Victoria Law Foundation

Law Week Oration 2011

Delivered by the Victorian Ombudsman

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Achieving Integrity: Do we judicialise too much?

1. Traditionally, integrity of society's institutions was sought to be achieved by a delicate balancing of the respective roles of the Parliament, the executive and the judiciary. The Parliament's role in theory is to ensure, among other things, the integrity of the executive through its responsibility to the legislature. The Parliament also is a guarantee of the integrity of the judiciary by having the ultimate power to remove judges who may not be considered fit for office. However with the development and the

entrenchment of the two-party system the accountability of the executive to Parliament becomes somewhat illusory in a unicameral Parliament or where a government has control of both Houses of Parliament.

2. The judiciary also has an important function to ensure the integrity of the executive and its organs of administration purporting to act in accordance to law and that of the Parliament in terms of the integrity of its legislation within a given constitutional framework. In exercising these functions the judiciary operates in accordance with the adversary system of adjudication, which is essentially a contest of interests.

3. Increasingly in open democracies these measures have not been thought sufficient. Hence the development of specific bodies which may be conveniently labelled 'integrity bodies' such as the offices of the Auditor-General, the Ombudsman, anti-corruption bodies and so forth, as well as Royal Commissions and Judicial Inquiries for specific purposes. The hallmark of these bodies worldwide is that they do not use the adversary system used in courts, but operate along inquisitorial lines. Their purpose is not an adjucation of a contest of interests but to find out the truth of a given situation.

4. However, the co-habitation of the adversary based trial system on the one hand and the inquisitorial bodies on the other is not always an easy one and

creates at their intersection dilemmas which have not been satisfactorily resolved. This occurs particularly where the adversarial jurisdiction overlays its norms on the inquisitorial bodies. This can have the effect of impeding the integrity bodies' investigations or neutralising their effect. The following is not an apologia for either system. It is rather an exploration of issues to find out if we are on the right track in our attempts to achieve greater transparency, accountability and integrity in the community.

5. In this context, two questions need to be considered.

   I. Why is it that whenever societies with an adversary legal system are faced with serious problems of corruption or other issues of great community concern they resort to inquisitorial

bodies such as Royal Commissions etc. to get to the bottom of things i.e. to establish what happened and how and why did things go wrong?

II. Why is it that when there are spectacular breakdowns of the adversarial trial system or serious miscarriages of justice, inquisitorial bodies are set up to ascertain why and how these breakdowns occurred? Instances where this has occurred include:

- the *Inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974* which reported in 1990 and led to the quashing of the convictions of the Maguire Seven.

- The Royal Commission on Justice which was established in Britain in 1991 following the eventual acquittal of the Birmingham 6 and
- The Northern Territory Royal Commission into the Chamberlain convictions in 1987.

6. The answer to both these questions lies in the nature of the adversarial system and its particular objective i.e. the adjudication of a contest of interests rather than a search for the truth.

7. Before the 18th century truth seeking was an integral element of the English trial system. As Langbein and other jurists have pointed out*, the shift in England to

* The outline in paragraphs 7-11 of the evolution of the adversary trial draws on the extensive treatment of this subject in Langbein, The Origins of Adversary Criminal Trial, O.U.P. 2003; and the contribution by D. Lemmings, A. May, A.W. Alschner and John H. Langbein in Symposium; The Origins of Adversary Criminal Trial held at the American Society for Legal

what we have come to know today as the adversarial based trial started occurring in the late eighteenth century and developed further in the nineteenth. It was in response to particular historical circumstances at the time. Fear of crime and the perceived threats to law and order were widely held. This gradually led to increasing use of private prosecutors in the service of Government Departments and London Corporations to enhance the prospect of convictions, often on the perjured evidence of accomplices. The government's attempt at the time to encourage private prosecutions via monetary rewards for convictions had the additional effect of compounding the situation as did the practice of London magistrates, keen to break up criminal gangs, of

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History's Conference in Washington DC, 2003 and published in The Journal of Legal History, volume 26, no. 1, April 2005.

admitting accomplices to give evidence against their fellow criminals in return for immunity from prosecution. The intervention of quasi-professionals in the preparation of prosecution cases was tipping the balance of the criminal trial in favour of the prosecution. In response, individual trial judges began to use their discretion to permit barristers to stand in for the defendants to enable more rigorous testing of the prosecution evidence. Ultimately the trial's purpose was transformed into providing the defence with the opportunity to test the prosecution's case.

