National Judicial College of Australia
Conference on the Australian Justice System in 2020
Sydney, Saturday 25 October 2008

The Australian Justice System – what is right and what is wrong with it?

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1 The organisers of this conference have done me great honour by inviting me to speak. May I begin with a moment's self-indulgence. It has now been almost 40 years since I completed my law degree. That alone entitles me to reminisce about 'the good old days' and to rail against declining standards, as judges of mature years are often inclined to do. I shall try, nonetheless, to avoid carrying on in that manner. If there is one thing that I have learned over the years, it is that it takes a very long time to reach the stage of knowing what you do not know. I am now finally approaching that stage.

2 Any attempt to predict what changes there will be to our system of justice over the next decade or so is, of course, fraught with difficulty. I could speak in the broadest of generalities, with the reasonable assurance that, in the way of the Chinese fortune cookie, anything I say will ultimately prove correct. Alternatively, I could provide the most detailed of predictions in the sure and certain knowledge that by 2020, I will have died or at least retired. I expect that in either case, I will by then have only passing interest in matters legal.

3 One further self-indulgence. There are lessons to be learned from history. In thinking about the future, I went back to my early years in the law. I asked myself, what could anyone of my generation have foreseen of developments over the past

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four decades?

4 Being the compulsive hoarder that I am, I dug out my old university lecture notes. I found that they contained some rich gems. For example, my lecturer in legal studies, Professor David Derham, is recorded as having said:

> The modern practice is for a statute to lay down only the broadest and most general principles. The details are left to be filled in by delegated legislation.

Professor Derham's description may once have been entirely apposite. It could not possibly be so described today. Modern statutes are typically drafted in a highly prescriptive, and usually prolix, style. They rarely leave anything to the imagination, let alone to the exercise of any sensible discretion.

5 I have heard it suggested that the last time any Parliament passed an Act that was well drafted was in 1893 when the United Kingdom Parliament enacted the *Sale of Goods Act.* Perhaps that is an exaggeration. At the same time, I would dearly love to see those responsible for having inflicted upon the courts, the legal profession, and the public such excrescences as the *Social Security Act 1991* (Cth), with its more than 1367 sections, punished by forcing them to read, and attempt to make sense of, their own handiwork. [2]

6 My lecture notes are relevant to this paper in another way. They reveal that I spent many happy hours at university exploring the nuances of legal principles that are now totally obsolete. I remember the pleasure I gained from considering every possible permutation of the famous rule in *Rylands v Fletcher*[3] regarding strict liability for the escape of dangerous substances. Sadly, that rule has now been

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2 See generally *Blunn v Cleaver* (1993) 47 FCR 111 in which the Full Court of the Federal Court noted that the Act in its then form occupied more than 1471 pages of the Commonwealth statutes. Curiously, the Minister in his second-reading speech declared that the Act had been drafted in 'clear English' to 'overcome the problem of readability'. In *Secretary, Department of Family and Community Services v Geeves* (2004) 136 FCR 134, I observed that it had taken senior counsel for the Department the best part of a morning simply to explain the statutory regime under which the respondent had sought entitlement to a particular benefit.

3 (1968) LR 3 HL 330. The rule as enunciated by Blackburn J was that a 'person who for his own purposes brings on his land and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape'.

consigned by our High Court to the dustbin of history. What joy there was in reading every single s 92 case decided by the High Court before the decision in *Cole and Whitfield*[4] rendered a significant number of volumes of the Commonwealth Law Reports otiose. What delight was gained from embarking upon a detailed study of the *Matrimonial Causes Act 1959*, and the various grounds then available for divorce.

7 I suppose it could not have been anticipated in the 1960s that much of what I was studying at university would eventually turn out to be of no utility. Of course, society evolves, and the law must follow suit. Change is, if anything, more rapid today than ever before. The lessons from the past are clear. One cannot confidently predict what changes there will be to our system of justice, even within a relatively short period such as a decade.

