



*National Judicial College of Australia
Conference*

Australian Justice System in 2020

*"Courts in 2020: Should they do things
differently?"*

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25 October 2008
The Mint Building
Sydney

The year 2020 has evoked many attempts at prophecy, some underpinned by the laudable objective of planning for the future. Perhaps that is because 20/20 are numbers often associated with vision, and their prospect has subliminally invoked visions of the future.

At the risk of pouring cold water on a potentially romantic gaze into the future, I am obliged to observe that, notwithstanding the rapid and accelerating rate of change over the last 100 years or so, there is a tendency for the years for which future predictions are made to be reached rather quicker and less dramatically than is perceived at the time the prediction is made. 1984 seemed to be upon us much quicker than one might have expected at the time of first reading George Orwell's novel, which was written in 1949. Fortunately, the predictions which he had made as to living conditions in 1984 had not come to pass. Similarly, 2001 seemed to arrive rather quicker than one might have expected when viewing the film written by Arthur C Clarke and Stanley Kubrick in 1968. Again, happily, our computers don't yet seem to have assumed the malevolence of "Hal" or to have embarked upon a programme for the elimination of mankind.

Again at the risk of being a spoilsport, a sober assessment of the likely position of our courts in 2020 will recognise that 2020 is only 12 years away. If we look 12 years into the past - to 1996, and ask how much has changed since then, one is not immediately confronted with an impression of revolutionary or dramatic change. Perhaps the greatest area of development over the last 12 years has been the area of information technology. It seems quite likely that trend will continue for the next 12 years - a proposition to which I will return. The essential point of these introductory remarks is the observation that the legal system, and the courts in particular, are not a segment of our society in which rapid and radical change is a notable characteristic. This reality must temper any realistic assessment of developments over the next 12 years. However, because of the visionary imagery which the year 2020 invokes, I cannot resist the temptation to indulge in a few flights of fancy in the course of this paper.

Some common themes

Later in this paper I will separately address likely changes in our civil and criminal justice systems. However, at this point I will endeavour to identify some common themes in the many criticisms of our contemporary legal system, criticisms which apply with equal force to all aspects of that system.

There can, I think, be no serious argument with the proposition that, at least when compared with the expectations of our citizens, the Australian legal system is generally perceived to be out of touch, expensive, slow, technical, complex, and in many respects incomprehensible. These are the areas of complaint which I think are most likely to be addressed over the next 12 years. If they are not addressed by the judiciary, there is every prospect that they will be addressed by the legislatures. Perhaps the most productive way forward is a co-operative interaction between both branches of government aimed at increasing access to justice. If there is any theme that runs through the various predictions which I will make in this paper, it is the theme of addressing the issues of expense, delay, complexity, technicality and comprehensibility. Addressing these issues will, in my view, contribute to the courts not only being seen to be mindful of the expenditure of public monies, but also ultimately, and most significantly, as just.

The Civil Justice System

The vanishing trial

Each of Professor Marc Galanter and Justice Kenneth Hayne has written on the subject of "the vanishing trial" in recent years. In the Supreme Court of Western Australia, less than 3% of civil lodgements are resolved by a trial. This percentage is remarkably similar to the percentage in the US Federal Court. I would be surprised if it is very different to the percentage in other Australian jurisdictions. So the reality is that almost all civil cases commenced in our superior courts are resolved by some means other than a trial.

This raises a number of questions. Perhaps the first is "why is this so?" If the high rate of resolution by means other than trial is a consequence of case management and alternative dispute resolution processes bringing cases to a consensual resolution without need for a trial, then it is a positive sign. On the other hand, if the high rate of non-trial finalisations is due to the financial or emotional exhaustion of the parties as a result of the cost and delay occasioned by pre-trial processes, then it is a bad sign. As far as I am aware, the only evidence which would enable us to make a choice between these competing explanations is anecdotal. Given the enthusiasm (which I share) for intensive case management and alternative dispute resolution, the time has come for empirical research to be conducted for the purpose of testing the intuitive assumption that these are good things. Subject to the outcome of that research, I am confident

that the current trend favouring judicial supervision of case preparation and court referral to alternative dispute resolution will continue.

