2006 Australian National Family Law Conference

The Hon Wayne Martin
Chief Justice of Western Australia

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Introduction

It is a great pleasure and an honour to have been invited to address the last gathering of delegates at this importance Conference. To the extent that I have been able to participate in the Conference, from the feedback which I have received from a number of delegates, it appears to have been an outstanding success. No doubt that success is attributable in large measure to the conspicuous achievements of the organisers in putting together a programme with such an interesting and diverse array of topics addressed by such a distinguished panel of national and international speakers. The social programme has also been an outstanding success, and has provided informal opportunities for interaction between delegates on issues of common concern. The success of this Conference will, I think, provide the organisers of the next Conference to be held in Adelaide with a challenging benchmark to aim for.

The Importance of Family Law

It is impossible to overstate the importance of family law to the justice system which serves the community in which we all live. For many members of that community, their only interaction with the justice system occurs if they or a member of their family are injured on the road or at work, or if they suffer the breakdown of the most important relationship in their life - namely, that with their spouse or partner. For many members of our community, the Family Court is the only Court with which they have any significant dealings in the course of their lives. For those people, the Family Court, and its processes, represents the justice system.

And, of course, litigants are interacting with the Family Court at a time when many of them are undergoing the most traumatic and stressful event of their lives - other than perhaps the death or serious illness or injury of an immediate family member. So the stress which is inherent in, and I think exacerbated by an adversarial process of dispute resolution, comes at a time when the parties are undergoing one of the most stressful events of their lives. This accumulation of stress and its inevitable effect upon the behaviour and personality of the litigants and other family members caught up in the process, obviously creates a challenging environment in which the Family Courts and the legal profession operate to try and resolve the dispute, which is an essential pre-requisite to any return to normality on the part of the litigants and other family members.

Some less informed members of the legal profession, even senior members of the legal profession, have occasionally been heard to mutter remarks which are disparaging of the importance of family law work, or the intellectual rigour with which it is carried out. I entirely reject any such suggestion. Any member of Parliament around Australia will tell you that representations from constituents relating to family law disputes represent the single biggest item in their constituency workload. The family, in its various contemporary forms and structures, remains the vital heart of the social organisation of our community. Disputes within the family are the legal equivalent of a coronary occlusion which, unless satisfactorily treated and resolved, has potentially morbid consequences. Torturing this metaphor to its logical conclusion, the Family Court and its practitioners are the equivalent within the legal profession of the cardiologist or coronary surgeon within the medical profession. Nobody denies or doubts the importance of the justice system in determining the guilt or innocence of those charged with criminal offences, or in the

resolution of significant commercial disputes between major commercial enterprises. No sensible or reasonable person could or should deny the vital importance of the Family Court and its practitioners, and the law which they administer, to the workings of our system of justice.

The Adversarial Process

I have already mentioned the adversarial process which, despite some debate, both prior to the passage of the *Family Law Act* in 1975, and since then, remains the basic vehicle for the resolution of disputes in the family law area which cannot be resolved by mediation.

The logic which underpins the adversarial process is perhaps best epitomised in the proposition enunciated as long ago as 1822 by Lord Eldon, namely:

> "Truth is best discussed by powerful statements on both sides of the question."

However, on the subject of civil procedure I must confess to being an unabashed disciple of the Honourable Geoff Davies QC, formerly a member of the Queensland Court of Appeal. He has written extensively on the need for reform of the procedures which we use to resolve civil disputes, including the need to review the desirability of the adversarial nature of those processes. He has pointed out that the efficacy of the premise that truth is best assessed by requiring the parties to adopt diametrically opposing positions depends upon an assumption that each party will have equal access to legal resources. But plainly that is not a valid assumption in contemporary Australia. If, as is so often the case, the parties have unequal access to legal resources, the adversarial process

can become an instrument of unfairness. Many of you will be aware of instances in which that has occurred and is occurring around Australia today.