8. The adversarial system of criminal trial that emerged in eighteenth century England was not premised on a coherent theory of truth-seeking. Tensions in the

public debate at the time were soon evident. Debates over defendants' counsel in the 1830s turned on the issue of whether allowing the criminal trial to become a full-fledged adversarial contest would promote or impede discovery of the truth. A criminal trial, it was argued, should be in the words of one contemporary a "dispassionate inquiry" into the truth relieved from the obstreperous contention of counsel.

9. Two other concerns in adversary procedure came to the fore in the 19th century debate on this issue – the so called "wealth effect" and the "combat effect". With the course of the trial coming increasingly under the control of respective counsels, the outcome largely depended on the excellence of counsel a party could afford to procure. In the words of a

contemporary at the time – 'Verdicts will often depend, not on innocence' but on eloquence'.

10. Similarly, with the gathering and probing of evidence being largely in the hands of counsel the pursuit of truth was not the principal concern. It has been said that the core fallacy of the adversary trial is the idea that the truth will emerge even though no one is made responsible for seeking it. If the adversary process achieves that end, it does so incidentally and by accident as the objective of an adversary contest is not to reveal the truth, but to win. And "winning" often entails tactics that can distort or suppress the truth; for example, defence counsel is under no obligation to reveal relevant witnesses, or to provide information that could help

the other side. The evidence thus presented may suit the objective aimed for by a particular party, but not necessarily to reveal the whole story. In the context of a contest of interests, such tactics and their consequences may be entirely appropriate. But if the objective is to find the truth, the adversarial process can only be an inadequate means of achieving that end. Adversary trial cross-examination is not a guaranteed means of obtaining the truth. Professional liars are credible professional perjurers. In the absence of facts obtained by preceding painstaking investigations this is difficult to counter as the many experienced legal practitioners who have been charged with the responsibility of heading up anti-corruption bodies have made clear.

11. The historical and legal developments sketched out above were accompanied by the gradual development of the exclusionary laws of evidence that have come to characterise the adversary legal system. While those exclusions have purpose or logic within that context their applicability seems unnecessary and counter productive in an inquisitorial process whose clear purpose is to find the truth untrammelled by restrictions that would hinder them in or prevent them from finding it.

12. As Langbein points out, if we are to understand why the authorities were not more troubled about the truth-defeating dimensions of the adversary criminal trial it should be borne in mind that English law at the time was notorious for over-prescribing the death

penalty for even what would nowadays be considered minor offences. The developments sketched out above in relation to the criminal trial took place at a period in which too much truth meant too much death[*].

13. It has also been pointed out that the development of the adversary criminal trial raises an acute theoretical challenge which has never been satisfactorily resolved in the Anglo-American tradition i.e. how to justify the truth impairing tendencies of a procedure that remits to partisans the work of gathering and presenting the evidence upon which accurate adjucation depends[*].

[*] Langbein, p6.
[*]Id., p8.

14. Likewise, the various legal and other privileges that have characterised the evolution of the adversary trial have no place in an inquisitorial process as they can and do have the effect of preventing relevant information coming to light. In this respect there is a certain schizophrenia in current legislative provisions governing inquisitorial bodies - where on the one hand the body is charged with finding out the truth in a particular matter, while on the other hand that body is subject to privileges imported from the adversary system, the primary effect of which is to hamper the body from effectively fulfilling the functions for which it was set up. What is often forgotten is that the privileges exist to prevent certain information from being used against individuals. But an integrity body is not concerned with such

matters and any conclusion it reaches and the evidence it collects can have no direct impact on witnesses. It is for others, the recipients of an integrity body's reports, to take any necessary action against individuals and to collect their own evidence for that purpose. Nonetheless, this is one of the areas to which I referred earlier where the meeting of the two systems can result in neutralising the effectiveness of the one (the inquisitorial) by the other (adversarial), particularly if there is a misunderstanding as to the nature and purpose of the inquisitorial scheme.