8 Having accepted the task of preparing this paper, I will stick my neck out and make a number of what I hope are educated guesses. Before doing so, however, I will outline a number of assumptions that underlie these predictions.

9 I assume, of course, that Australia will continue to be a liberal democratic society, committed to constitutional government and the rule of law. We will continue to have an independent judiciary and, perhaps just as important, an independent legal profession.

10 In broad terms, we will continue to function 'adversarially' rather than 'inquisitorially'. Of course, these terms have no precise or simple meaning. As has been noted, they reflect particular historical developments rather than the practices of modern legal systems. No country now operates strictly within a pure model of an adversarial or inquisitorial system.[5] This is not the place to enter into a debate about the merits or disadvantages associated with each. Whatever criticisms there are of the adversarial features of our justice system, they plainly provide important

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[4] (1988) 165 CLR 360. Section 92 of the Constitution relevantly provides: '… [T]rade, commerce, and intercourse among the States … shall be absolutely free.'

[5] See, for example, the discussion in S Nehlep, 'A Glance at the Far Side: A Comparative Analysis of the Role and Powers of Judges in German and English Criminal Trials' (2005) 7 TJR 181, 204-9.

safeguards to litigants and the community. In any event, the adversary system is so clearly entrenched in our legal culture that one can confidently predict that it will be sustained, at least in the short term.

11 Another assumption that can safely be made is that the Federal Government will continue to expand its power at the expense of the States. The High Court shows no signs of changing course in that regard.

12 Australia will remain a sparsely populated country with the vast majority of its citizens living in a handful of major cities. Our economy will continue to depend increasingly on commodity exports. We will manufacture less and less as time goes by.

13 Finally, globalisation will ensure that nothing that we do will ever again be considered in isolation. We will increasingly find ourselves involved in international organisations and activities. We will be party to an ever-growing number of treaties, most of them multi-lateral. International law, far from being a boutique discipline, will become ever more important.

14 With these assumptions in mind, let me turn then to my predictions. In no particular order, they are as follows. By 2020,

- courts will have become much less central in importance in resolving civil disputes;
- information technology will play an increasingly important role in the way that courts operate, and in the wider practice of law;
- despite strenuous efforts currently being undertaken, there will be little, if any, improvement in access to justice;
- the problem of delay will not be overcome;
- our system of civil justice will operate more efficiently, and a number of archaic practices will have been eliminated;
- there will be vast and radical changes to our criminal justice system;
- the trend towards specialisation will increase;

- sensitivity towards human rights issues will be heightened; and
- the law will have become more complex and less comprehensible than it is even today.

15 I will develop each of these predictions.

Courts less central to the justice system

16 Courts today play a much less central role in the resolution of civil disputes than they once did. Cost and delay have contributed to this development. Law schools now offer courses in alternative dispute resolution. Modern techniques that are taught include not just the 'golden oldies' of conciliation, arbitration and mediation, but entirely new methods such as 'early neutral evaluation', 'therapeutic jurisprudence', and even the use of 'private courts'.

17 There has also been a trend, which is likely to continue, towards the greater use of tribunals, rather than courts, for resolving disputes. Tribunals are said to provide justice that is less formal, quicker and cheaper than courts. Whether that is true across the board may be doubted. In any event, there is a price to be paid. Tribunals can never be as fully independent as courts. Their members, though they may be of unimpeachable integrity, are not given judicial tenure. Governments are often party to disputes which are heard before them. There is a real danger that, in such cases, justice may not always be seen to be done. And to the extent that tribunals are given the almost unlimited powers that many of them now have, the difficulties that arise when they fall into error, and have to be corrected, should not be underestimated.

18 That said, our system of civil justice would collapse if the vast majority of disputes did not settle. Mediation, in particular, has had a spectacular record of success in this regard, at least in the courts with which I have been associated. Even if a case does not settle, a good mediator can achieve a great deal by narrowing the issues in dispute. Once that occurs, the chances that the matter will settle are greatly increased. If it does not settle, there is still likely to be a shorter trial.

