

National Judicial College of Australia
Conference on the Australian Justice System in 2020
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Complex Litigation

Judge Felicity Hampel, County Court of Victoria

Edited Transcript

1. It's a fabulous speaking slot to have, isn't it, the last speaker on a day of fantastic papers, and I've been wondering what I was going to do to make it different, apart from showing my deficiencies, compared to other speakers.
2. Fortunately for me, Mark Weinberg and Wayne Martin particularly, but also James Alsop, have really fleshed out the philosophical basis for why we should be looking at courts in 2020, so I can ditch that part of what I'd prepared. What I had thought about doing, seeing it was the last paper of the day, was doing something I learnt when I was doing some training for doctors, some years ago; I was asked to do some training in how to conduct fair hearings for doctors who had to make decisions about the fate of other doctors, and who kept on falling over the procedural fairness hurdles every time they were taken to the Federal Court.
3. I set up a training program for them and the feedback for the first one, after we got through the compulsory 'why we hate lawyers so much' session, was that they liked the rest of it except that it was really hard just sitting and listening all day. As I was sitting listening to the papers this morning I thought, well, at least I have got this bit right; I'll be the only one with slides. But unfortunately, the after-lunch speakers got to me on that, but it's clearly the scientists that assisted in that, although, David, I was very impressed to see someone else using slides.
4. We, as lawyers, are about the only group of intelligent, educated people I know who can go along to conference sessions and sit and listen; everybody else needs to read something or look at something on a board while they're listening, in order to keep them engaged. What little I've learnt about the way Generation X and Y learn and assimilate information is that they won't sit and listen; they actually need to be shown things and read things too.
5. Dr. Jacqueline Horan, a barrister and academic from Melbourne, has done what is possibly the only authorised research in Victoria into juries; that is she was officially able to poll juries about their responses. She has given some fantastic examples in papers she's published about how jurors comprehend very little when they're just told things, and how much more they understand, particularly the younger ones – by which she now means those 45 and younger – if they're shown things. So, for those younger judicial members in the

audience, and those who'd like to think they're still young, I'll show you a few slides.

6. I decided to use as a framework the work that was done by the Victorian Law Reform Commission, of which I am a part-time Commissioner, on our Civil Justice Reference and also a little bit on the consultation paper we've just put out on jury directions. Both references are really about how we can make our justice system, civil and criminal, work better, and actually get to the heart of issues more efficiently; this means getting to better, fairer results in a way that people are happier with, and in a way that is compatible with the amount of money that government is prepared to put into the legal system. It also means taking account of the seriousness with which people regard disputes, and their desire to have them adjudicated when they can't resolve them themselves.
7. When I was first asked to speak I thought 'ohh, this is projecting way into the future; ' but when I did the arithmetic I worked out that it was only twelve years ahead: that's not much time to think about changing a system like the legal system.
8. That in itself was quite a confronting realisation, because, as lawyers – and I was sharing this thought with a couple of people earlier in the day – our whole basis of legal learning, from the time we were students, through our time as practitioners, and now our time as judges, is spent looking backwards more than looking forwards, and so we look to the safety of what's happened before, rather than look excitedly at a blank future, and work out what we could put in it to make it work.
9. So, only twelve years to bring about significant change is, to me, a recognition of the fact that anything we're going to do to change a system that people clearly think needs changing – because it's not adequately meeting needs today – is going to take a long time. We either do the equivalent of accepting that it'll take twelve years to turn the Queen Mary around, get it to face a different direction properly, or we blow her up and start building again; if we do that we're left without a ship at all.
10. If we started afresh to devise a legal system, we probably wouldn't have the system we've got now; we probably wouldn't have supreme courts and a federal court; we'd probably have one intermediate appellate court and one trial court across the country, with regional differences; we'd have local courts, the equivalent of the existing Local Court or Magistrates Court. However, we've had District- or County Courts for many years, in most states, and our Supreme courts have divided themselves into trial and appellate divisions; the idea of merging the trial divisions of the Supreme Court with the County and District Courts in any state would be so heretical that it would, clearly, undermine the foundation of society as the whole civilised world knows it, not just Australia, so we can only talk about it hypothetically rather than as a possibility for the future.
11. Interestingly, in the state I come from we now have shared jurisdiction with the Supreme Court in all criminal matters except murder and treason; our murder rate has been relatively steady over the last fifty years and we've not