Another question which arises from the very high rate of finalisations by means other than trial concerns the desirability and efficiency of managing all cases within our civil courts on the assumption that they will go to trial - an assumption which is false in the vast majority of cases. While there is obviously some overlap between the preparatory work which needs to be done before the parties have sufficient information to arrive at an agreed resolution, and the preparatory work required for a trial, the current focus in most jurisdictions is upon preparation for trial - on the basis that the work done in that regard will have incidental benefits in terms of preparation for alternative dispute resolution. The figures identifying the means by which cases are finalised would suggest that in many cases, this is a flawed approach. The figures would suggest that the predominant approach ought be to focus upon the minimum amount of work required to get the parties to the position where they might sensibly decide to resolve their differences, rather than focusing upon getting them to the point where they can conduct a trial. I expect that the period between now and 2020 will see much greater emphasis upon preparation for ADR, and much less emphasis upon preparation for trial. The current assumption that ADR is a process which is engaged to stop a case going to trial, will be replaced by an assumption that a trial is something you have only after all ADR processes have been exhausted.

A less adversarial approach

The adversarial system which we inherited from our colonial founders is based upon a proposition enunciated as long ago as 1822 by Lord Eldon:

"Truth is best discussed by powerful statements on both sides of the question."

However, in contemporary Australia, and perhaps even more so by 2020, there are reasons for questioning the desirability of a continuing focus on an adversarially-based system.

First, the fairness and efficacy of the adversarial process presumes that each party will have access to legal resources. That is not a valid assumption in contemporary Australia. If the parties have unequal access to legal resources, the adversarial process can become an instrument of unfairness, and impede the administration and delivery of justice.

Second, the adversarial process is, at least in the civil justice system, being used in a system which is intended to resolve disputes. But the adversarial process is antithetical to a conciliated resolution. Given that the vast majority of civil cases in the superior courts of Australia are resolved by a means other than trial - presumably most often by agreement between the parties (excluding those finalised by an administrative judgment such as a default judgment), it seems curious that we are wedded to a methodology which is calculated to exacerbate dispute and push the parties to that dispute further and further apart.

Third, the adversarial process is fundamentally inefficient from an economic perspective. It causes each party to separately and expensively prepare each issue for a trial which most often will never take place. So, in a case in which there are two parties, each party will pay for the preparation of each issue - and in a case with three or four parties, the same work is done three or four times. This is inefficient, expensive and time consuming.

Fourth, the adversarial process encourages parties to identify and pursue issues upon which they have a forensic advantage. This tends to discourage parties agreeing to narrow the issues in dispute to the fundamental areas of contention between them. Again, this is inefficient, expensive and time consuming.

By these criticisms of the adversarial process, I do not mean to promote the adoption of what is sometimes described as the "inquisitorial" model which is found, for example, in many European countries. Many published reports and my own inquiries suggest that those who have experience of that model are no more enthusiastic about it than those who criticise the adversarial process in common law jurisdictions.

What I do mean to suggest is that future years will see the strict rigours of the adversarial approach modified to encourage a more collegiate approach to the identification of the real issues in contention, and the most efficient and inexpensive means of resolving those issues.

A number of courts, including my own, have adopted less formal means of case management and case conferencing. Often I will conduct case management hearings around a conference table and encourage informality. I have found that this encourages a more collegiate and less adversarial approach. It tends to impress upon the parties and their representatives that the purpose of a case management hearing is to

address a common objective which all present share - that is, the quickest and least expensive means of resolving the case, consistent with the interests of justice.

Case management

As I have suggested, by 2020 I would expect judicial case management to have become the norm. Judicial dockets, of the kind currently in use in a number of superior courts, will have become the standard mechanisms for case management. Court rules, at least in the superior courts, will provide a framework for flexible and bespoke management of individual cases by reference to their particular facts and circumstances. The focus of case management will be upon the early identification of the real matters in contention between the parties, and the quickest, most efficient and inexpensive means of resolving those issues, while ensuring justice is achieved.

Judicial case management will also be directed at the preparation of the case for ADR. The skills required of judicial case managers will critically include the capacity to discriminate between those cases that are likely to resolve without trial, and those cases in which a trial is likely. Only the latter cases will be subjected to the full range of pre-trial processes.

Another skill required of case managers will be the capacity to ensure that case management processes do not become the cause of cost and delay which they are designed to reduce. There is a line to be drawn between appropriate levels of judicial supervision, ensuring that the cases move forward in an appropriate way and at an appropriate rate, and hounding the parties into frequent appearances before the court, which are expensive and can be a distraction from case preparation. In the Supreme Court of Western Australia, although we have enthusiastically adopted case management systems, we actively discourage interlocutory appearances. The total number of interlocutory appearances per annum has diminished by about 25% over the last 4 years.