19 In my opinion, by the year 2020 no commercial dispute of any significance will be tried by any superior court unless the parties have made at least one attempt at mediation. Court-ordered, and perhaps even judge-conducted, mediation will be routine. It was my invariable practice to require any commercial case docketed to me during the 10 years that I served on the Federal Court to be mediated. I found that it paid handsome dividends.

20 At the same time, there may be other ways in which trials are avoided. We are likely to see the introduction of something like a system of 'private courts' operating outside the parameters of commercial arbitration, but, of course, on a consensual basis. These 'courts' will be promoted as offering speedy, less costly, and completely confidential, resolution of commercial disputes.

21 I should say something about 'early neutral evaluation'. This has been extolled within certain courts, such as the Family Court. However, I have serious reservations about it as a technique of alternative dispute resolution. It is very difficult to assess the likely outcome of any proceeding when one has only the most limited understanding of the facts in the case. The earlier the evaluation, the less that is known. Mediation seems to me to be a better technique for achieving early settlement. Of course, the quality of the mediator is of critical importance.

Curse of the computer

22 I can still remember my early days at the Victorian Bar. If anything had to be copied, this could only be done by the use of a wet paper photocopier. It would take one or two minutes to copy each page. As a result, briefs were, as their name suggested, brief. They usually consisted of a few folded pages tied by pink or white ribbon. No one drowned in a sea of paper.

23 How different it all is now. Any self-respecting brief in a complex matter will consist of a large number of arch-lever folders. Particularly complicated matters may be briefed in the form of a number of CD Rom disks.

24 None of this has contributed in any way to an improvement in the quality of justice administered in civil cases. I have sat on trials where extensive use has been made of computerised data. I have also sat on several so-called 'electronic appeals'. I can state categorically that, as far as I was concerned, not one minute of court time was saved by using such technology. I suspect that not much preparation time was saved either. Indeed, the time taken to learn how to use the relevant software took longer, in some cases, than the time taken up at the trial itself. At least there was a saving in paper.

25 It is not only the trial courts that are being swamped by computerised data. Nothing is more frustrating to an appellate court than being burdened with huge numbers of documents in the knowledge that very few of them will ultimately feature in the appeal. This happens all too regularly. Last year I conducted a call-over for an appeal to be heard in the Federal Court. The issue in the appeal, which concerned access to relatively few documents, seemed to me to be confined, and had been dealt with by the trial judge succinctly and expeditiously. Nonetheless, counsel unashamedly informed me that approximately 25 arch-lever folders of material would have to be included in the appeal papers. Of course, each folder would have to be copied in multiple. I replied, somewhat testily, that I would not for one moment accept that submission. I imposed a somewhat arbitrary limit of two arch-lever folders. Counsel looked astonished. I was adamant. I understand that the appeal was ultimately heard on the basis that I had stipulated. I did not sit on it but was told that, as I had expected, only a handful of documents were actually referred to.

26 Information technology plainly has both advantages and disadvantages. Assuming that one knows what one is doing, research tasks can be carried out with great efficiency. Aids such as transcript analyser can be invaluable.

27 On the other hand, computer research tends to be indiscriminate. One can generally find a case to stand for almost any proposition. Recently, on the Court of Appeal, we were referred to a somewhat dated decision of a single judge of the

District Court in Western Australia. That decision preceded a long line of authority by appellate courts, which ran directly counter to that single judge's view. A good deal of time and effort was wasted in dealing with a persistent submission regarding that point. So it is that the courts today are bombarded with numerous references to authority, much of it, I suspect, unread by counsel who cite it, and plainly of dubious value. In that regard, over-citation of authority has rendered the task of ascertaining the law more, and not less, difficult.

