

**Second International Conference on Non-adversarial Justice:  
integrating theory and practice**

Sydney, 6 April 2017

*Reflecting on the Practice of Non-adversarial Justice*

**The Honourable Wayne Martin AC  
Chief Justice of Western Australia**

I am greatly honoured to have been invited to address the second international conference on non-adversarial justice. I am sure that I will learn a great deal of practical benefit over the next three days from the very distinguished group of international experts, practitioners in various fields and judicial officers gathered at this conference as we explore together the rapidly developing fields of knowledge and share the experiences we have gained in the various fields of endeavour loosely grouped under the title of 'Non-adversarial Justice'.

**The Traditional Owners**

Before going any further, I would like to commence by acknowledging the traditional owners of the lands on which we meet - being for this place, the Gadigal people of the Eora nation. I pay my respects to their Elders past and present and acknowledge their continuing stewardship of these lands. The capacity for non-adversarial justice to mitigate the harm caused to the traditional owners of the land now called Australia as a result of colonisation, dispossession and the intergenerational trauma

which has resulted in the multifaceted disadvantages experienced by too many of the descendants of the traditional owners is one of the topics I hope to address.

### **Eleven years at the Coalface**

Almost 11 years ago, about a month after my appointment to the bench, I was invited to address the third international conference on therapeutic jurisprudence, which was held in Perth. The invitation to address that conference at the outset of my judicial career was serendipitous because it required me to discover the basic concepts of therapeutic jurisprudence and exposed me to the prolific writing in that burgeoning field. Eleven years later I am very pleased to have been invited to address another international conference dealing with similar issues.

In this address, I would like to reflect upon some of the basic concepts and practices that I referred to in my first address in this area, by drawing upon my 11 years of experience not only as a judge, but as the head of a judicial system. At the most general level, the conclusion which I draw from that experience can be expressed shortly, but with as much emphasis as I can muster, and that is that development and expansion of the principles of non-adversarial justice is essential if the systems in the various jurisdictions represented at this conference are to provide effective justice to the communities which we all serve.

My fundamental point can be illustrated by drawing upon two quotes which I cited in my first paper in 2006. The first is from Ambrose Bierce, who described litigation as a machine which you go into as a pig, and come out as a sausage. The second is attributed to Voltaire: 'I was

never ruined but twice, once when I lost a law-suit and once when I won one.' The point I draw from those quotes is that there are rarely winners in adversarial litigation, which can often bring out the worst in people.

This point can be developed more specifically by considering the two fundamental branches of the justice system in most jurisdictions - namely, criminal justice and civil justice. In the criminal justice system we have an elaborate and extremely expensive system involving numerous taxpayer-funded agencies, primarily police, courts and corrective services, which have resulted, at least over the last two decades, in the incarceration of ever increasing proportions of our communities, with little or no evidence of any causal effect upon re-offending rates. Our civil justice systems retain many of the characteristics described by Dickens in *Bleak House* and by Dean Roscoe Pound more than 100 years ago in his paper descriptively entitled 'The Causes of Popular Dissatisfaction with the Administration of Justice'<sup>1</sup> - namely, cost, delay, complexity and uncertainty of outcome.

Of course, we are all familiar with the proposition that insanity can be defined by doing the same thing again and again and expecting different outcomes, but that description characterises the justice systems in most of our jurisdictions.

There is, however, one notable exception to that characterisation - the development of systems of non-adversarial justice - an exception which gives me cautious optimism with respect to the future of our justice

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<sup>1</sup> (1906) 29(I) *American Bar Association Report* 395.

systems and encourages me to hope that we may be able to better serve our communities.

In this paper I will endeavour to explain the reasons for that cautious optimism by drawing upon my experience, and the literature - first by reference to criminal justice, and then by reference to civil justice. Because I am drawing upon personal experience, my observations will inevitably have a parochial flavour, for which I apologise.

### **Criminal Justice**

Over the last few decades, many governments in Australia have embraced and applied policies with respect to criminal justice which criminologists would describe as 'popular punitivism'. Politicians anticipating electoral support for these policies claim that they are 'tough on crime', and many State and Territory elections turn into a 'law and order auction' in which participants endeavour to outbid each other with increasingly punitive policies. Those decades have been characterised by increases in maximum penalties and, more significantly, by the expansion of mandatory minimum penalties for an increasing number of offences.

