

**National Judicial College of Australia
Conference on the Australian Justice System in 2020
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The Australian Justice System in 2020

The Hon. John Hatzistergos MLC

Attorney-General for NSW

Edited transcript

1. I'd like to thank the organising committee of the National Judicial College of Australia for presenting this event, and for inviting me to speak to you today. Since its inception in 2002, the National Judicial College of Australia has been an innovative force promoting excellence in judicial education and professional development, and in the administration of law.
2. I'm delighted to be here at this conference on the future of the Australian Justice System. The question being explored here today is, what will the Australian justice System look like in 2020? We know that the law is renowned for its devout attachment to traditions; the modern justice system is the product of a long and celebrated history in which the great legal thinking of generations past is venerated in legal precedent.
3. Courts, however, and systems of administration of justice are far from being immune from change. For example, in the last decade courts across Australia have embraced technologies that have improved efficiency and transparency, reduced costs, mitigated the trauma for vulnerable witnesses giving evidence. Court business is now routinely accessible on court websites. More and more, courts are being fitted with audiovisual and real-time digital transcription facilities. We are moving towards comprehensive systems of electronic filing, voice recognition and online hearings.
4. In NSW we are in the process of introducing 'JusticeLink', a new \$48,000,000 computer system that will streamline processes in the Supreme, District, Local, Coroners and Children's Courts, offering greater accessibility to court users. When fully implemented, JusticeLink will establish a single case-management system for the state courts and tribunals, provide a range of e-services, and facilitate secure information exchange within the wider justice system.
5. So, we know the courts can and do change and adapt to new circumstances, but what kinds of change can we predict over the next 12 years? Of course, further technological and demographic changes will be relevant to the structures and organisations through which court services and legal services are delivered, and the nature of legal issues which will arise. For example, with the expanding influence of the internet in business and in personal life will come new problems and new challenges for the regulation of online activity. As the percentage of women in the workforce continues to increase, courts and legal professionals who wish to retain high quality staff, both male

and female, will need to place more emphasis on flexible working hours, access to childcare services and other forms of support for working parents.

6. With older people forming a greater proportion of our population, matters relating to probate, wills, age discrimination, pensions and healthcare will become more and more common.
7. However, courts have adapted to technological and demographic changes in the past. Changing immigration rates at the end of the White Australia policy meant greater need for court interpreters and the introduction of sound-recording equipment created the scope for new kinds of offences and new kinds of evidence to be adduced in court.
8. In my view, the changes we can expect in the Australian justice system over the next few years will go beyond the adaptation of institutions to circumstances. I predict changes to philosophical and practical orientation of our justice system, both in criminal and civil matters. I will confine my remarks to New South Wales, though many of the issues I identify will be relevant to other jurisdictions.
9. In recent years there has been a significant, and in my opinion welcome, shift in our justice system to give greater acknowledgment to the social context in which the criminal process and criminal offences take place. Specifically, criminal justice processes have been reoriented towards the needs and perspectives of victims. Many victims unwittingly dragged into the criminal legal process have little or no idea where they stand in the greater scheme of things.
10. Over the past decade there has been a growing recognition of the particular needs of victims in the criminal justice system. In relation to support and legal information, Victim Services has expanded its operations to include a free dedicated telephone support service, to provide free counselling and legal advice to persons of Aboriginal and Torres Strait Islander descent. The support line is staffed by an Aboriginal Contact Officer who is available to offer sensitive advice about counselling, compensation and the rights of indigenous victims of crime.
11. However, there have been other changes to give victims a greater role in the criminal justice process. Forum sentencing is a relatively new scheme that brings together the offender, the victim of the offender's crime and other people affected by [the] crime. Offenders meet face to face with their victim to talk about the impact of the crime on the victim's life. The victim can be involved in the development of an intervention plan, to repair the harm suffered by the victim and the community, and to reduce the likelihood of reoffending. The plan may include apologies, compensation payments or orders to undertake drug and/or alcohol treatment. This innovation seeks a just resolution by using the victim's perspective to emphasise the personal accountability of the offender for their actions. I'm aware that more needs to be done to support victims and I anticipate that the Australian justice system will continue to develop new ways of doing so, over the coming years.
12. In the same way that the criminal justice process can be adjusted to recognise and account for the particular needs of victims there is also scope for the legal process to evolve to consider the particular needs of offenders. In New South

Wales we have implemented a number of initiatives that incorporate the principles of problem-solving justice. Just two examples of the current court programs designed to solve problems rather than just punish offenders are the Drug Court and the Magistrates Early Referral Into Treatment Program, otherwise known as MERIT.