had a treason trial in that time, even with the terrorism trials. Until recently we did all of the non-exclusive-jurisdiction cases: all of the rapes, all of the armed robberies, all of the drug trials, everything, in fact, for which you had to give life sentences, or could give life sentences. This was the case even after non-mandatory life, and limited sentencing came in for homicides. Even though the County Court can sentence to gaol for life for drug-dealing or causing non-intentional deaths, (such as culpable driving) the shared jurisdiction does not cover murder or treason.

12. We now have unlimited civil jurisdiction, shared with the Supreme Court. So, if you have a civil claim you can bring it either in the County Court or the Supreme Court; (we don't have an administrative law jurisdiction because we're not smart enough for that!). Nonetheless, it's an increasing trend around the country that the County and District courts jurisdiction is being increased; effectively they are sharing the work and there is competition, even within the state, between the courts for the work.
13. We then see it divided again with the Federal Court, and to see the somewhat unseemly disputes between the Family Court and the Federal Magistrates Court in relation to who gets what work – and who gets the biscuits in the tearoom – is not something that a modern court system really should have to look at, or worry about.
14. At this stage then, we can't start afresh as we need to carry on in the meantime. We'd have to have a total revolution, I think, to merge courts; however we may have to have some more sensible discussion about how we divide the jurisdiction between the courts. Some of the proposals for judicial swaps, or a national judiciary, and for a single intermediate appellate court around the country, seem to be ideas that could be considered. I think it is a confronting realisation for us, that twelve years may be a very short time to bring about significant change; we're still grafting things onto a system that may not be appropriate for Australia today, and certainly may not be appropriate for Australia in twelve years time.
15. I can skip through all the philosophical reasoning and identify for you the things that we at the Victorian Law Reform Commission looked at, because I think most of them provide a really sensible genesis for the way we may be dealing with litigation, or dispute resolution, in the courts in 2020.
16. The matters that I wanted to cover are the VLRC Civil Justice Report; the VLRC Jury Directions Reference and what our Attorney-General has just put out, Justice Statement 2; this is a statement of the Government's policy, much of which is drawn from those two earlier reports, that they are planning to implement in the immediate future.

17. CIVIL JUSTICE REVIEW: THE 12 PRIORITY AREAS.

18. Now, the Civil Justice Review I'll skip through. The Terms of Reference were the sort of Terms of Reference you'd expect for a civil justice review but, most importantly, setting out at the bottom that the principles of fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability

were the main things that they wanted us to look at. There was recognition in the reforms that we proposed that we wanted to make the civil justice system – and we use that in the broadest sense, although VCAT was actually carved out of our Terms of Reference – more flexible in approaches to dispute resolution, and making dispute resolution more accessible. People have already spoken about the problems with access, not only in terms of money – un-/self-represented people – but complexity of law and reducing delay and costs; I don't need to go over that further.