15. Similar considerations apply in connection with judicial review of integrity bodies and the applicability of prerogative writs in particular.

Should those writs apply to inquisitorial integrity bodies? Certainly, it seems that the designers of most of the original Ombudsman schemes in Australia thought not, or only in a limited manner. For example, section 29 of the Victorian *Ombudsman Act* prevents civil or criminal proceedings from being brought against the Ombudsman or Ombudsman Victoria officers without the leave of the Supreme Court, and that leave can only be granted if the Court is satisfied that there is a substantial ground for the contention that the person concerned acted in bad faith. Furthermore section 29(3) prevents orders being made restraining the Ombudsman from conducting an investigation or making a report or recommendation or compelling that an investigation

be conducted or requiring that a particular report or recommendation be made.

16. There is, however, a recent High Court decision (*Kirk*) which may well call into question the validity of aspects of such provisions. That decision seems open to the interpretation that legislation which would take from a State Supreme Court power to grant prerogative relief on account of jurisdictional error is beyond State legislative power; and, given the breadth that has been given to the concept of jurisdictional error in relation to tribunals and administrative decision makers (into which category I believe the Ombudsman falls) by the High Court in an earlier decision (*Craig)* the effectiveness of section 29 may well be open to question.

17. This question is, of course, at present an open issue for debate and speculation, and in any consideration of this issue the Court will need to take into account the peculiarities of the Ombudsman Act, including section 27, which establishes an alternative means by which the Supreme Court has jurisdiction regarding the Ombudsman's jurisdiction, as well as the Ombudsman's status as an independent officer of the Parliament, which may well bring with it the privileges of Parliament in relation to reports that the Ombudsman intends to table before the two Houses. These considerations are relevant also to other similarly constituted integrity bodies.

18. It seems clear that unless integrity bodies are protected from being captured by the adversarial trial orbit, their ability to achieve their very purpose can be easily negated - and one might then query what purpose is then served by such bodies - other than window dressing. A complicating factor in this context is the tendency for the courts to read provisions like section 29 narrowly to prevent a perceived erosion of their jurisdiction. Such a tendency in fact judicially colonises the inquisitorial body with the consequential risk of limiting its effectiveness.

19. This is not to say that integrity bodies should not be accountable for their actions. However, it is necessary for any accountability methodology to be

both effective and not stymie the performance of the body's function. An examination of the application of the rules of natural justice and due process demonstrates how accountability processes can operate in an inquisitorial context.

20. There is often much confusion about the application of the rules of natural justice or procedural fairness to integrity investigations and reports conducted by inquisitorial bodies. Much of this criticism is made either by those who have been or fear that they will be subject to adverse findings in such investigations, or by those who do not fully appreciate the nature and purpose of integrity investigations.

21. Integrity investigations, unlike adversarial processes, such as civil or criminal proceedings, are not intended to determine liability or guilt of individuals. As I have pointed out earlier, but it is worth repeating, the results of integrity investigations have no direct impact on the rights or interests of individuals. The purpose of integrity investigations is very different. It is to determine what happened and to report and make recommendations. While these reports may identify persons who need to be named in the public interest, any actions regarding a person's conduct are taken by others and through processes where the normal legal protections for individuals apply.

22. Owing to that distinction it has long been recognised in legislation, throughout Australia and overseas, that the evidentiary restrictions that apply in adversarial proceedings are not applicable in investigations by Royal Commissions, anti-corruption and integrity bodies as they would work against finding the truth.

23. Concerns have been expressed that reputations can be affected where adverse conclusions are made regarding named persons in reports made to the Parliament. This is true, but this a necessary consequence of an integrity body system. However, it should be recalled that named persons will have the opportunity to contest the integrity body's conclusions publicly and in the context of any

procedures taken by the responsible authorities against that person as a result of the conclusions reached by the integrity body.