Another fundamental difficulty with the adversarial process in civil cases is that it seems to me to be fundamentally antithetical to the overall objective of the system in which it is being utilised which is, after all, a system intended to resolve civil disputes. In that context, it seems to me to be somewhat bizarre to engage a process which is inherently likely to exacerbate dispute, polarise parties and push them further and further apart.

Most courts around Australia, and the Family Courts of Australia are no exception, engage what seem to me to be two fundamentally inconsistent and antithetical processes to the resolution of civil disputes. The first is the process of mediation, which is designed to bring parties together, to emphasise the areas in which their positions are common and to minimise the areas of difference between them, with a view to resolving those areas of difference. But the Courts seek to employ and engage those processes at the very same time as they are providing an adversarial process which has historically encouraged parties to adopt diametrically opposing positions, emphasising and exacerbating their differences.

Intuition would suggest that the efficacy of the mediation process is likely to be diminished by requiring it to be conducted in the context of an overwhelmingly adversarial process. Nevertheless, despite the tensions created by a fundamentally adversarial process, agreement between the parties, with or without formal processes of mediation, is by far the most common method of resolving civil disputes in Australia. In the Supreme

Court of Western Australia, less than 5% of civil lodgements are resolved by a trial. That, of course, means that a little over 95% of our civil lodgements are resolved by some other means - most commonly the agreement of the parties or a default judgment. I haven't researched the figures for comparable courts, but would be surprised if there was any civil court in Australia, including the Family Courts, in which the majority, or anything approximating the majority of matters, were resolved by a judicial determination following an adversarial trial.

There is another significant problem with the adversarial process, and that is that it is fundamentally inefficient from an economic perspective. Any economist reviewing the processes which precede a trial and a trial itself, would point to the fundamental inefficiency of requiring each and every party to the trial process to fully prepare each and every issue themselves so that, in the case of a bi partite at trial, costs are doubled, in the case of a tri partite trial, trebled and so on. Considerations of this kind have, of course, led to the adoption of the single expert witness approach which is now standard in civil courts and commercial arbitrations in the UK, and which has now been adopted by the Family Courts of this country, in what I generally believe has been regarded as a successful change.

These various considerations lead me to think that if we are serious about the efficient allocation and utilisation of the limited resources of the Courts and parties, we should focus those resources upon a methodology which is most commonly the means by which disputes are resolved, and which defers the considerable cost and economic inefficiency of an adversarial trial. That methodology embraces the various methodologies which are generally grouped together under the heading "Alternative Dispute Resolution" including conciliation and mediation. It is, I think,

arguable that we should focus rather more of our case management processes and pre-trial resources on those methodologies, and rather less on the adversarial processes, and in particular actively discourage interlocutory disputes, and only commit to a full-blown adversarial trial when it is clear that all other means of resolution have been exhausted.

These considerations also cause me to wonder whether the nature of our adversarial processes should not also be reviewed. There is often a mistaken conception that there are only two alternative processes - namely, either an adversarial process or an inquisitorial model of the kind utilised in Europe. However, there is, of course, a continuum of processes with varying degrees of adversariality, and it may be time to consider the more general application of processes which contain a blend of approaches.

I recently had the benefit of attending an address delivered by Justice Stephen O'Ryan of the Family Court of Australia on the operation of Division 12A of Part VII of the *Family Law Act*, which established a substantially different regime for the conduct of proceedings relating to children under that Act. Amongst the principles that the Court is required to apply in proceedings of that kind is the principle that the Court is to actively direct, control and manage the conduct of the proceedings, and that the proceedings are, as far as possible, to be conducted in a way that will promote co-operative and child-focussed parenting by the parties, and further, that the proceedings are to be conducted without undue delay and with as little formality and legal technicality and form as possible.

Justice O'Ryan reported upon the empirical studies that have been conducted on the operation of the new Division. Those studies uniformly

conclude that it has been a significant success, and that is the feedback that has also been received from practitioners.