19. These then were the key recommendations, or the twelve areas, that we identified. (see power point). As I go through them, I want to pay particular tribute to Peter Cashman, who was appointed as the Commissioner-in-Charge of this Reference. We initially had a twelve month period for inquiry and report that was extended by three months. Peter did the most extraordinary job; he is one of the most visionary people I think I have ever come across, in being able to sit back and look across the whole of the civil justice system. His energy in inspiring us to think that we could do more than just a scoping study, which was what we'd originally thought we'd do in the twelve months, was just remarkable, as is the fact that the government is examining so many of the recommendations. What I've heard today shows how much he was able to draw in for us the work that was being done in other states and other countries; again, this emphasised for me how extraordinary he was and how lucky we were to have him on that Reference.
20. The first thing was looking at pre-action protocols: the means by which people in dispute communicate, before they commence proceedings, and looking at ways we could improve that. The second was dealing with Standards of Conduct of parties in civil litigation, and that's the one I want to come back to and spend some time on because to me, ultimately, it seemed that changing the culture of the people who are involved in civil litigation was really going to be one of the most fundamental changes we could bring about.
21. Throughout my time with the Law Reform Commission every time we've looked at an area of law, be it defences to homicide, or sexual offence reform, or something like assisted-reproductive technology, or privacy, what's been clear to me is that it's not so much the way you write the laws down on the paper, the way you make the recommendations, or what Parliament actually ultimately enacts, but rather whether people are persuaded by the ideas behind it, and persuaded they want to actually make any reform work; that's going to be the key to its success.
22. We thought, looking at the Standards of Conduct, and bringing together in one legislative body ethical obligations, obligations to the court and requirements for parties and practitioners, in what we call the 'Overriding Obligation', was going to be a very clear statement of principle that might help win the 'hearts and minds' campaign, as well as bringing about the procedural or substantive reform.
23. We also looked at appropriate dispute resolution, and the means available for that in addition to litigation, and at pre-trial ascertaining of information. We were particularly concerned about the areas where, for example, a former

employee of a company was very happy to speak to the other side but was bound by ongoing confidentiality obligations to their former employer, and therefore couldn't speak unless subpoenaed. That, as well as the despair about discovery, that's already been spoken about by just about every speaker today, led us to look at a proposal for a limited form of pre-trial oral discovery. This was intended to assist in finding out what people would say, and seeking their assistance in helping to identify documents and therefore narrow the scope of the documents that were sought. This would also have the benefit of better achieving early dispute resolution.

24. Control over conduct, that is, much greater power to judges to have customised pre-trial procedures and case management has already been addressed. We have an extensive chapter on experts, as well as some reforms in relation to class action procedures. These reforms are designed to make class actions more manageable, and ensure that the mechanisms don't run up costs unnecessarily. They are also intended to ensure that access to class actions is not limited to those where the result would be a significant payout to each person in the class.
25. We looked at financing of litigation, including the role of litigation funders. We recommended ultimately the establishment of what we called a 'Justice Fund'; the money for this fund would come partly from court fees, and partly from any proceeds coming through class actions that ultimately couldn't be applied to the members of the class. An example is the *Alcopops* legislation: if this fails the taxes already collected under the regulation which could not be returned could go into the Justice Fund, and help fund public-interest and other types of litigation.
26. The report looked at dealing with self-represented litigants and also understanding that access was often hampered by language; it took a more systematic look at the provision of language assistance to people who were unable to communicate with the court in the language that they normally used. It also looked at more efficient procedures for striking out unmeritorious claims early, and also for dealing with the vexatious litigants, or 'querulants', as opposed to the self-represented people who had some merit in their claim.
27. We spent a lot of time looking at rationalisation and reduction of costs. There are different scales of costs applying in different jurisdictions so you couldn't readily do a cost/benefit analysis, to see whether it was going to be cheaper to issue in the Supreme Court or the County Court. This seemed to us to be not a particularly helpful thing for parties.
28. While having different regimes for taxing costs between the courts seems to be anachronistic now, we also wanted to deal with some of the areas where costs could grow unnecessarily: unnecessary interlocutory proceedings, taxation of costs in interlocutory proceedings which delay the trial of the action- these were areas where cost build-up could significantly affect unmatched parties.
29. There are also the areas where costs often built up, for example the profit costs or the costs in things like the photocopying. Just as many hospitals make more money out of car-parks than they make out of anything else, many law firms

make more money out of their photocopying than they do out of the other costs that are charged, and if that's to be the case – that there's a commercial venture involved in some of the defraying of the costs – then that's something that needs to be regulated, or at least dealt with and exposed.