28 Computers have also led to a trend in writing judgments which I think is to be deprecated. Many judgments are far too long. The reason is simple. Judges, who are generally under enormous pressure to get their judgments out, can now produce reasons safe in the knowledge that corrections and additions can easily be made. In the past, more care was required. The process of preparing reasons by hand, or having them typed, imposed its own discipline. There is also a temptation, all too rarely resisted, to 'cut and paste' from other judgments, rather than synthesising the principles for which those cases stand.

29 It is often harder to write a short judgment than a long one. It must be remembered that lengthy judgments are not user-friendly. Nor, for that matter, are judgments that are copiously, and perhaps excessively, footnoted.

30 The trend is plainly towards making greater use of computers as an aid to the work that we lawyers do. Already, some courts have introduced more advanced computer techniques, such as the Federal Court's eCourt system, which allows the public to search for information on specific cases and enables parties to lodge documents electronically. There are those who see great advantages in the ever-widening use of information technology. I agree with them, but with serious reservations.

Access to justice

31 With all the research and other work that has gone into developing greater access to justice, it would be nice to think that by 2020 the law will be easier to

ascertain, and the courts more generally available to ordinary members of the public. I do not think that this will occur.

32 Of course, access to justice means more than simply access to courts. At a formal level, it entails the ability to vindicate rights through legal processes. For the overwhelming majority of people, who never become involved with the courts, this may simply mean the ability to obtain competent legal advice at a price that they can afford.

33 Legal services are expensive. That is true not just in this country, but in many other parts of the world. It is also true irrespective of whether such services are provided by the legal profession to fee-paying citizens or whether they are provided through taxpayer-funded systems of legal aid.

34 I see little prospect of this changing. Any demand for services will ultimately be met. The next decade is likely to see the demand for legal services increase. A highly regulated and complex society cannot function without a capacity to obtain quality legal advice. Quality services cost money.

35 Despite some populist opinion to the contrary, many lawyers are not particularly highly remunerated. It is misleading and unfair to treat the very high incomes derived by partners in major city law firms, or a handful of leading QCs, as though these are in some way typical of what lawyers earn. A high percentage of lawyers, particularly those who take on legal aid cases, are paid very modest fees. If costs are to be cut in the interests of promoting greater access to justice, it cannot reasonably be expected that this will be done at the expense of those who are prepared to act for the most needy in society.

36 There is a glimmer of light. Many Australian lawyers today provide pro bono services on a scale that would have seemed unimaginable some years ago. Young lawyers, imbued with a sense of social justice, often volunteer their services to help those in need in areas such as refugee law. Governments encourage this, as they should. The legal profession deserves enormous credit for its contribution to society

in this area.

37 There are some steps that can be taken to keep a lid on legal costs. The introduction of contingency fees, delayed billing arrangements and litigation funding can help to provide financial assistance to those who may not otherwise be able to afford legal services.[6] There will be further developments in the area of 'no win, no fee' agreements, uplift agreements and other arrangements whereby the risks of litigation are spread. Another possible avenue for keeping costs manageable lies in the future growth of legal expenses insurance.

38 Judges too can play an important role in keeping a cap on costs. They can case manage so as to avoid wasteful steps being taken. It has recently been estimated that in one case currently being brought in the Federal Court, the cost of discovery alone will exceed $20 million. That is both outrageous and intolerable. It matters not in the least that the parties to that litigation are large corporate entities, presumably able and willing to ensure that they leave no stone unturned in pursuing their interests.

39 Case management, if it is to be fully effective, requires the introduction of something like a United States-style docket system. Such a system operates in the Federal Court and in some divisions of the various Supreme Courts. There are those who oppose active case management on the basis that it can build up costs through what is described as 'front-end loading'. I can only say that I disagree. If conducted properly, case management can play a significant role in enhancing access to justice.

40 I see some virtue in the introduction of time limits on cross-examination. I see even more virtue in setting time limits on the presentation of argument in appeals. Case management can also ensure that orders are complied with in a timely manner and that the process of litigation is conducted efficiently with proper regard to keeping costs down.

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[6] Australian Law Reform Commission Report, *Managing Justice – A Review of the Federal Civil Justice System,* ALRC 89 (2000), [5.21].

