidence, and may inform itself of a matter relevant to a proceeding in any manner it considers appropriate - the MHT is released from the restrictions of adversarialism and can take an active role in gathering evidence, testing that evidence, and more generally in deciding matters in a way that is robust, fast, and fair.

Because of its inquisitorial approach, the MHT can provide large numbers of very vulnerable people with access to crucial rights protection. These are people who would have little or no hope of asserting their rights if they were required to approach an adversarial court to do so.

The major (reasoned) objection to the adoption of inquisitorial procedures seems to be that it is undesirable for a judicial officer to make findings of fact and law in relation to evidence that they have played an active hand in accumulating.

However an inquisitorial family court system could easily meet these concerns by simple organisational expedients.

For example the task of evidence gathering, mediating the dispute or seeking other forms of settlement could be done by a subordinate judicial or other court officer rather than by the magistrate or judge who would eventually hear the case if the matter goes to hearing.

There are a huge range of other procedural protections that could be put into place. For example it may be appropriate to distinguish between routine matters and what are sometimes called “big money matters” that might be better and more economically resolved via adversarial procedures.

The issue of cost is no doubt relevant, but unfortunately I lack any data to allow me to properly address that issue.

What I can venture fairly confidently is that although the cost to government of running an inquisitorial court might be greater than the alternative, there should be a vast overall saving to members of the community in terms of the reduction in the need to pay legal fees, along with other costs such as the cost of Legal Aid and the huge expense of private mediation which the Court has passed on to the community.

I might finish with a brief point about access to justice.

Lawyers tend to talk about the problem of *access to justice* as though justice is by its nature remote and inaccessible, and the solution is to find money for lawyers (and perhaps privatised dispute resolution processes such as mediation) to help ordinary people access this remote system.

In my view the major feature that keeps justice so remote and inaccessible in this country is our reliance on adversarial procedures, which are procedures that are inherently designed to make courts remote and disinterested.

In place of the ongoing catastrophic failure of the access to justice model, I think that we should work towards what I call the *devolution* of justice, where our institutions are reformed so as to bring justice down to the people.

In my view the best (and really the only) vehicle for such a change is an abandonment of adversarial court procedures, and a deliberate movement towards Inquisitorial judicial decision-making.

Thank you for taking the time to consider this submission.

I would again apologise again for the fairly general tone of this submission, and for its limited subject matter.

If the ALRC is not provided with more substantive submissions on this point I may be able to provide a more complete submission in the future if that would assist.

Yours faithfully,

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