Pre-trial processes

Consistent with the views I have expressed in relation to case management, pre-trial processes will be focused upon the substantive issues. I would expect the principle of proportionality to be adopted and enforced by all superior courts. If the cost and delay occasioned by an interlocutory process would be disproportionate to the contribution which

the process would make to the just resolution of the case, the process will not be directed. If the substantive issues in a case can be identified without need for pleadings, pleadings will be dispensed with. The expense, delay and oppression sometimes occasioned by an assumption that general discovery on the "Peruvian Guano" basis will be ordered will be recognised, and discovery orders will be fashioned to suit the particular circumstances of the case. Parties and their legal representatives will be required to confer, in a meaningful way, before any interlocutory dispute is countenanced by the court. Enforcement of this requirement is one of the reasons why we have been successful in reducing the number of interlocutory disputes in our court.

Alternative dispute resolution

I have already suggested that ADR will acquire a much greater prominence by 2020. Highly respected judicial commentators have expressed the view that the courts should remain distant from ADR, which should generally be conducted outside the court system^{1 2}. While I have the greatest of respect for that view, I do not share it. Court-based mediation has been a feature of practice in the Federal Court and the superior courts of Western Australia for about 20 years now. I am not aware of any problems relating to judicial independence which have been caused by the use of officers of the court to conduct mediations. In our court, in exceptional cases, mediations will be conducted by appropriately qualified Judges. Of course, that Judge is thereafter disqualified from any participation in the case. As it comes to be recognised that ADR is not, in fact, the "alternative" means of resolving a dispute, but the primary means, there will be greater acceptance of a proper role for the courts in this area.

That is not to say that ADR will be limited to court-supervised mediation. On the contrary, I would expect that pre-action protocols, which have been in place in the United Kingdom for some years now, will be adopted by Australian courts. Under those protocols, parties will be encouraged to pursue ADR prior to invoking the jurisdiction of the court. Failure to conform with the protocol may have consequences for the costs of the court proceedings.

As the emphasis shifts towards ADR, the tendency to regard mediation as the last step undertaken before a trial is conducted will diminish. We

¹ Sir Laurence Street (1991) "The courts and mediation - a warning", 2 *Australian Dispute Resolution Journal* 203;

² *Duke Group (in liq) v Alamein Investments Ltd* (2003) SASC 272, per Debelle J

have comprehensively rejected that notion in the Supreme Court of WA. Our catch cry is "mediate early and, if necessary, often". Over the last 2 years we have brought forward the stage at which the first mediation is conducted in the case management process. Mediations are now often conducted as soon as the issues have been identified, by pleadings or otherwise. Our figures reveal that the success rate, in terms of an agreed resolution, is no lower in those early mediations than in the mediations which were, in the past, conducted at a much later stage in the process. Anecdotal evidence suggests that the disadvantages involved in early mediation, in terms of the capacity of parties and their advisers to accurately assess their prospects in the litigation, are offset by the advantage of conducting a mediation before massive amounts of costs have been invested into the litigation, and before the parties have become entrenched in their respective positions.

Trials

In the diminishing proportion of civil cases which go to trial, case management and judicial oversight of the trial will be directed at expedition and will focus upon the key issues. Evidence-in-Chief taking the form of the adoption of a previously exchanged witness statement will become invariable practice. Judges will be more inclined to impose time limits upon cross-examination and feel more confident about intervening to limit cross-examination to the substantive issues in contention. The procedures for obtaining, exchanging and adducing expert evidence which are now in place in the Supreme Court of New South Wales will become the norm throughout Australia. Procedural and case management hearings will increasingly be replaced by documentary processes, and where hearings are held, audio visual communication will be used more often to enable "virtual" hearings. The trial process will become increasingly written, indeed electronic, and less oral. Electronic documentary exhibits will become standard practice in any case lasting more than a couple of days. Witnesses giving evidence by videolink from other locations will become increasingly standard practice. If the pre-trial processes have been successful, and judicial supervision of the trial is effective, trials should become shorter. The prevalence of electronic means of communication between commercial parties will decrease the scope for cases turning upon who said what to whom. Even where a meeting or conversation is at the heart of a case, the contemporaneous email traffic is likely to provide an indisputable context for an assessment of the likelihood of one version of an oral communication rather than another.

Funding for legal expenses

I do not think there is any significant prospect that Legal Aid funds will be available for use by parties in the civil justice system (with the exception of family law) in 2020. The provision of pro bono legal services will be increasingly important, and will become an institutionalised part of private legal practice. Commercial litigation funders will continue to grow and to make an impact in particular areas - such as class actions and big commercial cases in which the potential returns to the funder are large enough to justify investment. There is some prospect that after the event legal fees insurance, of the kind which is now popular in the United Kingdom as a means of funding litigation, will become a feature of the market in Australia. Contingency fees ("no win no fee") will continue to provide access to justice in some significant work areas - such as personal injury.