41 Access to justice means both the ability to ascertain what the law is as well as the ability to make use of it. As to the former, there are steps that can be taken to increase understanding of legal rights and responsibilities. Law should be taught much more widely in schools than it presently is. Law is an important social discipline and an indispensable tool in the workings of a modern participatory democracy.

42 We can also do more in the field of continuing legal education for both lawyers and judges.

43 As to making use of the law, it must be remembered that in many disputes, one side will be anxious to bring the case on as quickly and cheaply as possible, while the other has an interest in delaying the case outcome. Sometimes both sides are content to have matters drift along, without any great urgency. Judges need to be alive to these possibilities, and ensure that the courts are not clogged up with cases that are going nowhere.

44 Over recent years, there have been a host of procedural reforms that were intended to enhance access to justice. One such reform has been the greater availability of class actions. For my part, I wonder whether such procedural changes have achieved a great deal. Most class actions in this country have ended up benefiting the lawyers on both sides with only a modest return to the plaintiffs. There is also a question of justice to defendants. There is a real cost to business in defending such claims. Plaintiffs sometimes have to be bought off simply to avoid the time and cost of litigation.

45 Litigation funding is another relatively new phenomenon. I am yet to be persuaded that our retreat from the traditional common law position, which prohibited this practice, has in any significant way improved access to justice. Yet the likelihood is that, the courts having opened the door to this particular Pandora's box, this phenomenon will grow.

46 I should interpolate that there is one group within the community who seem

to have no difficulty whatsoever in gaining access to the courts. I refer to those who are sometimes described as 'querulous litigants'. They are few in number but take up a hugely disproportionate amount of court time. Many of them are sad cases, with genuine and deeply felt grievances. Nonetheless, their claims are usually without any legal foundation.

47 Declaring such individuals as 'vexatious' litigants achieves little. Undeterred, they simply make repeated applications for leave to issue further proceedings. Judges are obliged to sort out their claims, which are often expressed in lengthy documentation, much of it difficult to follow. The time spent on this group is largely wasted, and at the expense of other litigants who want to have their cases brought to court.

48 Legal aid is a subject upon which a great deal could be said. It is not a major vote winner. There is precious little of it available in civil cases. That situation is unlikely to change. Unless it does, I see little prospect in years to come of any significant improvement in access to justice.

Delays

49 The delays that currently bedevil our system of justice will not easily be overcome. The problem can be seen quite starkly in any trial court where cases are ready to be heard, but no judge is available to hear them.

50 In criminal matters, there has been a certain amount of robbing Peter to pay Paul. Legislatures have directed that certain types of cases must be heard ahead of others. Thus, sexual offences are tried ahead of other crimes. This does not mean that these offences are necessarily dealt with close to the time that they were allegedly committed. Sometimes, the conduct in question goes back literally decades. However, once reported and once charges have been laid, they are given a speedy hearing. Unfortunately, this has a 'knock-on' effect with regard to other criminal matters.

51 As for civil cases, the position seems to be at least as bad. Some delays are startling. As previously indicated, courts can chip away at the problem, at least to some degree, by active case management. I have no doubt that by 2020, rolling lists will be a thing of the past and that individual docket case management will be adopted widely throughout Australia. The cost to litigants and the wider community of having cases ready for trial, but not having any judge available to hear them, is too great to allow such a situation to continue.

52 There are also problems with delays at the appellate level. There has been an increase in the proportion of criminal appeals now being heard as compared with civil appeals. Criminal appeals now make up more than 50 per cent of the workload of intermediate appellate courts in most States, and more than 60 per cent in some. Where the appellant is in custody, it is obviously right that any appeal be heard as soon as practicable. Yet while the time taken to bring a civil appeal on for hearing has been reduced, the opposite seems to be true in relation to criminal matters. One important reason is that it can take literally months to obtain the transcript of a trial, which is only prepared once a notice of appeal has been filed.