### **Popular Punitivism and Non-adversarial Justice**

So, in Australia at least, the political and public policy environment in which non-adversarial justice practices have been developed in the criminal justice system has been antithetical to those practices. The tension between non-adversarial criminal justice and public sentiment, as perceived and reflected by politicians in the policies which they adopt

can be seen at both a philosophical and practical level. At a philosophical level, non-adversarial justice aims to protect the community by addressing, and hopefully resolving the causes of offending behaviour, or at least reducing the risk that identified underlying conditions will be criminogenic, in the sense that they will cause or contribute to offending behaviour. By contrast, 'popular punitivism' focuses upon the consequences of crime, rather than its causes, and contends that the community is best protected by increasing levels of punishment which will deter future crimes by the offender and others.<sup>2</sup> At a practical level, mandatory minimum sentences discourage offenders from acknowledging or admitting their guilt, and predetermine the outcome of the sentencing process in the event of conviction - both of which are antithetical to any and all forms of non-adversarial justice. The question of whether legislative provisions which, in effect, remove any element of discretion from the sentencing process and pre-determine its outcome are compatible with more general notions of justice, whether adversarial or not, is beyond the scope of this paper.

### **Non-adversarial Justice Survives**

Given the acidic nature of the soil in which the seeds of non-adversarial justice have been planted, it is remarkable that those seeds have germinated and developed into thriving plants bearing fruit for the benefit of the community. Perhaps the most prolific fruit-bearing trees in the non-adversarial orchard are drug courts and mental health courts, which are to be found, in varying forms, in many, if not most,

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<sup>2</sup> A contention supported only by the intuition of its proponents and which lacks substantive empirical or evidentiary support.

jurisdictions. How have these courts flourished and borne fruit in the hostile environment which I have described? I believe the answer lies in the fact that, despite the methodological problems of analysing the outcomes of such courts, analysis has repeatedly shown that such courts produce better outcomes for a significantly reduced overall cost. Perhaps just as significantly, the philosophical and practical underpinnings for such courts are almost self-evident to a wide section of the community, and their elected representatives. The proposition that a person who is addicted to illicit drugs or who suffers a mental illness or disability will continue to offend unless and until their drug addiction or mental health issue is resolved is not difficult to accept.

The survival and development of non-adversarial practices in the environment which I have described is one of the sources of my cautious optimism. Nevertheless, it would be naïve to underestimate the potential impact of popular punitivism in the future development of non-adversarial justice practices.

### **Development Phases**

In my foreword to the second edition of *Non-adversarial Justice*<sup>3</sup> I paraphrased the development of the new occupational practices described in that book<sup>4</sup> as occurring in four stages:

- Optimistic embracing
- Hostility

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<sup>3</sup> M King, A Freiberg, B Batagol, R Hyams, *Non-adversarial justice* (2<sup>nd</sup> ed) (2014) v-vi.

<sup>4</sup> Based on the work of L Boulle, *Mediation: Principles, Process, Practices* (2011) cited in *Non-adversarial Justice* (2<sup>nd</sup> ed) above note 3, 103-104.

- Institutionalisation entailing a more measured understanding of benefits and pitfalls
- A strong interdependence between the developed initiative and other services demonstrated by the cross-fertilisation of practices and philosophies.

I suggested that non-adversarial justice had reached the third phase of development and would shortly enter the fourth phase. I was wrong. It is clear that non-adversarial justice continues to generate responses which fall within the second phase of development - that of hostility. I tender the following evidence in support of that proposition.

Adherents to non-adversarial justice, and the related concepts of therapeutic jurisprudence, restorative justice, problem-solving or solution-focused courts, have long acknowledged the criticism implicit in the language sometimes used to describe those practices - such as 'touchy feely', 'new age', 'flaky', or 'soft on crime'. In the scale of criticism generally, and in the scale of criticisms of courts more particularly, language of this kind is relatively benign. However, there have been much more specific and pointed criticisms of non-adversarial justice principles in the media. I will provide two examples which suggest that there may have been less warmth in the reception of non-adversarial justice than I had hoped.

### ***Justinian* – 'A jihad on adversarialism'**

Following the First International Conference on Non-adversarial Justice in Melbourne in 2010, a report of the conference was published in *Justinian* - an Australian journal focused on legal issues and the legal

profession. The author, using the *nom de plume* Portia, described the conference as launching a 'jihad on adversarialism' and, in a generally facetious description of the conference, drew an analogy to:

... a Billy Graham ... gospel-tent experience with members of the audience mumbling 'Amen sister' during the homily, delegates rushing to the front, shaking with the fervour from the love flowing down.

The author described the character of the papers as referring to 'naughty lawyers who failed to settle and undisciplined judges who audaciously allowed them to proceed to a trial'. The article concluded, consistently with its headline, by proposing that:

the practice of non-adversarialism requires its devotees, adherents, followers and believers to be fighters in a jihad against adversarialism.