30. Finally, the report looked at maintaining the momentum after the report had been completed. We ultimately decided that something like a civil justice council, that has responsibility for monitoring reforms that have been implemented – to see whether they are working and what changes need to be done and to monitor changes – is essential, otherwise we'll always be reactive, rather than acting.
31. We considered consolidating in one piece of legislation all the existing obligations on lawyers, in relation to the conduct of litigation; we also wanted to add some obligations. We wanted to impose obligations on clients directly, so that lawyers could no longer, in effect, take instructions from clients to take delaying proceedings, because the overriding and paramount obligation was to the court and the obligation had to conform with the efficient, speedy, and fair disposal of proceedings. Further obligations included obligations not to bring unnecessary or unreasonable interlocutory proceedings, or to unnecessarily incur costs. We thought it was important, in order for provisions like certification of merit, or viability in claim made in a statement of claim or a response or any allegation made in an affidavit, that it was not the lawyers saying 'my client told me it was so' but the client having an obligation themselves to say 'I've got a good-faith basis for putting this allegation'. So we included things like that in the Overriding Obligation.
32. We were very troubled about sanctions for failure to comply with the Overriding Obligation, firstly because we wanted to avoid 'satellite litigation', secondly because we were conscious of the fact that ultimately a fair trial and proceeding, would have to be the overriding obligation. The proposals that had been put up initially in the Woolf Reforms, of, 'well, your claim will be struck out and you can sue your lawyer for negligence if they've breached a duty to the court' was something that certainly hadn't found favour with the English courts. Professor Zuckerman, when he was in Australia two years ago, castigated the Court of Appeal and the House of Lords for their failure to be courageous enough to strike out claims for failure to comply with procedural obligations. No doubt this was something that was deeply felt by him, but something that wasn't likely to change in the UK.
33. We also thought it unlikely that courts here would ultimately say 'Well, we can punish by costs personally against the practitioner if we want to; we can punish by not allowing interest on a claim that ultimately succeeds if the successful party has been the one dragging their heels; we can punish by misconduct proceedings against the practitioners if they're personally at fault'. It's unlikely that there will ever be a systematic attitude of striking out a claim if there's been too much heel-dragging.
34. We also recommended the pre-action protocol and a much wider range of appropriate dispute-resolution. We also thought that the Peruvian Guano test was probably outmoded these days, although we know that the Federal Court

had been trying very hard to narrow the scope of its discovery. We felt that it had been somewhat unsuccessful; we decided that there was value in talking about documents directly relevant to a fact or an issue in dispute, and working on defining issues in the dispute that may have some merit. We also thought that, at least for major litigation, greater judicial control had at least some prospect of improving and narrowing discovery, although we too were very dispirited by Justice Finkelstein's experience and by similar experiences in the *Multiplex* litigation in the UK. Maybe the solution is indeed, to abolish discovery entirely and see what happens after that.

35. Of course, and relevant to this conference, all this has to come about with education, and cooperation between rule-making bodies to make sure there is coordination and this went to the Attorney. This was our little report after one year; it's smaller than an ALRC Report but it's still very, very big for a Victorian Law Reform Commission report; it's over a thousand pages; it's got the twelve key areas; it's got over a thousand recommendations. The Attorney has been reading it, or at least his advisor has, helped by the fact that she was the team leader on the research team at the time that the Law Reform Commission was dealing with it, and so the justice statement, when it came out just two weeks ago, had many of the proposals that we'd put in as reforms. They're the key aspects of the Justice Statement, and you can see how they would all relate to how litigation's going to run, complex or simple, in 2020.
36. I've set up there [referring to audiovisual presentation] some of the projects; there are 35 projects identified under those four headings, and I've set up there some of those that will clearly have an impact on litigation, and the future of the way we run cases.

Jury Directions Consultation Paper

37. Let me just go very briefly to the Jury Directions consultation paper. Victoria has the longest Jury Charges of any state, by far – it's not something to be proud of. Our charges are very complex; they're pretty much all oral and in fact we had a Court of Appeal decision just two weeks ago that cautioned – in the majority – against giving the jury anything in writing, because of our tradition of orality. I think that's a problematical caution so I've been getting the consent of counsel to any written document I give to the jury to assist them in the course of delivery of my charge, or their deliberations, but we'll wait and see what the Court of Appeal makes of that.
38. What we came up with was this, that our directions are longer than anyone else's. There's quite a high rate of allowed appeals. Most of the appeals - most of the conviction appeals- are allowed on discretionary exercise, and most of them on consciousness of guilt or on directions in sentence trials, evidentiary directions essentially. Of the appeals that are allowed many do not proceed on retrial because the complainants, or other witnesses, don't want to proceed. Of those that do proceed there's a success rate on retrial of over ninety percent. That suggests to us there's something wrong if so many trials are the subject of successful appeals; there's something very wrong at appellate level if, of the appeals that are being returned, so many result in reconviction on retrial. It's

