AUSTRALIAN LAW REFORM COMMISSION CONFERENCE

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MANAGING JUSTICE IN THE AUSTRALIAN CONTEXT

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The Australian Law Reform Commission's recently published review of the federal civil justice system[1], which is a notable contribution to modern studies of practical issues relating to the administration of justice, needs to be understood in a wider context. One of the purposes of this Conference is to assist such an understanding.

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1 Managing Justice, a review of the federal civil justice system, ALRC 89.

Viewed in the Australian context, the first thing to be noted about ALRC 89 is that its subject, the federal civil justice system, is an important, but also a relatively new, and in some respects distinctive, part of the Australian justice system.

As the report notes[2], until the creation of the Federal Court of Australia and the Family Court of Australia in the 1970s, the federal justice system was small, and was confined to the High Court of Australia, and certain specialist statutory courts and tribunals. The Family Court is also a specialist court. The jurisdiction of the Federal Court has, since its creation, been the subject of numerous changes. That process is continuing.

Both the Federal Court and the Family Court are also unusual, in that they administer their own finances. State courts in Australia, with the exception of South Australia, are typically administered, financially, as cost centres in a Department of the executive government. Judges of those courts have less capacity to make decisions as to expenditure priorities than their federal counterparts. It would also be wrong to assume that the policy of the Commonwealth government in relation to funding federal courts is typical of Australian governments. So far as I am aware, no one has undertaken a comparative study of the resources made

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2 par 1.6.

available to the various justice systems in the Federation, having regard to their respective caseloads.

In Australia, the form of civil or criminal justice with which an ordinary member of the community is most likely to have contact is administered in summary proceedings before State-appointed magistrates, sitting in Local Courts. The largest trial court in the country is the District Court of New South Wales. The largest superior court of general jurisdiction is the Supreme Court of New South Wales. In both of those courts, especially the District Court, there was, during the 1990's, use of acting judges, to an unprecedented extent, as one of a number of methods of coping with serious delays, which greatly exceeded any delays that have ever been experienced in the federal courts and tribunals.

In certain respects, the fact that the federal courts and tribunals studied by the Commission have never been in a situation of crisis management meant that they were more useful objects of study. The Commission was given an opportunity to address long-term problems, and solutions to problems, in a principled fashion, without the distractions and distortions that accompany a need to cope with urgent but temporary difficulties. The principal issues considered in the report raise concerns that are common to most Australian courts, and what was said about them in relation to federal courts and tribunals has important lessons for other courts.

My present purpose is to take up some of those issues, and to seek to give what was said in the report a wider application. In doing this, I will necessarily be highly selective. No doubt others will take up other issues, or see those which are of particular interest to me from a different perspective.

Early in the report a point was made, in passing, about a matter which seems to me to warrant further study. Referring to the work of the Federal Court in commercial cases, the report said[3]:

> "It creates and maintains formal and informal rules which keep business transaction costs low, defines and protects rights (including intellectual property rights), gives force to contractual agreements, influences private commercial dispute resolution, ensures the security of property, helps to regulate markets (including capital and labour markets) and ensures competition, and sometimes the behaviour of public officials and the quality of legislation."

Reference is made in footnotes (155 to 157) to some of the literature on what is sometimes called "the new institutional economics".

With appropriate modifications, the same things could be said about all Australian civil courts; and corresponding observations could be made about the criminal justice system.

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3 ALRC 89 par 1.105.

The economic significance of an effective system of administration of justice is generally undervalued. Perhaps the system is a victim of managerial bias towards calculation: if something is difficult to measure, it is often treated as unimportant; if it is impossible to measure it is often treated as if it did not exist. Economic rationalism should be comprehensively rational. If proper attention were given to the economic importance of the institutional framework within which commerce and industry function, then courts throughout Australia might compete for government funding on better terms.

At the same time, those involved in representing to government, on behalf of the justice system, the need for adequate funding, need to understand the distrust with which people responsible for allocating scarce resources view what they see as a system with an insatiable appetite for funds. The idea that providing additional resources to the court system is merely a way of building a bigger sandpit for lawyers to play in is firmly entrenched; and the behaviour of some lawyers does little to contradict it.

It would be interesting to know whether the Commission has considered developing a methodology to demonstrate to the public, and to governments, the economic importance of the court system. Governments are quick to complain if decisions of courts, or court procedures, are seen to have an adverse effect on commerce. I

am not aware of any attempt made by a government to evaluate the infrastructure which the justice system provides, or to relate the cost of the system to its value.

The universality of problems of cost, delay, and insufficient access to justice is mentioned repeatedly in the report[4]. It may be fortunate that the manifest imperfections of our system, and of all other systems, give us so many practical problems to try to fix that we are spared the embarrassment of having to identify the goal towards which we are presumably stumbling. So long as what we are seeking to achieve are relatively modest and measurable, improvements to a necessarily imperfect system, we can maintain our sense of purpose. However, occasionally someone must ask what is the ultimate objective.