### ***The Australian* – 'Courts must dispense justice, not therapy'**

Earlier this year, an article was published in *The Australian*, a national newspaper, under the heading 'Courts must dispense justice, not therapy'.<sup>5</sup> The article was published adjacent to a cartoon depicting a patient on a couch attended by a robed 'counsellor' sitting in a chair with a gavel on its arm.

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<sup>5</sup> Jennifer Oriel, 'Courts must dispense justice, not therapy', *The Australian* (30 January 2017) (also published under the title 'Society expects justice from courts, not therapy').

### ***Revolutionary courts***

The author described restorative justice and therapeutic jurisprudence as 'political ideals' which had been developed by a 'revolutionary court' without 'a parliamentary vote or public consent'. In case readers might have missed the author's insinuation that courts were acting undemocratically, later in the article she observed that:

In liberal democracies ... making systemic changes to the law is generally understood as a matter for parliament and the people, not the unelected judiciary.

Significantly omitted from the article is any acknowledgement that the protection of the community by the rehabilitation of offenders is a long-recognised principle of sentencing, commonly, if not universally, embodied in statutes setting out the principles of sentencing in most jurisdictions. Nor does the author acknowledge that the mental health and drug courts to which she refers in the article are, in most cases, created with express statutory authority and in all cases operate within the statutory provisions relating to sentencing.

### ***Emotions not law***

The author went on to assert that the proponents of the pernicious principles to which she referred were promoting the notion that:

the efficacy of courts is measured not by the faithful application of legislation and just punishment for crime but the degree to which criminals emote and judges manage their emotions.

### ***The judge as talk-show host***

The author refers to a scenario apparently cited by a US opponent of therapeutic courts in which a judge roams around the court with a microphone in hand 'like a talk-show host' before prompting an offender, described as a client, to confess his crime and emote about it before all celebrate his rebirth with courtroom applause, a certificate and a pen. It seems that this scenario was taken from a now somewhat dated textbook by Professor James L Nolan, *Reinventing Justice: the American Drug Court Movement* (2003), in which it was cited as one example of a range of ways in which different judges approached drug courts in the United States. Professor Nolan pointed out that in the circumstances he described, Judge Stephanie Duncan Peters was dealing with mainly African American participants and that her approach was markedly different from other judges. Professor Nolan concluded that in the US 'the widespread popularity of the drug court movement suggests that its defining philosophy and forms are consistent with the dominant sensibilities of American culture'.<sup>6</sup> In making that point, Professor Nolan highlighted the capacity of non-adversarial justice to respond appropriately to the different cultural sensibilities of the communities in which it is applied.

### ***Therapeutic justice and mass killings***

Returning to the article 'Courts must dispense justice, not therapy', the author was apparently not content with falsely alleging that specialty courts were acting undemocratically, and trivialising the sentencing process by implying that talk-show host styled court proceedings are

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<sup>6</sup> James L Nolan, *Reinventing Justice: the American Drug Court Movement* (2003) 14.

'the' model for therapeutic justice. She went on to question whether therapeutic jurisprudence was responsible for a man being granted bail who was later charged with murdering many innocent victims by deliberately driving his car into the crowd on the footpath of a street in the Central Business District of Melbourne. The implicit suggestion that therapeutic justice had any role in these tragic events is entirely unsupported by any evidence of which I am aware.

The article also wrongly asserts that empirical research into the longitudinal impact of therapeutic approaches to the law is 'rare' when in fact the longitudinal impact of speciality courts is commonly and frequently analysed.<sup>7</sup>

### ***Systemic failure***

The author concludes by asserting that the 'quiet revolution transforming court practice from black letter law to therapy culture' was responsible for 'the systemic failure of our legal system to protect innocent citizens from violent criminals'. In her view:

Therapy is no substitute for justice. We expect justice in our courtrooms. Leave therapy to the therapists.

Happily, I am confident that not even ill-informed criticism of this character will discourage my judicial colleagues from protecting the community - by addressing the causes of offending and thereby reducing the risk of re-offending. However, I am not so confident that the electoral process is immune to attacks of this character. There is a very real danger that politicians may perceive these views as reflecting

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<sup>7</sup> See, for example, the research reports referenced in *Non-adversarial Justice* (2<sup>nd</sup> ed), above note 3.

popular sentiment and therefore matters properly taken into account in the formulation of justice system policy.