53 The factors which explain delay are complex. Foremost among them must be a shortage of judges. That shortage is chronic and becoming more acute. Of course, the appointment of a judge involves significant cost. However, that must be set off against the very great cost involved in not having enough judges to discharge the ever-increasing burdens imposed on the courts.

54 Can anything be done to overcome undue delay? I have no doubt that it can. In the field of criminal law, some States have experimented with time limits whereby trials must be brought on within a specified period, failing which a judge may stay the prosecution. Regrettably, in practice, these time limits are rarely enforced. What often happens is that the Crown applies for leave to extend time, and such extensions are usually granted.

55 Victoria has a *Charter of Human Rights and Responsibilities* which came into full

operation earlier this year. The Charter stipulates that a criminal trial must be conducted without unreasonable delay. It is questionable, however, whether this requirement will make a great deal of difference in practice. What is needed is a commitment on the part of Government to ensure that cases are heard speedily, and that any untoward delay results in consequences that are real and tangible.

Changes to civil justice

56 I have long thought that we should move from a series of rules and practices in civil proceedings that are archaic to something that more closely approximates a sensible method of resolving disputes. A number of my colleagues see great virtue in retaining formal pleadings. I see none. I would much rather see us move to a system of narrative pleadings,[7] whereby each side provides the other, and the court, with a detailed outline of the nature of its case.[8] The test should be: does each party know with reasonable precision the case that it has to meet? [9]

57 Frankly, I regard pleading summonses as largely a waste of time. Forays into court to fight about further and better particulars are little better. These exercises simply build up costs and rarely achieve anything of true value.

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7 In the Commercial List of the Equity Division of the Supreme Court of NSW, the practice is to use what are known as 'statements of contention' rather than formal pleadings: Practice Note SC Eq 3, paragraph 8. There is a helpful discussion of the differences between pleadings and contentions in *David Ballard v Multiplex Ltd* [2008] NSWSC 1019 at [21]-[22]. In that case, the contentions were drawn as though they were pleadings. If that were the general practice, it would make the distinction in the Practice Note seem somewhat pointless.

8 In *State of Queensland v Pioneer Concrete (Qld) Pty Ltd* (1999) ATPR 41-691, 42,827, Drummond J noted that recent authority acknowledged the blurring of the distinction between pleadings and particulars. His Honour referred to *Beach Petroleum NL v Johnson* (1991) 105 ALR 456, where von Doussa J had spoken of the tendency now towards narrative pleading arising from a growing concern that pleadings according to traditional rules do not adequately make known to the Court and to the parties the nature of the opposing cases in complex matters. Justice von Doussa also commented that:

> [t]echnical objections raised to pleadings on the ground of alleged want of form will be received with less enthusiasm today than in times past.

9 In *David Ballard,* see above n 7, it was noted at [22] that Lander J had said in *Arthur Young v Teico International* (1995) 182 LSJS 367, 370, that the question of the adequacy of pleadings should be approached not by looking with a critical eye for some deficiency but by reference to what his Honour regarded as 'the ultimate question', which was whether the pleading notified the opposing party of the case to be made against it.

58 I would supplement narrative pleadings with carefully limited oral discovery. The ability to ask direct and pointed questions of at least the main witnesses for the other side, at a relatively early stage of the proceeding, is likely to promote earlier settlement. It also provides a proper basis upon which documentary discovery can be kept within rational bounds.

59 That takes me to discovery. In my view, this is an overrated preparatory tool. Most cases, even those that are complex, end up turning on a handful of documents. The problem is that everyone is terrified of missing the 'smoking gun' that may be hidden away within the vast numbers of documents in the possession of the other side. Yet that 'smoking gun' probably does not exist. If it does, I have yet to see more than a handful of cases in which it was produced, and turned out to be decisive.

60 Computerisation has had its impact on discovery as well. Virtually every communication that takes place within a large organisation is now permanently recorded. Words that used to be spoken are now emailed. The task of trawling through this material in the hope that it may contain something adverse to the other side's case can be immense. It is also soul destroying, as many young lawyers will attest.