24. Moreover, such instances occur relatively rarely and only where it is necessary in the public interest for a person to be named. For instance, only a small proportion of my reports are made to the Parliament, and this occurs only where there is need for the Parliament to be informed of the results of an investigation. This will occur where the matters investigated or the conclusions reached are of a particular significance or sensitivity. It is necessary in such instances to report direct to the Parliament not to merely make those reports available to either Ministers or senior bureaucrats - who may, or may not, provide the attention needed to resolve those

conclusions that the public scrutiny necessitates. And to perform this function appropriately and effectively, requires that certain persons are named - but, only where I consider that it is in the public interest for the Parliament to be aware of my conclusions regarding those persons.

25. The common law rules of natural justice do not apply to inquisitorial investigations under the Ombudsman Act, but are replaced by statutory obligations and entitlements which are appropriate to those investigations. Natural justice in inquisitorial proceedings is ensured by enabling individuals to be advised of any adverse comments that may be made against them, by enabling them to respond and by having their response fairly reflected in any final

report. Allowing witnesses to interviews in the course of investigations to be accompanied by legal counsel or other support person is a further safeguard against abuse of power. This is permitted in the Ombudsman and Whistleblowers Protection Acts and is the practice followed in all Ombudsman investigations and applied equally to other inquisitorial bodies in other jurisdictions.

26. Seeking to turn inquisitorial processes into adversarial ones would undermine the nature and purpose of integrity investigations and reflects a lack of experience in administrative investigations. For example, the suggestion that witnesses be given notice of the details of the matter under investigation would provide witnesses with the opportunity to

manufacture evidence and collude prior to an interview. Such notice serves neither the investigation nor the public interest, although it may well assist the efforts and objectives of persons who seek to avoid being held accountable for their actions. As pointed out, integrity bodies do not and cannot impose disciplinary and other sanctions but can only recommend.

27. Similarly, the suggestion that persons be given prior access to adverse material during the course of an investigation would potentially allow witnesses to fabricate their evidence in the interview or elsewhere. Witnesses who raise this concern are generally those who are not prepared to deal with the substance of an allegation, but rather would wish to know who

raised it. What is relevant to an integrity investigation is whether the allegation arising from the adverse material is true or not; and witnesses do not need to know the source of an allegation before providing their response to its substance. Of course, the source of an allegation may be tainted and where appropriate, witnesses will be given the opportunity during subsequent questioning or as part of their responses to adverse comments in draft reports to respond to both the source and substance of allegations. But they certainly do not need to know a source of an allegation before providing their initial response to the question - "is it true or not?"

28. Furthermore, any suggestion of codifying or prescribing the operations of integrity bodies along

these lines, can only limit the willingness of witnesses and complainants to provide information regarding maladministration or corruption and, as such, will hamper the effectiveness of investigations.

29. Considerable flexibility needs to be retained to effectively conduct integrity investigations: flexibility in respect of which, as an independent office of the Parliament, the integrity body should be responsible to the Parliament for its exercise. Poorly conceived and ill-considered natural justice suggestions do not assist integrity investigations, indeed can only limit them and lead to a reduction in transparency and accountability. The measures outlined above, however, ensure proper accountability without

compromising the ability of integrity agencies to achieve their objectives.

30. A particular difficulty arises where inquisitorial investigations become the catalyst for criminal proceedings. Invariably those who may have been found out about their wrongdoing in the inquisitorial process based on the facts established during that process will be the first to proclaim their moral innocence as a result of a not guilty verdict. Yet, the court's finding is one based on whether liability or guilt has been established according to law, not whether the truth has been established. Thus, a "not guilty" verdict does not necessarily equate to "innocence" in a legal or moral sense. Neither does it necessarily reflect what actually may have happened.

31. The results of inquisitorial and adversary proceedings may well differ as the functions and objectives of each are quite different. As discussed, one is to find the truth, the other is a contest of interests. Thus, it is inappropriate for evidence gathered in integrity investigations to be used against individuals in criminal or civil proceedings. Moreover, the evidence before the court may be more limited for that reason and because of the exclusionary laws of evidence. In addition, a different result can be likely because a different standard of proof applies.

