

# Judge's role of 'umpire' deplored

# Adversary trial

# system now

# subject of study

The Law Reform Commission is to extend its present inquiries into the evidence law used in Federal courts to an examination of "the centrepiece of our legal system, the adversary trial itself," according to its chairman, Mr Justice Kirby.

Mr Justice Kirby said yesterday that the commission would look at alternatives to the present adversary system of conducting trials, in which judges were little more than umpires in a furious game between competing lawyers.

He said that justice under this system in Australia depended on each party before the court having legal representation that was roughly equal in talent. That did not always happen.

He was addressing the Melbourne Rotary Club.

Mr Justice Kirby said: "Unless a person on a serious criminal charge is always represented, the procedures of adversary trial break down.

"If one person is represented and another is not, the procedures break down.

If one person is represented

by a Queen's Counsel of the greatest skill and another by the rawest junior, the system has a tendency to break down.

"If one person is a humble citizen of little means and the other is the Government, a great corporation or a trade-union, the system also has a tendency to break down."

Mr Justice Kirby said legal aid could help but was not a solution, especially as it was now administered.

He told of a 1978 rape trial in Western Australia in which the accused was denied legal aid, partly because of the neglect of his lawyer. Regardless of the man's guilt or innocence, there was doubt whether he had had a fair trial.

"It is the boast of our legal tradition that even a plainly guilty man is entitled to a fair and public trial. But the fair-trial guarantee will be empty unless in every serious case there is an enforceable right to be legally represented. That right exists in the United States. It does not exist in Australia," he said.

But even with legal representation, there were basic unfairnesses inherent in the adversary system of trials. A different, more active role was required of judges, Mr Justice Kirby said.

"Under the adversary trial system, the judge does not take on the function, as he does in Europe, himself to search out the truth of the matter, to find the facts, to ask many questions and to take an active role in resolving the dispute.

"Under our system, the judge's role is that of a passive umpire in a furious game, whose sole function is occasionally to blow the whistle when there is a foul and to restart the match and then to take no part in it, nor tell the players how to play."

Mr Justice Kirby said the adversary system was a remnant of the medieval trial by ordeal but was still central to the English way of doing justice.

Many legal thinkers in England and Australia were questioning the fairness of a system of trials whose outcome depended on "verbal pugilism," he said.

"They point, by way of contrast, to the alternative system, which is inquiry. This depends much less on the skills of the combatant advocates and more upon the positive duty of the judge, not just to referee the match, but to discover for himself the truth of the matters in issue.

Mr Justice Kirby said Lord Devlin, a former Law Lord, who had been profoundly conservative on most matters of legal change, had published a scathing criticism of the adversary trial system late last year.

He said that Lord Devlin was among those who urged a close study of the cost-effectiveness of the adversary trial system and who said there should be less emphasis on winning the case and greater stress on dispassionately finding the truth of the matter.

## Legal aid chairman

CANBERRA. — The Attorney-General, Senator Durack, announced the appointment of Mr Justice Else-Mitchell as the new Chairman of the Commonwealth Legal Aid Commission.

Mr Justice Else-Mitchell, Chairman of the Commonwealth Grants Commission and former

chairman of the Legal Aid Commission of the ACT, succeeds Sir John Nimmo.

Sir John, a judge of the Federal Court of Australia and inaugural Chairman of the Commonwealth Legal Aid Commission, resigned late last year because of ill-health.