# Key Centre for Ethics, Law, Justice and Governance
# Launch of "Beyond the Adversarial System"

and

# "Educating Lawyers for a Less Adversarial System"

Banco Court - Supreme Court

Wednesday 6 October 1999 5.30pm

Hon Paul de Jersey, Chief Justice of Queensland

It is ironic that we gather this evening in the Supreme Court s largest, grandest courtroom to acknowledge the publication of two books which question the very foundations of the Court s approach to its task. Whether our system is properly styled "adversarial" is a moot point. But the approach of these books is certainly "inquisitorial". Their titles alone, "Beyond the Adversarial System" and "Educating Lawyers for a Less Adversarial System", suggest an existing system from which we should depart. I hope the judicial imprimatur set on this sort of debate this evening by our presence within this courtroom will be seen as a further illustration, if it be needed, of a judiciary actively committed to promoting the public interest, whether or not that means change.

I personally baulk at readily embracing these days what has become the pejorative description of our system as "adversarial". The classical adversarial model involves minimal intervention by the decision-maker; the absence of fact-finding commissioned independently of the parties; party control of the proceedings, in defining issues and so on; an emphasis on winning contested issues, with an outcome favourable to one party, rather than securing an outcome justified by reference to some external factor; and an emphasis on a single determinative hearing, usually oral ("The Adversarial Model and the Administrative Tribunal", A Rose, the Judicial Review, 1999 vol 4 p 103).

As these books make clear, our system has, throughout the nation, been substantially renovated to the point where it is quite different from that classic model. Most dramatic is the judicial embrace of "ADR". The mechanisms of alternative dispute resolution - mediation, case appraisal and the like - are founded on the desirability of consensual non-adversarial resolution. Melding those mechanisms into the traditional processes, the courts of this country have produced a hybrid interestingly different from the traditional adversarial model, and I believe of infinitely greater utility to parties in dispute.

Another interesting recent development in this State, quite inconsistent with a traditional adversarial characterisation, is the courts  effective declaration that they will take the initiative to manage cases, so far as resources allow, and that they will not tolerate an unremitting devotion to established traditional procedures which produces injustice. Those declarations may be drawn - other matters aside - from the Uniform Civil Procedure Rules , not yet sufficiently acknowledged in the public arena for what they are: a ground-breaking compilation of modern procedural rules applicable to diverse courts, in the preparation of which this State s judiciary has frankly led the nation.

Interestingly this evening, in the context of these two books, the Uniform Rules confirm the Judge s discretion to give directions which would ten years ago have been thought entirely out of the question: limiting the number of witnesses a party may call, limiting the time to be allowed for the examination, cross-examination and re-examination of witnesses, limiting oral submissions, requiring the exchange of witness statements prior to hearings. And as an equally startling departure from the traditional adversarial model, we see confirmation of the Court s right to appoint its own experts, regardless of the consent of the parties.

Now I should note that the contributors to these two books do generally accept the inappropriateness to the current Australian system of the traditional "adversarial" characterisation. The contributors also acknowledge the sorts of trends I have just mentioned. Some suggest much more radical surgery is needed, if we are to craft a system which truly serves the public interest. Yet interestingly, we hear, from time to time, from judicial leaders in jurisdictions running an inquisitorial approach, public suggestions that perhaps their own systems might well be rendered more adversarial!

The "evolutionary change" in our system, to which the editors of "Beyond the Adversarial System" refer, is the reliable way forward, but it must involve the melding of different perspectives. That volume contains a diverse mass of suggestions, from a diversity also of perspectives: judicial, political, legal practice and academic. And the diversity which should mark the evolution of our approach must include cultural diversity. It is patently unacceptable that indigenous people, for example, should regard our civil justice system as to alien that they must avoid it. I have spoken from time to time of the inaccessibility of the courts to all but the financially rich or poor: how regrettable, as I now additionally acknowledge, an insufficient past attention to cultural divides.

The editors of the companion volume, "Educating Lawyers for a Less Adversarial System", stress "the importance of an integrated approach to reform of the civil litigation system: case management, ADR, technological developments, structural and procedural reforms, professional and public education - none will be effective without the others."

As you may know, the two books grew from a conference and workshop hosted by the National Institute for Law, Ethics and Public Affairs (NILEPA) and the Australian Law Reform Commission in July 1997, and a second workshop held in November 1998. As the introduction to "Educating Lawyers for a Less Adversarial System" records, "NILEPA brought together "engaged academics" and "reflective practitioners" on the assumption that both groups have much to gain from collaboration - academics can "road test" their theories in real life settings while practitioners can explore the theory and philosophical foundation of their work."

The results provide a fascinating excursus into what is possible. The contributors are all extremely talented and experienced people, and we are extremely privileged to have the opportunity now to read their considered views. Those views are at present topical in this State in particular.

For example, the issue of the examination of child witnesses, especially in the criminal court, has indirectly given rise to some public inquiry about the proper limitations of the adversarial approach: how far should an advocate legitimately push what Lord Brougham called the "sacred" duty to the client. These books touch on such ethical questions. They also dwell disparagingly on the inflexible obsession of some lawyers, even now, with the "leave no stone unturned" approach, reminding me of the cynical observation of the lawyer in the Wizard of Id that "every man is innocent until proven broke".

In the end, the wealth of considered material these lateral thinkers present addresses the issue of fundamental concern to us all: the inaccessibility of justice. I personally drew criticism some weeks ago, responding to a question as to whether "justice" was definable, by saying "no", that it was ultimately subjective. I went on of course to explain that that is why Judges are sworn not to administer justice, but justice according to law.

Our methods are evolving. In facing our greatest challenge, as a legal community, which is to render justice (according to law) more accessible, we must, as these contributors have done, think laterally, be creative, eschew inflexibility.

All legal practitioners should read and consider these valuable works. I warmly congratulate and thank the many contributors, I commend the editors the Hon Michael Lavarch and Dr Helen Stacy, and for the second volume, Professor Charles Sampford, Miss Sophie Blencowe and Ms Suzanne Condlln, and I compliment the Key Centre for Ethics, Law, Justice and Governance, and the publisher the Federation Press, for their splendid initiative. I am honoured and pleased now formally to launch these two valuable works.