32. Inevitably, public and media discussion can lose sight of this distinction and may result in a lessening

of the impact of the original integrity investigation. Accountability for wrongdoing is thus diminished. This is especially compounded where such an acquittal is based on a black-letter interpretation of over-prescriptive legislation resulting in form being more important than substance.

33. The issues I have outlined arise largely in Anglo-Saxon countries with an adversary trial system. In those jurisdictions with an inquisitorial legal system which compromise the majority of countries, the contrast is not as stark. I am, of course, aware that the adversary trial is very highly regarded in Anglo-American legal systems, but this is partly because our legal education teaches little as to the benefits or otherwise of other legal systems.

34. It is also worthwhile bearing in mind that the adversary trial approach is evolving with an orientation towards a move away in certain areas of law from its adversarial or combative aspects. This is especially the case in those areas of the law were highly complex, personal and emotive issues are involved such as Family Law and Child Welfare where a purely adversarial approach does not assist in resolving what is often a highly charged situation. Issues that have come under scrutiny in the Child Protection area in recent years include the impact of a highly-contested system, the negative experiences of the legal system by Child Protection Workers, the substantial resources being absorbed by legal

processes and the quality of the department's legal representation.

35. Increasingly options are being considered, partly drawn from other jurisdictions, to arrive at procedures that operate in a more collaborative manner providing legal oversight that takes a less contested approach to ensure that the child's best interests are met.

36. A pilot program has been developed whose purpose is to change the culture of the Children's Court away from its adversarial nature to a more collaborative approach. Despite what seems to be a hybrid approach to the nature of the proceedings in the Family Division of the Children's Court as required

by section 215 *Children, Youth and Families Act 2005* (which requires that proceedings be held informally and without legal forms and that the court may inform itself on a matter as it thinks fit, despite any rules of evidence to the contrary) the adversary nature of the proceedings remains in that Division and the experience of the legal system is one of the most commonly cited by Child Protection Workers as to why they leave their employment with the department. The outcome of matters taken before the Children's Court is very much dependent on the strengths of the case presented by the department. The nature of the current system which involves the presentation of competing arguments to the magistrate or judge runs the risk of turning decision-making in relation to a child's best interest into a

competition to present the best argument. This is especially problematic where the quality of representation the department can afford is out-matched by the opposing party. The current adversarial legal system perversely encourages disputation rather than cooperation in the protection of children.

37. In one particular case the magistrate in the Children's Court was moved to state that both he and counsel "were prisoners of the grossly wasteful processes of the adversarial system in their negative impact on the efficient, timely and economical disposition of proceedings" in the court.

38. In 2009, the then Attorney-General raised for consideration whether the framework needs to be changed in terms of those matters that are decided judicially compared to those matters that need to be decided administratively. A further question that comes to mind is whether in those cases where they need to be decided judicially, this can be done in a less adversarial way.

39. A system of criminal law which pretends to a moral basis will need to be concerned with balancing the rights of the accused against the public interest. This balancing implies of necessity and somewhat ironically a compromise and the various systems of law strike a balance in many different ways. Both the adversarial and inquisitorial approaches attempt to

achieve, with varying degrees of success procedural fairness. Both approaches have undergone and are undergoing changes in the course of their historical evolution. Both can profit from each other notwithstanding their different contexts, social, political and legal. An exchange of ideas in this field, devoid of prejudice and not constricted by partisan attitudes to the theoretical perfection of either system is called for if society is to deal with the challenges facing it. These challenges ought not to be overstated. They are, nevertheless, real be they the threats posed by globalisation of terrorism, crime and corruption or, at the community level, increasing sophistication facilitated by technology in crime, corporate wrongdoing and corruption including in the public sector and at government level. Unless the

courts and integrity bodies are able to function effectively and in a complementary and mutually reinforcing fashion, the community will not be able to satisfactorily deal with an erosion of its values of integrity, transparency and accountability. If the community's concern is to achieve integrity in terms of institutional and individual behaviour, the test is which approach is more apt to achieve such an outcome. The consensus and the experience to date worldwide is that the inquisitorial approach is better suited to this task than an adversarial one.