### **Speciality Courts in Western Australia – The Rise and Fall**

I cannot exclude the possibility that criticisms of this kind may have contributed at least indirectly to a reduction in the specialty courts applying principles of non-adversarial justice in my jurisdiction of Western Australia, notwithstanding a report from the Law Reform Commission of Western Australia in 2009 which emphatically and enthusiastically endorsed the activities of such courts and made various recommendations for their continued expansion, development and enhancement.<sup>8</sup>

Eleven years ago when I was appointed Chief Justice specialty courts or court lists applying principles of non-adversarial justice operated in four areas - namely, drug addicted offenders,<sup>9</sup> mentally impaired offenders,<sup>10</sup> family violence offenders,<sup>11</sup> and, in two locations,<sup>12</sup> Aboriginal offenders. This was followed by a significant expansion of speciality courts. The Kalgoorlie-Boulder (Aboriginal) Community Court opened within a year of my appointment, the Barndimalgu Court opened in Geraldton as a specialist Aboriginal court dealing with Aboriginal family and domestic violence offenders in 2007, and another five

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<sup>8</sup> Law Reform Commission of Western Australia (LRCWA), *Court Intervention Programmes* (June 2009).

<sup>9</sup> The Perth Drug Court which commenced in 2000.

<sup>10</sup> The Intellectual Disability Diversion Program which commenced operating in the Perth Magistrates Court in 2003.

<sup>11</sup> The Joondalup Family Violence Pilot Court which commenced operating at the Joondalup Magistrates Court in 1999.

<sup>12</sup> Norseman Community Court which commenced in early 2006, and Geraldton, as the Geraldton Alternative Sentencing Regime, which operated from 2001.

metropolitan family violence courts also commenced operating over the next few years, and in 2013 the Specialist Treatment and Referral Team Court (START) Court was launched for mentally ill offenders. While the Drug Court and Mental Health Court remain in operation,<sup>13</sup> the specialty Aboriginal courts<sup>14</sup> have effectively been wound up and offenders returned to mainstream courts. The specialist family violence courts were formally discontinued - with some fanfare<sup>15</sup> - although as I explain below the reality is rather different.

The reasons for the discontinuance of those specialty courts in the face of independent and authoritative recommendations that they be continued and expanded<sup>16</sup> is an appropriate subject for detailed analysis and study. In the absence of such a study, the nomination of the reasons must necessarily involve a degree of conjecture. Despite that risk, I will nevertheless venture my suggestions as to the factors which may have contributed to these courts falling out of favour, dealing firstly with factors which may have been common to both, and then factors which may have been specific to the particular courts.

### **Objectives more Aspirational than Realistic**

The literature in this area<sup>17</sup> recognises two recurrent deficiencies which have bedevilled initiatives and programmes in this field. First,

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<sup>13</sup> In metropolitan Perth only.

<sup>14</sup> Described as community courts in Western Australia.

<sup>15</sup> See for example, Sonia Kohlbacher, 'Domestic violence offenders may no longer avoid jail in WA' *The Australian* (24 June 2015); Amanda Banks, 'Domestic violence court axed', *The West Australian* (23 January 2015).

<sup>16</sup> The community courts were not specifically considered within the scope of the LRCWA's court intervention programs reference, but had been recommended in the LRCWA's *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture Final Report* (2006); see Recommendation 24.

<sup>17</sup> See, for example, *Non-adversarial Justice* (2<sup>nd</sup> ed), above note 3.

programmes, including specialty courts, have often been launched and promoted by reference to objectives which are more aspirational than realistic. Family violence and Aboriginal offending are both issues of profound importance to the criminal justice system, and to the community of Western Australia. No reasonable person would not aspire to significantly reduce the magnitude of offending in either category. However, both categories of offending behaviour present problems which are extremely complex and multi-faceted, and in the case of Aboriginal offending, intergenerational. However worthy our ambitions, it is unrealistic to suppose that significant inroads will be made with respect to either category of offending behaviour in the short-term, and in particular, within any one electoral cycle. Nevertheless, the objective of significantly reducing offending behaviour has been at the forefront of the launch of specialty courts in these areas.

### **Recidivism Studies**

The second recurrent problem in this area arises from the frequent analysis of courts of this kind by reference to their longitudinal impact upon reoffending rates.<sup>18</sup> The difficulty with that form of analysis could sustain a paper all on its own. For present purposes it will be sufficient if I mention just two of the problems.

