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Inquisitorial and adversarial – more united than divided

Speech delivered by Dr Jacoba Brasch QC, President of the Law Council of Australia, at the 2021 Commonwealth Law Conference.

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Thank you for the opportunity to join you all in this session. It is such a shame I cannot join you, but our borders are firmly shut.

I will declare my hand from the outset – as an Australian barrister, I am a fierce defender of the adversarial system:

- I cross-examine for a living;
- making submissions and seeking to persuade a judge is my bread and butter;
- that said, I do think there is a time and place:
    - for less-adversarial proceedings.
    - for mediating and other forms of alternative dispute resolution.
    - but there is never a place in any court for conduct which is harassing, intimidating, offensive or inappropriate.
    - advocacy that is firm but respectful is a powerful form of persuasion.

Ultimately, whether we work under an inquisitorial or adversarial system we ought be united with the one common goal – to problem solve our client's problems…and that does not always mean court is the right option.

In his "Practical Guide to Evidence," legal scholar Peter Murphy gives an account of a frustrated judge in an English (adversarial) court asking a barrister, after witnesses had produced conflicting accounts, *'Am I never to hear the truth?*' The counsel's reply came: 'No, my lord, merely the evidence'.[1] This anecdote aptly reflects the tension between the inquisitorial and adversarial systems as alternative projects of justice.

Similarly, I recently read an article from our law reform commission where in the author mused:

> *Lawyers and journalists love to debate the relative merits of the adversarial and inquisitorial systems of law. Like playing the English at cricket, the debate is enjoyed, but we do not respond well to evidence that the other might be a better side.*[2]

In Australia, the closest we come to an inquisitorial system, is in coroner's inquests. I also like the role of an Independent Children's Lawyer, a lawyer representing children in family law proceedings (but not them directly, rather representing their best interests) in family law litigation to being more like a seeker of the truth as opposed to partisan advocate. But long gone are the days where the two styles of justice are mutually exclusive.

1 https://www.thestatesman.com/opinion/criminal-justice-system-trial-1502485060.html and https://www.amazon.com/Practical-Approach-Evidence/dp/1854310259
2 http://classic.austlii.edu.au/au/journals/ALRCRefJl/1999/15.html

Indeed, the differences in the two systems are better expressed as a continuous spectrum.[3]

So, civil law countries have taken on attributes traditionally seen as being part and parcel of adversarial systems. Meanwhile, the greater adoption of case management practices has introduced features traditionally seen in inquisitorial systems to Australian Courts, resulting in something of a 'halfway house' between adversarial and inquisitorial justice. Sir Anthony Mason, the ninth Chief Justice of Australia, has reflected on this partial convergence:

> *Adversarial justice is an expression often used in opposition to the inquisitorial system which is an imprecise label given to the procedure of the European system … That opposition has the potential to mislead, as there is a degree of commonality and convergence between the two systems. It is a mistake to regard the two systems as static ... Today the European system ... places more emphasis on procedural fairness ... The adversarial system, by moving to case management, begins to resemble the European one in expecting the judge to exercise more control over the litigation.*[4]

Managerial judging and the use of alternative dispute resolution (ADR) have been particularly apparent in the family law system. But in all of our adversarial courts in Australia, long gone are the days *"where judges sit 'inscrutable like the sphinx'*.[5]

Such is the move to being closer on the continuum, the Australian *Evidence Act* makes allowances for parties to seek, and judges to implement, a range of hearing styles to suit the needs of the parties, especially vulnerable parties and witnesses.[6]

That Act also imposes a positive duty on judicial officers to disallow improper questions, as found in section 41.

Further, Acts such as our Family Law Act specifically provide for "LATS" less-adversarial trials in parenting matters – the rules of evidence do not apply (unless a Court otherwise decides), and are conducted with as little formality, and legal technicality and form, as possible.

This gives courts considerable power to manage how parenting proceedings run, including for those who have suffered family violence. In fairly recent amendments, where a Family Violence Order exists, the violent or abusive party is not allowed to personally cross-examine the victim, where they are self-represented. Instead, Legal Aid funds a lawyer to do so.

However, before we even get to a trial, in all areas of law in Australia, ADR is a bedrock, so much so, that it is impossible to go to trial in many subject-matters, without first having a mediation or conciliation conference. Courts regularly order parties to mediation, and in some areas of law, mediation is statutorily mandated.

Trials are a measure of last resort. Yet, if a party wants their day in court, they are entitled to it, and will have it.

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3 Jolowicz, J. A. "Adversarial and Inquisitorial Models of Civil Procedure." The International and Comparative Law Quarterly, vol. 52, no. 2, 2003, pp. 281–295. JSTOR, www.jstor.org/stable/3663110. Accessed 31 Aug. 2021.)

4 http://www.austlii.edu.au/au/journals/NSWBarAssocNews/1999/4.pdf

5Johnson v Johnson (2000) 201 CLR 488 at 493

6 https://www.lawcouncil.asn.au/publicassets/674e2f97-7b6f-e811-93fb-005056be13b5/3440%20-%20Review%20of%20the%20Family%20Law%20System%20%E2%80%93%20Issues%20Paper%2048.pdf

The way judicial authority is described both in the Australian Constitution and Australian High Court cases is harmonious with our conception of adversarial justice. Section 71 of the Constitution, which refers to the "judicial power of the Commonwealth", has been interpreted in *Huddart, Parker & Co Pty Ltd v Moorehead*[7] as "*the power which every sovereign authority must, of necessity, have to decide controversies*."[8] The language of '*deciding controversies'* situates advocates, usually barristers, at the heart of the action of the courtroom, where the parties control the issues to be decided.

The emphasis on an independent and impartial judge, who can only make decisions on the issues that the parties indicate to the court are in dispute, and on the basis of the evidence introduced to the court by the parties, is a strong and meritorious focus of the adversarial system. Whereas in the inquisitorial process, the judge is in the driver's seat directing the process, in an adversarial system the judge '*serves … as an arbiter between claims of the prosecution and defence*'[9] or applicant and respondent.

The focus on the autonomy and activity of the parties before the Court allows the judge to weigh the merits and veracity of each case. This is because the adversarial system privileges, for the judicial role, the virtues of listening and weighing up alternative cases with a strong and defining commitment to procedural fairness for the parties. There is also a privileging of "*oral evidence with an emphasis on the importance of cross-examination*."[10]

Let me conclude with a comment I once heard made by one of our nation's preeminent barristers – David Jackson AM QC:

> *Each system is a product of the society in which it operates but each depends on the dedication and honesty of those administering it.*
>
> *That said, if there was a question of my involvement in a serious criminal offence, I would prefer the inquisitorial system if I were not guilty, but the adversarial system if I was.*

Thank you

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7 [1909] HCA 36
8 Huddart, Parker & Co Pty Ltd v Moorehead [1909] HCA 36
9 Dammer and Albanese, 2014; Reichel, 2017
10 http://www.austlii.edu.au/au/journals/NSWBarAssocNews/1999/4.pdf