13. This new direction is premised on the notion that courts should not just process cases and impose punishment but should use their authority to solve problems in collaboration with other agencies and the community so as to prevent reoffending. Evidence indicates that problem-solving justice has the potential to reduce crime, including rates of reoffending, improve and coordinate the delivery of services, increase community engagement with, and trust in, the justice system, and produce positive outcomes for victims, defendants and communities.
14. We are constantly looking at ways to integrate the principles of problem-solving justice into the operation of the courts. This overall objective has the support of the government and I anticipate that in years to come the criminal justice process will adopt further problem solving approaches and be more and more orientated to the benefits which flow from offender rehabilitation, and linkages between the courts and human-service agencies.
15. I hope to see civil justice changes, and these orientated in new ways. Only a small minority of disputes results in the commencement of legal action. Nearly 20 years ago, it was estimated that 5.7% of commercial disputes ended up in the court system, and the percentage is likely to be even less today. Nevertheless, tens of thousands of civil matters are filed in New South Wales courts each year, and access to justice remains a perennial concern.
16. Of course not all parties are interested in settling a dispute. Many individuals and businesses are seeking to obtain justice by enforcing their legal rights and entitlements under law. We must never prevent parties from accessing these remedies; however, the government is committed, wherever possible, to encouraging people and businesses to resolve their civil disputes without the need to litigate.
17. We want to help people to resolve their disputes quickly and cheaply without compromising their interests. One way to achieve this is to reconsider the way in which legal services and court services are delivered in the context of disputes, to orient legal practice more strongly towards outcomes. An example of an outcomes-based, or interest-based, orientation in legal practice is *collaborative law*, a practice which started in family law disputes in the United States and which is now emerging in practice in commercial matters in New South Wales.
18. In collaborative law, the lawyers for all the parties to a dispute formally agree with their clients that if they are not able to resolve the dispute through negotiation they must disqualify themselves from acting for the client in that matter. This means that all parties and their legal representatives are focused on settling the dispute, rather than on meeting certain case-management deadlines or on proving a point to the other side, or on developing a precedent, or meeting billing targets. Both the client and the lawyer are committed to good-faith negotiation.

19. The negotiations are conducted in a series of meetings. As with mediation, the primary advantage of this process is that the parties themselves negotiate the solution to their dispute. However, collaborative law has the additional advantage that clients are guided through the process by their lawyers, and formal agreements and consent orders can be filed by the lawyers once a resolution has been settled upon. The Collaborative Law Website for New South Wales advises that the average collaborative matter settles within two to ten of the two-hour meetings. There is very little, if any, letter writing between the lawyers and their clients, or the other lawyer. No court documents, no affidavits, no pleadings are prepared and most of the work is done in the four-way meetings. Of course, this means that in addition to being quick, the collaborative practice is less expensive for the clients and for the court. In my view there is great potential to reorient legal practice towards dispute resolution rather than dispute litigation, and I'll be giving careful thought as to how best to support the development and expansion of collaborative practice in this state.
20. As I indicated earlier, there is scope to consider changes to court services, processes, language and rules so as to orient parties towards resolution of disputes. Judges spend a lot of time dealing with interlocutory applications and other case-management issues. In a recent address to the Institute of Arbitrators and Mediators of Australia, the Chief Justice of South Australia observed as follows:
 21. "Trial judges from all around Australia, in my experience, often make three points about cases they hear: first, that when the case came to trial it was not really ready and the pleadings were not really helpful; second, that a fair bit of pre-trial proceedings proved ultimately to be of no great value to the resolution of the case; and third, that at the trial too much time was spent on peripheral matters."
22. If it is true that judges are already engaged in much more case management than case adjudication then the reforms suggested in the recent report by the Civil Justice Reform Group of British Columbia could be of interest to us here in New South Wales, or in Australia more broadly. The reform group consisted of the Chief Justice of the Supreme Court of British Columbia, the Deputy Attorney-General, two other judges and a representative of the bar, the Law Society and courts administration.
23. The group's report suggested three basic strategies: do away with pleadings and replace them with dispute summary and resolution plans, introduce case-management conferences presided over by a judge where the plan is discussed and directions are issued, and hold a further trial-management conference 15-30 days before the hearing. These suggestions would have the potential to address the issues identified by the South Australian Chief Justice, however more modest changes are also worthy of consideration. For example, consideration could be given to whether the model litigant policy, best practice for the conduct of civil matters, support for self-represented litigants, the provision in relation to costs orders and the settling of court fees could be useful in encouraging less litigation and more outcomes-focused orientation

for civil-justice matters, and these are by no means all of the potential options to explore.