easy for people to point fingers; trial judges say the Court of Appeal and the High Court have made it far too complicated; the Court of Appeal and the High Court say 'we've got to get the law right, and you've just got to understand it and get it right for the juries'.

39. There's merit in both. We have a juries book project, which sets out model charges; they are very long, very complex and we defy anyone to understand the directions that we have to deliver, particularly on propensity, cross-admissibility, uncharged acts and consciousness of guilt, but they are legally correct; if we deliver them in accordance with the charge book they're legally correct.
40. Former Justice Geoff Eames is a consultant to the Law Reform Commission on this project and he brings his trial experience and his appellate experience to bear, but he's insistent that something significant has to be done, and he recognises that incremental common-law change is unlikely to bring about enough change in a sufficiently timely way as to be the only way to proceed. So this is one area where we are actually looking at significant change by legislative reform, rather than by simply identifying the problem and hoping that as time goes by things will get better. I don't think we can wait twelve years to see that juries can actually understand the charges that we are delivering and I don't think that we can wait twelve years for people charged with offences to be able to be told in clear terms whether what they've done is a criminal offence or not, or whether what they've done required a jury direction.
41. So, they're the key recommendations that we've come up with in our consultation paper, which is still in the consultation stage.
42. The next thing I wanted to talk about was what's really going to change things, and that's cultural change. The first aspect is I think, enacting the Overriding Obligation -something that applies not only in civil but also in criminal litigation to me has a lot of merit. It's a much easier way of having the practitioners and the parties involved in litigation, civil or criminal, actively cooperate in the process, if we can put in one document what people's obligations are, the hierarchy in which they're ordered, and then set out the various steps that can be taken if the obligations are not complied with. This would lead to resolving disputes rather than working the system in a way that may be in their client's best interests but may not get disputes resolved fairly between parties as easily or quickly as they could be.
43. The second and more fundamental aspect of cultural change, I think, is questioning what we understand adversarialism to be. Is it as we've always understood it - that is, allowing the parties to identify the issues; for evidence-in-chief at cross-examination to extract information that will either lead to a finding -whether of truth or who's to be preferred- or acceptance of the fact beyond reasonable doubt.
44. I was really surprised, having taught advocacy for so many years, when I started to realise how the things I'd thought had been good aspects of advocacy - locking people into propositions in nice, tight cross-examinations -

often just appeared to me to be fundamentally unfair in a trial, particularly where there was a power imbalance in that trial; so starting to talk about ways we can actually get information before decision makers, and the best way of testing that information, are questions we should be asking, and that's something, I think, 2020 trials will be looking towards. The traditional form of evidence-in-chief, cross-examination, or heavily settled witness statement and cross-examination, may not be the way that we need to go.

45. Adversarialism doesn't always mean aggression, either, and I think too often they have been equated. When I went to my first mediation course my husband laughed hysterically and said, you know, "what are you going to that for? You haven't got a conciliatory bone in your body; you're adversarial through and through!" After my first day, with the best I'd learned in the course, I said, "that sounds a rather aggressive comment. Is there something you'd like to tell me?" He didn't like that either, but it was an interesting conception from someone who's been steeped in the common law for longer than I have about the difference between mediation and common law or adversarialism. I think we have to start asking about the best way to get information out and across to courts, and what both Mark Weinberg and Wayne Martin said earlier about the aggression - getting people to fight rather than getting them to resolve disputes - is something we really should be looking at.
46. So, they're the main culture-change things I wanted to talk about, apart from the procedural or substantive law changes that might bring about quite a different approach to running any sort of trial, not just a major one, in 2020.