Chief Justice Spigelman has adopted, for the Supreme Court of New South Wales, a practical objective of dealing with cases in a manner that is just, quick and cheap. (That phrase demonstrates the importance of punctuation. Sir Roger Casement, it is said, was hanged because of a comma. It is to be hoped that Chief Justice Spigelman will be able to resist any attempts to remove the comma from his mission statement). The objective is challenging and thought-provoking. It deserves to be thought about carefully.

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4 eg ALRC 89 pars 1.69-1.96.

Speed and economy are relative, even if justice is not. How much access to speedy and economical justice does the community want, or are governments and the legal profession willing to provide? To what extent does the survival of the system depend upon its not being completely, or perhaps even relatively, accessible? If every person who wanted to sue somebody else, (or who wanted to sue a government), could do so at reasonably affordable cost, and could achieve a just outcome in a reasonably short time, what would be the implications? To ask one obvious question: how many judges and magistrates would we need?

A recurring nightmare of some whose business it is to address problems of delay is the possibility that attempts to speed up the administration of justice may become self-defeating. (In this context I am not referring to gross delays, which, on any view, cry out for attention). For example, there is a question whether the development, by courts, of better techniques for the disposition of mega-litigation will simply result in more mega-litigation.

The ALRC report refers to "dispute resolution processes that are widely available – and affordable"[5]. How widely available? How affordable? It may be that, for most practical purposes, during my lifetime, it will be sufficient to answer: substantially more widely

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5 ALRC 89 par 1.80.

available, and substantially more affordable, than now. But this is hardly an intellectually satisfying response. It is certainly not likely to satisfy a Treasury official who is considering a case for increased funding.

Time standards for the disposition of cases already within the system provide only a partial answer. They do not address the problem of affordability, and, since they apply to people who already manage to litigate under the existing arrangements, they do not address the difficulties of those who do not have access to the civil justice system at all.

If we are setting ourselves the objective of making the process of civil litigation available to a substantially wider group of people than those to whom it is presently available, then, we need some understanding of how the system would cope if such wider availability were achieved. If we have no plan for this, then all we are doing is creating greater access to an increasingly inefficient system. If we are serious about giving more people access to justice, then we need a reasonably clear understanding of the kind of justice to which such access would be worth having.

The following are some problems that suggest themselves.

First, there is the matter just mentioned. Increased access to justice implies increased demand upon a system with limited

resources. Whatever the position in the federal courts, in the wider Australian context some elements of that system are already overburdened.

Secondly, the present users of the civil justice system do not make equally substantial, or equally meritorious, demands upon the system. Some litigants are voracious consumers of court time.

Thirdly, considerations of economy and efficiency demand that, if the civil justice system is to make a credible attempt to become generally accessible, its resources must be applied effectively, not indiscriminately.

Fourthly, litigation, like work, tends to expand to fill the available time. There is no better example of Parkinson's law in operation than a court case.

All this may suggest the need for a form of allocation of the system's resources so that they are used in the fairest and most effective way. Bearing in mind the propensities of some lawyers, and some litigants, that does not mean devoting the most time to those whose demands are the most insistent, or whose financial resources permit them to wage forensic warfare for the longest time.

Case management is now accepted practice throughout Australian courts. Judicial officers are no longer willing to leave it to the parties and their lawyers to decide the pace at which cases will be made ready for trial, and they acknowledge, within limits, a responsibility to intervene, where necessary and appropriate, in the progress of cases.

I say "within limits", because it is of the essence of the common law system of justice that the ultimate outcome of a trial, civil or criminal, is to be determined by a decision-maker whose role is conspicuously neutral and independent of the parties. In the case of a criminal trial, the judge, or magistrate, or jury, will take no part in the investigation of the crime, or in the decision to prosecute the alleged offender, or in the selection and presentation of evidence. Similarly, in the case of a civil trial, it is the parties, and not the judge or magistrate, who will define the issues to be fought, and select the evidence and arguments to be presented. All this is to preserve the neutrality of the adjudicator. These basic considerations constitute the limits beyond which, in a common law system, judicial intervention in the trial process may not go. Provided those limits are respected, modern judges accept a responsibility to require the parties and their representative to clarify and refine issues, and to adhere to requirements of relevance and economy in the conduct of cases. The need to maintain both the reality and the appearance of impartiality does not mean that judges are bound, or entitled, to disregard the fact

that the resources made available to the litigants are scarce, and, on occasion, need to be rationed.

With all the developments in techniques of case management, it remains the fact that many cases consume disproportionate amounts of court time. The problem of the mega-trial, in which a single case, or a small number of cases, may occupy a large proportion of the time of a court over an extended period, is not new, but is of increasing concern in most Australian jurisdictions. If the civil justice system is to make a credible attempt to become more readily accessible to citizens generally, it cannot devote unlimited time to individual cases.

Beyond case management, as we know it at present, there is a need at least to examine the way in which the resources made available for the administration of civil justice are allocated amongst those who have claims upon the time of the courts.