24. Before concluding, I also want to consider a warning that has been raised both in the United States and also in Australia, about potential dangers resulting from a rapid increase in private dispute-resolution, and the potential for courts and judge-made law to be marginalised. Justice Hayne, in a provocative article entitled “The Vanishing Trial”, has noted American research which has found that there has been a decline in the number both of civil and criminal trials in American courts over the past four decades so that, for instance, the American Bar Association found that the United States Federal Courts had tried fewer cases in 2002 than they had in 1962, despite there having been a five-fold increase in the number of civil cases instituted and more than a doubling in the number of criminal proceedings filed.
25. While Justice Hayne does not have the same statistics for Australia, he does have the clear impression that over the past 15 to 20 years, perhaps longer, the number of civil cases tried in Australia’s State and Territory Supreme Courts and in the Federal Court of Australia either has diminished or at least has not kept up with the increase in the number of judicial officers in those courts, or the increases in the size of the population. Justice Hayne argues that these changes have resulted from a different approach to court cases in Australia over the last decades, which has been greatly affected by the adoption of managerial judging techniques, and by an increasing emphasis upon alternative dispute-resolution mechanisms.
26. While it may be tempting to conclude that this reduction is a mark of the move away from a litigious society and towards greater extrajudicial efficiency, his honour cautions viewing them merely as signs of success and instead suggests that they may be indicative of popular dissatisfaction with the administration of justice. This theme is further developed by the American scholar Peter Murray, who argues in his article, “The Privatisation of Civil Justice”, that increased use of private actors as mediators and arbitrators to settle disputes without the benefit of creating legal precedent and judicial principle runs the risk of eroding public justice. The American context, he argues, is that the private enterprise notion of both mediation and arbitration has become more pronounced over the past thirty years as private ADR has boomed.
27. This development has led to a shift away from the courts, the eroding of norms and processes in public justice, and insufficiency of party agreement as the justification for their replacement by private processes would be reason enough for democratic decision-makers to exercise care before delegating state power wholesale to private dispute-resolution industry. However, in addition to this there is a further danger associated with the incentives and principles that govern private dispute resolution. The problem with this competitive private industry in dispute resolution services is that pressure on the professionals to garner more cases inevitably leads to a kind of insidious corruption that undermines the integrity of private dispute resolution as an alternative to public justice.

28. The situation in New South Wales is not nearly as bleak as Murray warns, and there are a number of factors that guard against NSW mediators and arbitrators being adversely influenced by one or other of the parties. One of these is the high proportion of former judicial officers engaged as mediators, men and women with extensive training in legal reasoning and objectivity. Another is the greater availability of public ADR services in NSW, such as the government-funded community justice centres and the comprehensive network that provides mediation services to people across the state. Nevertheless, the government continues to monitor the operation of the private dispute resolution sector and is currently developing plans to address some of these issues. We will remain cognisant of Justice Hayne's warning when considering the future directions for our justice system.
29. Australian civil and criminal justice systems are currently undergoing some exciting changes. The Victorian Law Reform Commission recently released a report on the first part of its civil justice review and many of the Commission's recommendations
30. It is difficult in a time of innovation to predict what the justice system will look like in 2020 but I've tried here today to identify some of the potential areas in which the civil and criminal justice systems may evolve in the near future.
31. To sum up, I foresee potential for further changes to the way in which the justice system interacts with communities, victims and human-service agencies. I predict changes to the way the legal profession interacts with parties to a dispute and with other practitioners. There'll be changes to the way in which the courts manage disputes. I very much look forward to participating in the development and advancement of the Australian justice system in years to come and, more immediately, I look forward to hearing the outcomes of this conference.
32. I would like again to thank the National Judicial College for its important and ongoing contribution to improving the administration of justice in this state, across Australia and regionally.