

Evan Whitton: Access to Justice –

The Australian Government has asked economists at the Productivity Commission (pc.gov.au) to research and advise on how to achieve “faster, simpler, fairer [civil] justice”. The Commission has asked for submissions.

This is the first submission by Evan Whitton*, a legal historian.

Faster, simpler, fairer justice

Amazing news! Tiny Australia has a chance to lead the common law world out of the morass of its corrupt legal system, and hence to relieve a billion taxpayers of the shame and exorbitant cost of funding the system.

The common law world consists of England and its former colonies, the US, India, Canada, New Zealand, Australia etc.

The chance is there because the Australian Government asked a bunch of presumably hard-headed economists at the independent Productivity Commission in June 2013 to research and advise on how to achieve “Faster, Simpler, Fairer [civil] Justice”. Submissions close at the end of October 2013.

The economists will know that you cannot really understand a problem until you know where it came from. Not many common lawyers, including judges and academics, can help them; law schools do not dismay students with that sort of thing.

Details of the origins and development of the common law and an alternative system are at pp. 22-68 of [Our Corrupt Legal System](#) (OCLS). A much abbreviated version follows.

A very short history of two systems

The role of chance:

Footfalls echo in the memory
Down the passage we did not take
Towards the door we never opened
Into the rose garden.

- T. S. Eliot, *Four Quartets*

The two systems are products of chance, ours in 1166, the alternative system in 1800.

When the common law began in 1166, England’s trade of authority was an extortion racket: every public office was for sale; buyers in turn extorted bribes from people who dealt with the office. Extorting judges probably used lawyers as bagmen, as 20 Chicago judges did recently.

Judge Richard Posner said judges, lawyers and academics [from the late 18th century] have always been “a cartel”. Members of a cartel collude to increase prices and profits.

The Productivity Commission will need a definition of justice. The Hon Russell Fox QC researched the two systems for 11 years. In *Justice in the 21st Century*, he said:

- Justice means fairness.
- Fairness and morality require a search for the truth, otherwise the wrong side may win.
- Truth means reality (what actually happened).

Inquisitorial means investigating the truth. Europe adopted an inquisitorial system after a conference in 1215. A half-dozen English judges formally rejected the system in 1219. The wrong side wins all too often.

European judges made a mess of the truth-seeking system for five centuries. Like recent United States governments, they believed that torture is a reliable way of finding the truth.

By 1350, lawyers were the “dominant interest” in Parliament. Lawyer-politicians effectively remain an oligarchy in many English-speaking legislatures, with the power to block change to a truth-seeking system. Lawyers are 43% of the US Congress.

It can be argued that the existence of a lawyer-judge cartel explains the following:

- **The adversary system.** In 1460, judges began to let lawyers take control of civil evidence, prolong the process, and increase profits exponentially. Yale law professor Fred Rodell said the system is a racket; Don Vito Corleone said: “A lawyer with his briefcase can steal more than a hundred men with guns.”
- **Will cases.** From about 1650, Chancery judges kept will cases going for decades. Lawyers with briefcases who periodically turned up got paid, not by clients, but from the deceased estates. *Jennens v Jennens*, a case about an estate worth \$1.5 billion today, ran for 117 years, from 1798 until the estate was empty in 1915.
- **Truth-defeating devices.** Civil litigation became even more of a lottery after lawyers began to defend criminals in the 18th century. New rules which concealed important evidence (and encouraged rich criminals to hire lawyers) were also applied to civil cases. [OCLS](#) details the system’s 24 truth-defeating devices at pp. 156-220.

A chance victory at the Battle of Chicken Marengo in 1800 gave Napoleon time to begin work on his monument, reform of the inquisitorial system. He built on its basic belief that justice means truth to produce a rational, effective and efficient system which serves the interests of the community. [OCLS](#) has details of the battle and his approach at pp 62-68.

By contrast, the adversary system serves the interests of 0.2% of the population, i.e. lawyers. The other 99.8%, including would-be litigants and taxpayers, are victims of the system.

How the systems work

What lawyers do. Charles Curtis, a US lawyer, said a lawyer’s function “is to lie for his client ... He is required to make statements as well as arguments which he does not believe in.”

Curtis was referring to sophistry, a technique of lying by false arguments, trick questions etc. Morally bankrupt charlatans called Sophists taught Athenian lawyers how to do it 2500 years ago.

In the adversary system, lawyers gather and present evidence to courts and question witnesses.