### ***Comparing apples with apples***

The first problem is that any analysis of the reoffending rates of offenders dealt with in a specialty court must be compared to an analysis of the reoffending rates of an equivalent cohort of offenders dealt with in

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<sup>18</sup> Contrary to the assertion made in *The Australian*, above note 5.

a mainstream court. Researchers customarily undertake their analysis of the respective cohorts by reference to objective criteria available from files, such as age, prior offending record, nature of the offence, etc. However, there is an inherent qualitative bias which such analysis can never reveal, and which tends to skew the more difficult cases towards the specialty court. The bias is best illustrated by an example. Let us take a busy lawyer in Kalgoorlie with two Aboriginal clients, both charged with assault. Because of the qualitative nature of the assault committed by one client, who has a lengthy history of offences of a similar kind, as compared to the qualitatively less serious nature of the assault committed by the second client, who has strong family support and good prospects for rehabilitation, the first client is much more likely to receive a custodial sentence than the second. In a mainstream court, the process between plea and sentence of the latter client will be brief and will not require the offender to engage with the process in any significant way, and will very likely result in the imposition of a fine which can be commuted to a period of community service. On the other hand, if either client elects to be dealt with in the specialty court for Aboriginal offenders,<sup>19</sup> the hearing will take much longer, would involve the client being subjected to detailed analysis and questioning by a group of Aboriginal Elders and perhaps 'shaming'. This course is unlikely to be attractive unless there is a very real prospect of a custodial sentence which might be avoided. In those circumstances, lawyers and their clients are making decisions as to the path that will be followed which qualitatively skew the more serious cases, with a greater risk of

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<sup>19</sup> Now effectively abolished.

imprisonment, and therefore a greater risk of reoffending, towards the specialty court. Put simply, apples are not being compared with apples.

***It is more than recidivism***

The second problem with analysis by reference to rates of recidivism is that it tends to distort the underlying objectives of non-adversarial justice, which are much broader than the reduction of reoffending. So, in the case of the Kalgoorlie community court, one of the very real advantages of that court was that it placed a bridge over the chasm between the court and the Aboriginal community and provided Aboriginal people with a court experience which was, for the first time, relevant to them and which included a prominent role for other Aboriginal people. The value of these advantages cannot be measured statistically. Similarly, the family violence courts<sup>20</sup> reported very high levels of satisfaction from the victims of family violence with experience of such courts,<sup>21</sup> the enormous significance of which is diminished if there is an undue focus upon statistical analysis of rates of reoffending. It is distinctly possible that it is victim satisfaction with the specialty court process that increases the reporting of further offences. On the other hand if victims feel alienated from or dismissed by the court process, they are likely to be discouraged from reporting further offences.

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<sup>20</sup> Now also formally abolished.

<sup>21</sup> Department of the Attorney General, Research and Analysis Branch, *Evaluation of the Metropolitan Family Violence Court and Evaluation of the Barndimalgu Court report* (January 2015).

## **Programmatic Support**

Another generic difficulty often experienced by courts of this character concerns the provision of resources providing proper support to the non-adversarial approach, including accommodation, counselling and treatment. If specialty courts are not supported by the provision of adequate resources of that kind, and are constrained to the imposition of traditional penalties, it is unreasonable to expect any significant improvement in outcomes.

## **Mandatory Sentencing**

Another generic problem for courts of this kind is one I have already mentioned - namely, mandatory minimum sentencing. As I have already indicated, if an offender is subject to a mandatory minimum sentence, there is little role or scope for non-adversarial justice.

## **Aboriginal Courts**

I turn now to specific problems that may have been faced by the two kinds of specialist courts which have disappeared from the Western Australian justice framework. Professor Chris Cunneen has eloquently made the point that specialty courts for Aboriginal offenders can be seen as distorting the justice system, because restorative justice practices are used for more minor offences and that more punitive punishment, including mandatory imprisonment, is used for those defined as repeat or serious offenders, which may more commonly include Aboriginal offenders. He also makes the valid point that discussion of restorative justice principles raises issues which have been debated over many years

with respect to the nature and purpose of punishment and the relationship to the citizen, the State and the community which, in the case of Aboriginal offenders, must be viewed through the prism of colonisation and its impact upon the indigenous community.<sup>22</sup> Considerations of this kind may have discouraged Aboriginal participation in the Kalgoorlie court, which was one of the factors which led to its closure.

### **Family Violence Courts**

Turning to the family violence courts, as I have already noted, they were formally discontinued despite high approval ratings from victims of family violence, in a context in which much greater political emphasis has been attached to the interests of victims of that type of offence (and appropriately so), and in a context in which other jurisdictions were developing specialist family violence courts. I am advised that family violence lists have been developed in the former family violence courts, conducted on specific days of the week and which, other than in one instance, continue to function in the same way as the specialty court.

