From the President

Litigation Reform

For most of this year, and no doubt for much of the next few years, litigation reform has been and will be the flavour of the month. The Bar's attitude towards it is very simple. It supports any initiatives which improve access to the courts and increases the efficiency of litigation so long as there is no reduction in the quality of justice.

One of the problems with litigation reform is that many of its advocates take unnecessarily extreme positions. The contrast between the rhetoric and the reality was vividly illustrated at an all day seminar during November entitled "Re-inventing the Courts". The seminar was sponsored by the Bar Association as part of the NSW Legal Convention.

Setting to one side the addresses by Bret Walker and myself, the presentations fell into two categories. The first category consisted of assurances that there was a "crisis in the courts", that "the justice system could not cope" and that "radical change is essential".

The fervour of these remarks stood in stark contrast to the reports from the coalface. That coalface was represented by Justice Mahoney, the President of the New South Wales Court of Appeal (and, at the time, Acting Chief Justice of New South Wales), Judge Jones of the County Court of Victoria, Judge Garling of the District Court of New South Wales and Mr Ian Pike, the Chief Magistrate of the Local Court of New South Wales. These four judicial officers reported on the extent to which their courts had, during the last twelve months, substantially reduced the enormous backlogs of cases. This was achieved, in each case, by a series of practical and sensible case management measures. In no case was there "radical reform". None of the courts sought to substitute an inquisitorial system for an adversary system. None adopted the ultimate bête noir of the New South Wales Bar, running lists.

It is easy in this area to trade clichés. The favoured phrase when a radical reformer is describing the activities of a moderate reformer is "band-aid solutions", a cliché which tends to inhibit discussion. The truth is that here are many things which can be done and which are being done to improve the efficiency of the courts. Call overs and listing systems can always be improved. Discovery can be streamlined so as to concentrate on essential issues. Steps can be taken to require the parties at an early stage to focus on the real issues in the litigation. Mediation and other forms of alternate dispute resolution can be encouraged ("the multi-door courthouse"). It is this type of measure which has been so successful in reducing existing backlogs.

It is unnecessary to destroy a system which fundamentally takes account of the innate human need that in some circumstances there must be winners and losers. The adversary system, unlike the inquisitorial system, is admirably suited for the determination of truth where disputes of fact exist. Cross-examination and the calling of evidence by a part with an interest to present is far more likely to expose error of dishonesty on the part of the other side than inquisitorial intervention by a professional judge who has never practised law and who is (and is intended to be) impartial. Impartiality is vital for decision-making; it is highly inappropriate for investigation and the exposure of lying or error.

We have, in general, a system of which we can be proud. By all means, let us improve it, but we must also defend it against unwarranted destruction. ❑ D.M.J. Bennett QC