In France, trained judges gather evidence and question witnesses. Lawyers can only ask questions through the judge lest they pollute the truth with sophistry.

Note. “Lawyers” here means trial lawyers, some 40% of the total. It is time the other 60% advocated change to a truth-seeking system, A billion taxpayers would be grateful, and it would obviate the Mencken Solution.

(H. L. Mencken said in 1924: “If all the lawyers were hanged tomorrow, and their bones sold to a mah-jongg factory, we’d be freer and safer, and our taxes would be reduced by almost half.”)

What judges do

In the adversary system, judges are untrained, uninformed and passive, at the mercy of whatever evidence lawyers choose to put before the court.

Judging is, or should be, different from lawyering, but in more than 800 years common law judges have never been trained as judges; they are lawyers trained in sophistry one day and judges the next.

Alan Dershowitz, a US lawyer, said “lying, distortion, and other forms of intellectual dishonesty are endemic among judges”.

Hence the unease about a judge’s ruling. Will it reflect justice? Or will it be sophistry for some other purpose? More money for lawyers? Power? To help big corporations?

In France and Germany, judges are trained as judges separately from lawyers in techniques of actively finding the truth. On a fixed wage, they have no incentive to spin the process out.

Efficiency

Cost. In the adversary system, some costly pre-trial procedures are largely useless: pleadings because they don’t have to be true, and discovery of documents because few are used at trial. Hearings can take weeks, months or years. Judges do the decent thing; they try to stay awake; Lord Thankerton knitted.

A New South Wales case, *ASIC v Rich*, was about a company, One.Tel, which went broke. It ran for three years, with 232 hearing days, and generated 16,642 pages of transcript. The judge, Robert Austin, took two years to write a judgment of 3,105 pages (about 10 ordinary books). The case cost taxpayers \$35 million.

In France and Germany, most hearings take a day or so in total. [OCLS](#) has some details (pp 255-259) of French civil procedures from Judge Russell Fox, and German civil procedures from Yale law professor John Langbein.

The Productivity Commission may get a sense of costs from the French and German embassies. Annette Marfording, then of the law school at the University of NSW, did a study of the costs of civil actions in NSW and Germany.

Justice. The Productivity Commission may find it difficult to compare the relative accuracy of the two systems in civil litigation.

However, *ASIC v Rich* offers a general pointer. The judge had to conceal from himself much of the evidence of forensic accountant Paul Carter. Austin said: “The proceedings are not a Royal Commission [a truth-seeking procedure]... many questions about the failure of One.Tel are left unanswered.”

Another pointer is that the civil systems have features similar to their criminal systems. In the adversary system, at least 1% (5% in the US) of people in prison are innocent, and fewer than half of guilty defendants are convicted. In France and Germany, the innocent are rarely charged, let alone convicted, and almost all guilty defendants are convicted.

Recommendations

Lawyers will suggest some fiddling at the margins, e.g. case management. That will not fix the basic problem. As the above shows, searching for the truth is the only way to get (a) justice, and (b) justice that is faster, simpler and fairer. Everything then falls into place.

All relevant evidence will be admissible.

Training judges separately from lawyers will dismantle the cartel. (A truth-seeking system needs six times as many judges and as many fewer lawyers.)

Giving judges back control of evidence will eliminate sophistry, decrease costs, and give the poor and middling more access to justice.

Implementation

One way or another, 99.8% of citizens are victims of the current system, and Judge Russell Fox said the public knows that “justice marches with the truth”. Properly informed, voters would support change to an improved truth-seeking system.

The only problem is that lawyers who would resist the change tend to be hugely over-represented in the legislature. If their numbers reflected their percentage of the population, there would be two lawyers instead of 230 in the US Congress, and half a lawyer instead of about 60 in the Australian Parliament.

A kinder solution than Mencken’s is: Vote 1: Anyone but a lawyer. They would hardly be missed - US lawyers were last in a 1213 Pew poll of 10 occupations. A 2013 *Reader’s Digest* Australia poll of trusted occupations found that lawyers are less trusted than police, bus drivers, hairdressers, waiters, and cleaners. Politicians – including lawyer-politicians – were 49th and second last.

* Evan Whitton is a legal historian. Dr Bob Moles, an authority on miscarriages, said *Our Corrupt Legal System: Why Everyone Is A Victim (Except Rich Criminals)* “should be required reading on Introduction to Law courses in all law schools”. It can be downloaded free from netk.net.au/whitton.asp. Also at Amazon and books.google.com.au/ebooks.