The one family violence list that operates differently (originally as a pilot but now implemented) reflects one of the reasons given for the formal closure of family violence courts in Western Australia; that was the desire to 'mainstream' some of the practices of the specialty courts, so that a broader range of offenders was brought within the scope of

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<sup>22</sup> See Chris Cunneen 'Restorative justice and the politics of decolonisation' in EGM Weitekamp, HJ Kerner, *Restorative justice: theoretical foundations* (2012) 32, 46-48 .

those practices.<sup>23</sup> While I understand that judicial case management and program participation through the family violence list continues to be restricted to perpetrators who plead guilty, some of the resources previously dedicated to intensive case management of offenders have been shifted to provide more extensive and earlier risk assessment in all family violence cases, regardless of whether the accused pleads guilty or not.

So, happily, in practice, some of the desirable characteristics of the family violence courts have in fact been maintained. Nonetheless the continued restriction upon judicial case management of offenders in the family violence lists to only those accused who plead guilty broadly reflects the concerns highlighted by Professor Cunneen and referred to above – that is, that perhaps those offenders who are most in need of a non-adversarial intervention are not eligible.

I note too that it is disappointing that what appear to be positive changes which arguably enhance rather than displace a therapeutic justice model were originally justified on the basis that regression modelling purportedly showed that perpetrators attending these specialist courts had a higher recidivism rate than those who attended the mainstream courts.<sup>24</sup>

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<sup>23</sup> One very significant concern was that the speciality courts only dealt with offenders who pleaded guilty.

<sup>24</sup> It was reported that:

offenders dealt with in the five Perth family violence courts, which cost close to \$10 million a year to operate, were 2.4 times more likely to go on to commit further acts of violence than matched offenders in the mainstream system (Amanda Banks, 'Domestic violence court axed', *The West Australian* (23 January 2015)).

Given that perpetrators who attended just one hearing before the Family and Domestic Violence Court (FDVC) and were found to be unsuitable were included in the category of those 'dealt with' by

## **The Significance of Non-adversarial Justice to Victims**

Although non-adversarial justice programmes initially evolved primarily as a way of addressing the needs of offenders, happily they have developed in such a way as to now effectively address the needs of victims as well. This is vitally important, not just because of the moral imperative to minimise the harm suffered by victims, but also because of the practical reality that today's victim may well be tomorrow's offender.

### **Aboriginal Women**

The latter point emerges strongly from a very interesting recent survey of Aboriginal mothers incarcerated in Western Australia.<sup>25</sup> The article noted that between 2004 and 2014 women were the fastest growing cohort in the Australian prison system - and that the imprisonment rate for Aboriginal women increased at a faster rate than for non-Aboriginal women. The article also noted that most violence involving Aboriginal people in Australia is committed by Aboriginal men, with Aboriginal women overwhelmingly the victims - Aboriginal women are 34 times more likely than non-Aboriginal women to have been hospitalised as a result of injuries caused by assault and nine times more likely to die from their injuries.

In that context the authors surveyed a number of Aboriginal women imprisoned in Western Australia. The survey revealed that most of the women in the study who reported using violence had themselves been

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the FDVC, it might be thought that the higher recidivism rate was more indicative of a methodological flaw than the purported criminogenic nature of the FDVC.

<sup>25</sup> M Wilson, J Jones, T Butler, P Simpson, M Gilles, E Baldry, M Levy, E Sullivan, 'Violence in the lives of incarcerated Aboriginal mothers in Western Australia' (January-March 2017) *SAGE Open* 1-16.

victims of violence. In many cases, offences were committed in circumstances in which women were retaliating to sustained and prolonged victimisation - often not reported because of the normalisation of violence within some families or communities. In that context, it seems to me to be very likely that the application of non-adversarial justice principles to victims, effectively and adequately addressing the consequences of the offence to which they were subject, is not only just and fair, but would also better protect the community by reducing the risk of the victim becoming an offender.

### **The Civil Justice System**

#### **Trial by Battle**

The common law system of civil justice which the colonists brought to Australia from England had historically incorporated a system which is about as adversarial as any system could ever be - namely, the system of trial by battle.<sup>26</sup> Under that system, disputes with respect to the ownership of land were resolved by a court ordering the disputing parties to require their representatives to bludgeon each other before an arena of spectating citizens - the victor taking the spoils for his principal. In his paper on the subject,<sup>27</sup> Professor Leeson points out that very few would defend such a process today, and that Baron Montesquieu described the process as 'monstrous' as long ago as 1748. However, perhaps in an attempt to show that there is a little good in everything, Leeson engages economic analysis to conclude that trial by battle was an efficient and effective way of resolving disputes with respect to the

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<sup>26</sup> Described in medieval documents as 'duellum'.