61 If there is to be discovery, it should be by leave, in tranches, and severely truncated. It should be necessary to make a case for discovery, identifying the kinds of documents that are required and stating clearly why they may be relevant and should be produced.

62 I would do away with interrogatories entirely. They are rarely used in commercial matters these days, and oral discovery would be far more valuable in any event.

63 Trials will need to be conducted in ways that may be unfamiliar to us all. Trial by affidavit in civil cases has many drawbacks. Affidavits are usually drafted by solicitors and sometimes settled by counsel. What is in them bears little

resemblance to what the deponent would have said if permitted to recount the story in his or her own words. I would allow affidavits only in relation to uncontentious evidence. I suspect that there are others who are becoming quite cynical as to the utility of receiving evidence in this fashion.

64 Notices to admit, which have been available as a technique for shortening trials but are used relatively infrequently, will come to be used more often. There should be serious cost consequences for those who decline to make sensible admissions. I suspect that the rules of court will be strengthened to ensure that this is done. In some cases, it will be appropriate to order costs against practitioners rather than their clients. This is rarely done at present, but warrants greater attention.

65 In addition, the law of evidence will continue to be simplified. A number of the exclusionary rules that still apply will be watered down. In civil cases at least, there will be fewer impediments to receiving material that is plainly relevant.

66 The methods by which we deal with expert evidence will be reassessed.[10] There will be limits on the number of experts that each party can call. There will be greater use of court-appointed experts. There will be more use of techniques such as 'hot-tubbing'.

67 Above all, we will have to accept what anyone who is involved in the law soon learns, namely, that perfect justice is unattainable. All that we can legitimately aspire to is a system of civil justice that operates both fairly and reasonably. We also need a sense of proportion. The methods by which we resolve disputes must be geared towards the issues to be determined, and how much is at stake. There is no point in spending almost as much to adjudicate upon a dispute as the case is in fact worth. Litigants who wish to fight cases 'on principle' must be protected from themselves.

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[10] See, for example, *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446, [479]-[485].

68 Whatever else can be said, no case, no matter how complex it may seem, should be allowed to run for months and sometimes years. Proper case management, sensible rules of court, and a strong commitment by all associated with the process to keeping things moving, can do much to improve our system of civil justice. Judges who are prepared to insist on the expeditious conduct of trials must be backed up in their endeavours by appellate courts.

Criminal Justice

69 There is a clear and discernible trend in the administration of criminal justice in this country. Traditional practices no longer hold sway. Many new procedures have been, and are being, introduced. I suspect that this will continue.

70 I anticipate that by 2020 committal proceeding will long have been abolished.[11] Speaking as a former Commonwealth Director of Public Prosecutions, that would be a regrettable step in my view. However, those who count the beans will have their way.

71 I suspect that trial by judge alone will increasingly be introduced as an option available to be taken up by the accused in criminal trials. Of course, this will not apply to Commonwealth offences. Juries are, and have been, from time immemorial fundamental to our system of criminal justice. However, they add enormously to both the length and cost of criminal trials, and the precedent of trial by judge alone has now been set.

72 I also suspect that there will be moves to do away with trial by jury in relation to offences that are regarded as not particularly serious. That has been the trend in Great Britain, and we are likely to follow. Some examples might include thefts of small amounts of property, minor assaults, and robberies and burglaries towards the bottom of the scale. Some sex offences will also fall into this category.

73 I expect that there will be strong pressure from various quarters to do away

[11] They are already on the way out in some States.

with trial by jury in complex fraud matters. The current situation, whereby such cases are sometimes regarded as too difficult to prosecute because juries will not understand them, must change. I believe that, over the next decade, governments will come to recognise how important it is to commit to adequate training of police, forensic accountants, and other appropriate experts, so that major tax evasion and corporate fraud can be properly investigated and dealt with where it belongs, namely, in the criminal courts.