The criminal justice system

I have segregated my observations relating to the criminal justice system because of the obvious distinction between that system, which is focused upon law enforcement at the behest of the State, and the civil justice system which is focused upon the resolution of disputes. However, my expectation is that in 2020, the procedural differences between the two systems are likely to be less pronounced. In particular, I would expect the next 12 years will see the application to the criminal justice system of a number of lessons that have been learned in the civil justice system. One lesson may be the declining reliance upon trial and I note that already in 2006-07, 94% of cases in the lower courts of WA were disposed of by way of guilty plea and in the higher courts there were guilty pleas in 55% of cases with an additional 16% withdrawn by the prosecution.

The advantages of judicial case management of cases prior to trial are likely to be recognised and more extensively and routinely adopted in the criminal justice system. Case management will, as in the civil area, be focused upon the early identification of the real issues in contention. I suspect that the traditional approach in which an accused person can simply advance the general plea of "not guilty" until the State has closed its case may not be acceptable to contemporary Australia, because of the cost and delay which flows from that approach. It is possible that legislation may be passed which will endeavour to shift that paradigm by expressly permitting a sentencing Judge to take account of failure to co-operate in the trial process at the time of passing sentencing and, in

extreme cases, perhaps even to comment to the jury on a lack of co-operation prior to its deliberations.

Active case management will be facilitated by the restriction or abolition of committal hearings. Committal hearings were abolished in Western Australia more than 5 years ago³, about the time of an associated legislative reform of disclosure obligations. Despite prophecies of disaster and gloom from the Criminal Bar, the sky has not fallen in. To the contrary, the abolition of the committal hearing has facilitated streamlined case management and reduced the prospect of significant delay prior to committal. In the Supreme Court we have now assumed control of the pre-committal process by arranging for two of our Registrars to be appointed as Magistrates. Every case within the jurisdiction of our Court is referred to those Magistrates at the time of first mention in the Magistrates Court in which the charge is laid wherever in the State that charge is laid. Cases from the regions are managed using audio-visual connections. Our Magistrates liaise closely with the Judge in Charge of the Criminal List to ensure seamless case management of the case from inception to trial or plea. Through this process we are able to give indicative trial dates very early in the life of the case, and to programme the pre-trial management of the case to facilitate a trial on those dates.

One of the incidental benefits of this process has been a decision by the DPP to allocate an experienced staff member to conduct all cases before our Magistrates Court. That in turn has had the consequence that the file is referred to the office of the DPP very early in the life of the charge, and defence counsel have the opportunity to speak to someone within the office of the DPP about an agreed resolution, much earlier than would otherwise be the case. As a consequence, early pleas of guilty (which we define as a plea of guilty within 2 months of the charge being laid) have soared, with very significant savings for police, DPP and the court.

Criminal mediation

There has been an understandable reluctance to embrace ADR in the criminal area. Because of the public interest aspect of the enforcement of the criminal law, there have been understandable concerns at the prospect of introducing a system which could be seen as an approximate equivalent to the American system of plea bargaining. Those concerns are real, but have not been realised in our experience since we introduced

³ As a result of a recommendation of the Law Reform Commission of Western Australia at a time when I was its Chair.

what we call Voluntary Criminal Case Conferencing almost 2 years ago. As the name implies, the process is entirely voluntary. That is not our approach to civil mediation where commonly parties are directed to mediate despite their opposition to that course (often resulting in an agreed resolution!). However, because of the presumption of innocence and the right to silence, we have proceeded upon the basis that an accused person should not be directed to participate in a mediation against his or her wishes. However, we have not yet encountered a situation in which a mediation suggested by the court has been opposed either by an accused person or the prosecutor.

We have published a protocol governing the conduct of these case conferences, dealing with issues like confidentiality. To date we have engaged three persons to conduct these conferences on a contract basis. Two are retired Judges of the District Court and one a retired and respected senior practitioner. Our experience has been that the conferences have been effective in producing pleas, sometimes to a reduced charge, and in other cases in narrowing the issues for trial. We have kept a record of our estimate of the trial days saved. That estimate suggests that savings are substantial, and significantly exceed the cost of providing the conferences. It is my expectation that the process will continue in our Court, and very likely expand to include the District Court of Western Australia.

Obviously these aspects of the criminal pre-trial process are inter-related. For example, our experience was that when we took control of pre-committal management of cases within our jurisdiction, demand for Voluntary Criminal Case Conferencing significantly diminished because the representatives of the parties had the capacity to reach informal agreement on the resolution of the case, without need for a more formal process.