Controlling the allocation of court resources and time is not a novelty. In the High Court of Australia, civil and criminal appeals require a grant of special leave to appeal. Only those cases which fulfil certain criteria, which include such considerations as the public importance of the issues raised, will be heard. The system by which the country's ultimate court of appeal accepts or rejects cases claiming its attention is similar to that which applies in the United States of America, Canada, and the United Kingdom. There

is no reason why the logic behind that should be, or can be, confined to ultimate appellate courts. At a narrower, forensic, level, time available for argument on special leave applications is strictly limited. Unlike the United States and Canada, we do not have formal limitations upon the time available for oral argument on the final appeal. In that respect, our tradition of oral advocacy has much more in common with the United Kingdom. Even so, it is a very rare appeal in the High Court nowadays where argument is permitted to extend over more than two days. In 1948, argument in the Bank Nationalization Case lasted for 39 days[6]. It is difficult to imagine that ever happening again. Much more argument is now put in written form, and firm pressure is put upon counsel who are tempted to be self-indulgent in the time they take to put an argument. Repetition of argument is a high-risk activity.

Intermediate appellate courts in most Australian jurisdictions also, where necessary, impose at least informal time limits on argument. This can be more difficult at a trial level, where the issues and evidence are still emerging, but it can still be more important.

At trial level, this has so far been regard as an aspect of case management. However, it has wider implications.

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6 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1.

Most State jurisdictions have three levels of trial courts: a Supreme Court, District (or County) Courts, and Local Courts. The existence of these three different levels is based upon the premise, with which I agree, that different cases require different treatment. The way the system deals with a collision between two ships in Sydney Harbour causing massive economic loss should not be the same as the way the system deals with a collision between two taxis in George Street causing minor property damage. The way the criminal justice system deals with a charge of murder is, and, should be, different from the way the system deals with a charge of petty theft.

When the civil justice system requires certain claims to be brought in a Local Court, and larger claims to be brought in an intermediate court, it aims to limit the availability to litigants of the resources of a superior court. The manner in which that well understood, and widely accepted, form of rationing works is adjusted from time to time. It may be necessary, however, to consider whether it is sufficiently rigorous. It may be, for example, that it is inadequate to rely upon cost sanctions, or the power of judges to remit cases from one court to another. Perhaps consideration should be given to establishing a kind of traffic police function for judges or court administrators, under which the litigious traffic is, where necessary, directed to what is regarded as a suitable court. The motives which plaintiff's lawyers may have for

commencing an action at one jurisdictional level may not necessarily accord with what represents the best and most efficient use of the system's resources.

In this connection, it is necessary to bear in mind an important practical consideration. It is not the parties to a case who, left to their own devices, will choose the forum. It is the plaintiffs. The interests of the defendants may be different. More to the point, the interests of fairness and efficiency in the operation of the system may require a more active direction of cases to an appropriate forum than occurs at present.

At each individual level within the court structure, there is already active direction of cases between different lists. The manner in which commercial cases are treated in most Supreme Courts illustrates this.

There are two qualifications I would make to what I have just said: one relating to a matter of principle; the other relating to a matter of practical reality.

First, in the context of the existing system of case management, I referred to limits upon the capacity of judges to intervene in the progress of cases. Similarly, there are limits upon the capacity of the court system to determine the resources that will be allocated to cases. The fundamental limit is the obligation to do

individual justice. Since the formal commitment of every judge is to do right by all manner of people, and to deliver justice according to law, the efficient and effective management of resources must be undertaken in a context that accepts that commitment.

Secondly, judicial management is aimed at substantially increasing access to justice, not at devising stratagems and expedients for the purpose of relieving the public purse of the obligation to provide the funding necessary to maintain an adequate and effective justice system. If the public seriously want substantially greater access to justice than they have at present, then that will come at a cost. Whether the community will accept that cost is ultimately a political issue, to be resolved by those with democratic accountability.

There is one subject taken up by the Commission's report which is of special interest to me. I note that it was also of interest to the Commonwealth Attorney-General. I refer to the matter of an Australian Judicial College[7]. The proposals as to funding involve issues which are for the executive governments to decide but, subject to that, I strongly support the Commission's recommendation.

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7 See ALRC 89 pars 2.147-2.204.

During almost 10 years as Chief Justice of New South Wales, and President of the Judicial Commission of New South Wales, I became convinced of the value and importance, both of initial training courses for newly appointed judges and magistrates, and of ongoing programmes of continuing education for judicial officers. It is not an accident that New South Wales has been the leader in this area. More than one-quarter of all Australian judicial officers are appointed by the State Government of New South Wales. As a jurisdiction, it has most at stake. Some other Australian jurisdictions have developed their own forms of judicial training, and most jurisdictions send representatives to an annual orientation courses for new judges conducted jointly by the Australian Institute of Judicial Administration and the Judicial Commission of New South Wales. What is now required is a national institution, which can address this important subject in a manner that achieves maximum effectiveness.

I would encourage governments, members of the legal profession, and the general community to get behind this important recommendation.