The paramount need to consider and protect the needs and interests of the child or children concerned in the proceedings, and the impact that the conduct of those proceedings might have upon the child, has provided a very strong justification for the adoption of this approach in proceedings of that kind. However, requirements that the Court should actively direct, control and manage the conduct of the proceedings, and that the proceedings be conducted without undue delay and with as little formality and legal technicality and form as possible, are of potentially universal application to all civil proceedings in Australia, whether proceedings of another kind under the *Family Law Act*, or civil proceedings generally.

The experience under Division 12A, and the empirical studies of that experience, substantiate the views that I have previously expressed about the desirability of greater judicial involvement with no greater support than my practical experience and a degree of intuition. I believe these developments in the Family Courts provide clear illustrations to the other courts of Australia as to the benefits which might be derived from greater judicial control of proceedings and an emphasis on substance over form and technicality together with a clear focus on expeditious resolution.

It has often been suggested that family law is one area of the law which is not particularly well suited to the rigorous adoption of an adversarial process. There is, I think, much to be said for that view, which could also be applied with equal force to a number of other areas of civil law. Many *Inheritance Act* cases and some corporations cases arise from disputes within the family. It is particularly pleasing to note that family law has

provided a demonstrable example of the ways in which the traditional adversarial model can be modified to the benefit of the parties and the interests of justice generally.

In my opinion, the days in which nothing more was required of a Judge presiding over civil proceedings than to sit back and watch the parties do whatever they think is appropriate are long gone. The approach identified in Division 12A is a logical extension of judicial case management of the preparation of cases for trial which has been an established feature of most civil courts in this country for more than a decade. The significance of Division 12A is that it authorises greater judicial intervention into the course and conduct of the proceedings and the trial itself. Traditionalists may have some difficulty reconciling that approach with the conventional view of the aloof and disinterested Judge watching the battle from on high and then presenting a laurel wreath to the victor. However, experience under Division 12A shows that departure from that traditional model towards a model in which the Judge takes much greater part in the identification of the issues for trial and in directing the course of the trial itself, provides substantial benefits and has the capacity to bring the justice system back within the reach and comprehension of ordinary Australians.

The Rabbit-Proof Fence Around Family Law

The observation that the general civil courts of this country can learn a lot from the Family Courts brings me to the final topic I wish to mention today, which concerns the unfortunate isolation of those who practise family law from those who practise law generally in most jurisdictions of Australia. Many of you will have seen the excellent movie called "The Rabbit-Proof Fence" depicting the plight of Aboriginal people in Western

Australia last century. It depicted a fence thousands of kilometres long, the purpose of which was to keep vermin out of the farming areas of the State.

It seems to me that a kind of rabbit-proof fence has grown up between those who practise family law and those who don't. I don't want to take the metaphor too far, because it might lead to the suggestion that there is vermin on one or other side of the fence, and debate about which side! But it is, I think, most undesirable that this division in the structure of the profession has developed.

Prior to my appointment, I was one of the few Barristers in this State who was offered an occasional brief in the Family Court in the context of a general commercial practice. There have been examples in other States - Justice Paul Brereton of the Supreme Court of New South Wales being another that jumps readily to mind. But it is quite the exception. It has the consequence that improvements and developments in one area of the law are less likely to find their way into the other. Evidentiary skills that might be honed in the crucible of a criminal trial will seldom find their way into a Family Court. Commercial expertise honed in major commercial cases may not find its way into Family Court cases involving the proprietor or substantial shareholder of the very same commercial entity. And important procedural developments such as those experienced in the operation of Division 12A, or the skills developed by the general civil courts in the area of case management may have difficulty passing through the fence.

There are, I think, a number of ways in which this might be addressed, including movement away from rolling lists, reduction of use of technical

jargon - such as the ubiquitous reference to documents by their form numbers, encouraging solicitors to think more laterally when deciding who to brief, encouraging Barristers to think outside their comfort zone and encouraging firms to expand the range of work available to those mainly working in the area of family law. This audience is much better equipped than I to know the ways in which the problem might be addressed, but it is, I think, an issue that should be addressed for the benefit of the profession as a whole.