<sup>27</sup> Peter T Leeson, 'Trial by battle' (Spring 2011) 3(1) *Journal of Legal Analysis* 341.

ownership of land - essentially because it provided a mechanism by which the party who attached greatest value to the land in dispute could be identified, because that was the party who would spend the most money to obtain the most successful gladiator.<sup>28</sup> Parallels with our current system of civil justice are obvious, as is the prospect that cases determined on an adversarial basis are more likely to be won by the party who spends the greatest amount of money on their legal representatives.<sup>29</sup>

## **ADR**

These observations underscore the vital importance of applying principles of non-adversarial justice in the civil justice system. There is a tendency to see those principles given expression predominantly, if not exclusively, through the application of ADR<sup>30</sup> such as mediation. I do not mean to diminish the significance of those processes - indeed, I am a fervent advocate of those processes and regularly conduct mediations myself.<sup>31</sup> However, I believe that there is much that could be done, over and above ADR, to make the fundamentally adversarial civil justice system less adversarial. I will try to develop my point by reference to some practices we have adopted in the Supreme Court of Western Australia.

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<sup>28</sup> Analysis of Leeson's thesis is beyond the scope of this paper, but it does pose the obvious rhetorical question - namely, wouldn't it be simpler and less barbaric to simply invite the disputants to bid for the land in an auction?

<sup>29</sup> Despite the best efforts of the courts.

<sup>30</sup> I will leave the debate about whether the acronym stands for Alternative Dispute Resolution or Appropriate Dispute Resolution to others.

<sup>31</sup> For many years now it has been standard practice in the Supreme Court of Western Australia to require mediation in all civil cases prior to trial.

## **Docket Case Management**

It should first be noted that these practices have been introduced in the context of a system of docket case management which is applied to all contentious cases.<sup>32</sup> That context, in itself, assists to generate a non-adversarial culture in which the parties and the case manager collectively address, hopefully in a less adversarial and more collegiate way, the common objective of identifying the matters truly in issue, preparing those issues for mediation and, if necessary, trial as quickly, inexpensively and efficiently as possible.

## **Hearing Room Configurations**

The less adversarial more collegiate approach to which I have referred is encouraged by the hearing room spaces we have designed and provided in our new civil court premises. Because of the significance of the case management work undertaken by the court, hearing rooms suitable for case management are the most numerous category of hearing room provided in our new building. They are furnished with modular furniture which can be flexibly arranged and rearranged. Although the furniture can be configured in such a way as to emulate a more traditional courtroom, with a separate table for the judicial officer and bar tables for counsel, there is no elevated platform upon which a bench can be placed, and in fact the majority of these spaces are configured as conference rooms, rather than courtrooms. Perhaps unsurprisingly my colleagues and I have discovered that the configuration of the space in which a hearing is conducted has a profound impact upon the character

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<sup>32</sup> That is, cases which are not resolved administratively by default or consent judgment.

and culture of the hearing. Parties sitting around a round conference table are much more likely to confer, whereas parties sitting in a courtroom are much more likely to argue. Spaces do matter.

### **Interlocutory Disputes**

During my time in practice, civil work was characterised by an almost never-ending sequence of interlocutory disputes with respect to almost every step in the pre-trial process - pleadings, particulars of pleadings, interrogatories, discovery and so on. Those disputes consumed quantities of time and money which were entirely disproportionate to their contribution to the just and efficient resolution of the dispute. We have actively discouraged those disputes in a number of ways. First, we have copied our colleagues in the Federal Court and introduced a provision into our rules which enables a case manager to direct that an interlocutory dispute will not be heard or determined. That power will be exercised when, consistently with the overarching principle of proportionality, the time and expense involved in the determination of the interlocutory dispute is disproportionate to its contribution to the just and efficient disposition of the case.

### **Conferral**

Second, for some time now there has been a provision in our Rules which requires the legal representatives for parties to 'confer' prior to initiating any interlocutory dispute. Shortly after my appointment I construed that rule as requiring discussion of the issues, preferably face to face but at least by telephone, between representatives of the parties with authority to settle the dispute. The rule thus construed has been

applied in such a way that any lawyer commencing an interlocutory dispute without conferring, in the sense I have described, is at great risk of being ordered to pay the costs of that dispute personally. This approach to the construction and application of the rule has reduced interlocutory disputes by at least one-third.