Restorative justice and problem-solving courts

In cases in which guilt remains an issue, the criminal process is likely to remain vigorously adversarial. However, in cases where there has been a plea of guilty, I think the next 12 years will see the adoption of processes which are significantly less adversarial in nature. Those processes are already evident in the related fields of restorative justice and problem-solving courts. Restorative justice provides greater focus upon the interests of the victim in the criminal process. The trend to give greater recognition and voice to those interests is, in my opinion, likely to continue between now and 2020. Similarly, the notion of criminal courts

as "problem-solving" courts is also likely to gather momentum. Problem-solving recognises that much criminal conduct is the manifestation of a substantial underlying problem. The processes adopted in those courts recognise that unless and until the substantial underlying problem is identified and resolved, criminal conduct is likely to continue. Despite "popular punitivism", once established, the success of those courts, such as the drug courts, will reinforce and encourage this approach.

The role of the jury

Recent years has seen a diminution in the role of the jury in most jurisdictions. They have been eliminated from the civil justice system in a number of Australian jurisdictions, and their role in that system has diminished in others. In most Australian jurisdictions, their role in the criminal justice system has been diminished by the expansion of "either way" offences, which will increasingly result in more significant cases being resolved summarily. There are also increasing numbers of "judge only" trials for some indictable matters where "other-way" options do not apply. I expect this trend is likely to continue, although I would expect the jury to remain the primary arbiters of guilt for the most serious cases in 2020.

The courts and the public

Some of the criticisms directed at the courts from outside the legal system derive from a lack of information or a misunderstanding of the information that is made available. Australian courts have specifically addressed this issue in recent years, and I would expect this trend to continue until at least 2020. There is more that can be done in this area, including greater use of plain English, simplification and standardisation of forms and procedures, and publication of plain English guides to court processes for litigants, including self-represented litigants. The internet provides a wonderful opportunity to provide information to court users in an interactive form and the capacity to significantly improve access to the courts through e-filing (which will also improve court efficiency). Courts have already become substantial web publishers, and this trend is likely to continue, perhaps extending to web-casting of trials (although there are many issues which need to be addressed before this becomes a reality). Increasingly, the courts will come to see the printed and electronic media as a means by which the transparency of the judicial process can be enhanced, and the trend towards giving the media improved access to

information and greater opportunities for audio and visual recording for republication is likely to continue.

The courts and the government

While I do not apprehend any significant threat to individual judicial independence from government, the courts cannot expect immunity from the demands of government, supported by public expectation, for publicly-funded agencies to account for their performance and the efficiency with which their services are delivered. At present, the measures of court performance are crude, almost entirely quantitative rather than qualitative, and in many instances (such as the Productivity Commission's annual Report on Government Services), virtually meaningless. This is unlikely to continue. Governments will insist upon accurate and meaningful measures of court performance as a condition of public funding, and increased funding is likely to depend critically upon demonstrated efficiencies. It is in the interests of the judiciary to actively co-operate with government in the development of appropriate performance measures. Abdication of judicial responsibility for the identification and development of appropriate court performance measures seems to me to pose the greatest threat to the institutional independence of the courts between now and 2020.

The structure of the courts

As I near the end of this paper, I propose to indulge in a slightly greater flight of fancy than past experience of the rate of change in judicial structures would justify.

It seems to me that there is much to be said for a re-alignment of the basic structures of our superior courts. In all States other than Tasmania, there are two superior State courts exercising both civil and criminal jurisdiction. The distinction between the jurisdictions is based upon the significance of the case. At the risk of being branded a heretic, I think there is much to be said for a re-orientation of the jurisdictional division by reference to the nature of the case, rather than its significance. Put more directly, I think consideration should be given to the creation of a single superior criminal court and a single superior civil court in each jurisdiction, rather than the hierarchical structure which presently exists in five States. Such a re-alignment would not be dissimilar to the structure which exists in the United Kingdom.

Obviously this is a complex issue and this paper is not the place for a detailed elaboration of the arguments for and against this possibility. However, I think there is some prospect that at least some jurisdictions may reconsider the efficiency of their basic structures between now and 2020.

Judicial exchange programmes have now been accepted by both the judiciary and the various governments of Australia. I think it likely that future years will see an expansion in the use of those programmes, although cost and geography are likely to constrain the extent to which these programmes can ever be fully implemented. Returning to a flight of fancy, there seems to me to be much to be said for the creation of a single intermediate Court of Appeal in Australia, but I suspect that I will have to wait to be invited to deliver a paper on our justice system in 2050 before I can advance that as a serious prospect.