

REDUCING THE COST OF ACCESS TO  
JUSTICE  
– ADR AND OFFICERS OF THE COURT

In search of a Proportionate Process in an  
Adversarial System

- 1907 – Professor Roscoe Pound at University of Nebraska –
- He concluded that dissatisfaction with the adversarial system was principally because of the clinical operation of Rules and hence of law.
- *“It leads to exertion to get error into the record rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations to affect credit, which have made the witness stand the slaughterhouse of reputations.”*

- Chief Justice Gleeson, in Darwin in 1994, explained the explosion of mediation as an alternative to adjudication referred to:
  - *“A process of justice that is profligate in its use of time and money”*
  - He described mediation as *“a case of invention responding to necessity”*.
  - *“ Paradoxically, as our standards for the administration of litigious justice become more demanding, increasing ingenuity is being devoted to ensure that people do not get caught up in the machinery that developed to comply with those standards.”*

- Former Chief Justice Doyle of Supreme Court of SA:

*“My view is that the system is slowly strangling itself and I can't see the present system surviving this century. They (the legal profession) are pricing themselves out of the market.”*

- Dr Josiah Benton in his treatise *The Lawyer's Oath and Office* :
  - “A lawyer is not the servant of the client. He is not the servant of the court. He is an officer of the court with all the rights and responsibilities which the character of the office gives and imposes.”

## ▪ Who would benefit?

1. First, the public. Choice is created in a realistic way to meet the parties' needs and at a proportionate cost in terms of financial cost and non-financial cost.
2. Second, the legal system benefits. The Court system remains as the primary body to enable resolution of disputes and enforcement of remedies. The common law can develop as required.
3. Third, the lawyers benefit. The solicitors are likely to have more clients. That also means the barristers benefit. Any conflict of interest is seen as non-existent in practice because the lawyers do not have to confront the difficult client. The adversarial system works as it should.
4. Fourth, everyone providing services in the proposed system benefits because they are more meaningful, their work meets community approbation, they feel that they are contributing in an important way to harmony and just resolutions of disputes by a process which is proportionate to the issues.

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