Third, instead of setting aside significant amounts of time to hear interlocutory disputes, they are generally programmed in such a way that only a relatively short amount of time is allowed, and there is an expectation that, in the vast majority of cases, an extempore decision will be given immediately following the conclusion of argument.

### **The Strategic Conference**

In order to further facilitate the achievement of the fundamental objectives of docket case management to which I have already referred, some years ago we introduced a procedure which we describe as a 'strategic conference', which occurs relatively early in the life of a case - sometimes before pleading - for example, if there is a question as to whether the time and cost involved in the pleading process is justified - but more commonly after defences have been served. The conference is conducted in the presence of the parties in a conference room environment and involves a wide-ranging discussion aimed at identifying the real issues in the case and charting a strategic course particular to those issues, which will facilitate mediation, and if necessary, trial as quickly and efficiently as possible. During the procedure the judge will encourage the lawyers and the parties to think laterally, and to chart a procedural course which best suits the particular

circumstances of the case, rather than simply adopting the traditional processes of pleadings, followed by particulars, followed by discovery, followed by expert evidence and witness statements, etc. Once that course has been charted, the lawyers and, at least as importantly, the parties will be aware of the direction in which the case is going, and can plan accordingly.

### **Expert Evidence and Discovery**

In complex civil litigation expert evidence and discovery can consume very substantial amounts of time and money if not properly supervised by the court. In such cases, we commonly apply to these processes a similar approach to the approach taken in the strategic conference to which I have just referred. So, in a complex civil case a discovery conference will be ordered, attended by the lawyers and, if appropriate, the IT consultants to the parties, where the possible alternative approaches to discovery will be discussed in a conference environment and, ideally, in a collegiate way. The same general approach will be taken where substantial issues arise with respect to expert evidence. The topics ordinarily addressed in a conference relating to expert evidence will include the fields of expertise in which opinion evidence is to be given, the facts which the experts can assume for the purposes of their advice, the facts which are contentious and which might affect the opinions given and the questions to be posed to the experts, with a view to reaching agreement on these issues and avoiding the all too common phenomenon of the expert opinions being like ships passing in the night, and therefore of limited assistance to the court but involving great expense to the parties.

### ***Family Provision Act 1972 (WA) Cases***

The increasing age profile of the Australian population, the increasing complexity and diversity of family configurations, and the increasing value of deceased estates is creating a burgeoning field of claims to the effect that a testator has made inadequate provision for a beneficiary in his or her estate. Although those cases turn almost exclusively upon the financial needs of the various parties who might have expected to receive the testator's benefaction, and the size of the estate, it was all too common for parties to seize upon the claim as an opportunity for the ventilation of long simmering family grievances, and affidavits were commonly filed giving vent to those grievances. Although the vast majority of these cases settle, usually at or after mediation, the exchange of insulting and offensive affidavits was often an impediment to early resolution. We responded to this problem by promulgating a Practice Direction<sup>33</sup> limiting the topics which could be addressed by affidavit evidence prior to mediation to the essential issues in the case - namely, the value of the estate, and the financial position and needs of the prospective beneficiaries. Not only has that Practice Direction saved costs and time, it has greatly facilitated the ADR process.

### **Family Disputes Masquerading as Commercial Cases**

During the last 11 years I have managed and tried a number of very significant cases which, at first sight, appear to be cases between commercial entities but which are, in fact, disputes between family members. Although I have not done a detailed analysis of the cases I

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<sup>33</sup> Supreme Court of Western Australia, *Consolidated Practice Directions* (as at 24 March 2017), Practice Direction 9.2.2.

have managed and tried over that period, I would estimate that at least half of the most significant and complex cases with which I have dealt have been of that character. I have gained the distinct impression that although those cases are, ostensibly, about money, like the testator's provision cases, these are very often influenced, perhaps profoundly, by a significant underlying family dispute or grievance. Good ADR practitioners will identify and endeavour to resolve that underlying grievance. But it will assist the proper management of the case if the case manager is also attentive to the likelihood that the case may be about more than just the money. That appreciation will be facilitated through the more flexible and informal processes associated with what I would describe, in the civil justice system, as less adversarial justice.

### **Summary and Conclusion**

In this paper I have endeavoured to look back on 11 years of experience as a judge and head of a court system, to reflect upon ways in which non-adversarial principles can improve the delivery of justice to the communities which we all serve. Despite some recent setbacks in Western Australia, and a continuing degree of hostility to these principles in some quarters, these reflections reinforce my long-standing belief in the importance of non-adversarial principles and my cautious optimism that adherence to those principles will continue and indeed develop and improve, assisted and encouraged by the depth of knowledge and experience, and the commitment of the delegates to this important conference.