74 I think that there will be a concerted move towards both charge negotiation and sentence indication. Plea bargaining, as it is called, is a central feature of the United States system of justice. It is the only method by which that system is able to continue functioning.

75 Open and transparent agreement as to the charges to be admitted, and the general type of sentence that would be supported by the Crown, is a development that I would welcome. Of course, the ultimate decision as to the sentence to be imposed will be made by the judge, and not simply rubber-stamped. However, a more formalised system of plea bargaining, including perhaps some mediation prior to trial, will have a beneficial effect upon the administration of criminal justice as a whole.

76 The rules of evidence will certainly face significant change. The right to silence, the rule against propensity evidence, and the hearsay rule are already in the process of constant modification. The principle of double jeopardy appears to be on the way out and there is a trend towards treating all evidence that is relevant as ordinarily admissible. Public policy, which has played a major part in the development of some evidentiary doctrines, is being gradually watered down as legislators respond to pressure from various sources to get more convictions.

77 The work of appeal courts will continue to grow. The trend towards evermore detailed and prescriptive legislation, including sentencing laws which require judges to apply principles of higher mathematics if they are to be

implemented, will continue. For some reason, the legislatures seem to view judges as being devoid of common sense in this area, and require them to follow a road map that sometimes leads nowhere.

78 Once again, all this comes at a cost. The more detailed the legislative regime, the more likely it is that mistakes of a technical nature will be made. The criminal law is particularly, and rightly, unforgiving. A simple error in computing a sentence, which is easily made, often means an appeal, and the need to go through the entire sentencing process once again. That is costly and wasteful.

Specialisation

79 It is generally agreed that the age of the generalist is over. Both within the large firms, and at the Bar, specialisation is dominant. There is little alternative. The law today is vastly more complex than it was even some 20 or 30 years ago. No one can hope to acquire proficiency across a wide range of areas. I know solicitors who specialise almost to the point of absurdity. At the Bar, something similar has been happening.

80 Specialisation is a feature of a number of courts at state level. For example, in Victoria, the Trial Division of the Supreme Court is itself divided into three divisions: common law, criminal law, and commercial and equity. New South Wales operates in much the same way.

81 There was a time when all judges had to be generalists. They could adapt to anything. Those appointed from a common law background often became outstanding commercial judges. Some commercial lawyers evolved into first-class criminal trial judges.

82 It has always seemed to me to be useful, when hearing a particular case, to draw upon experience from other fields of law. On the other hand, it must be said, litigants are entitled to assume that their cases will be dealt with competently and expeditiously. There is no place in our system for judges on L-plates. It is for that

reason that pressure continues to mount for more specialisation among judges. One hears claims from patent lawyers that there should be a patent court, from tax lawyers that there should be a tax court, and from industrial lawyers that we should reinvigorate the Industrial Relations Court. Family lawyers, of course, have their own court.

83 I hope that these calls for specialist courts will be resisted. Whatever advantages there may be in appointing specialist judges to such courts, there are also disadvantages in doing so. Sometimes, it takes a judge with no specialist knowledge to inject common sense into a case perhaps by asking whether the emperor is in fact clothed.

Human Rights

84 By 2020, Australia will almost certainly have some kind of statutory human rights protection. I doubt that it will take the form of a constitutional provision. Australians are cautious about amending the Constitution, and will not support legislation of this kind where it is strongly opposed by influential groups within society.

85 A national Charter of Rights, by whatever name it is called, will no doubt start off modestly. It will be characterised initially as nothing more than a guide to interpretation. When it is seen that such a law has few, if any, teeth, there will be pressure to make modifications to it.

86 There is little point in having statutory protection for human rights unless there are consequences for a breach of its provisions. These will work their way through the system, focusing predominantly on the criminal law, as has been the experience overseas. The statute will be used as a peg upon which to challenge the actions of law enforcement bodies. It will be controversial. It will provide an opportunity for judges to engage in as much, or as little, activism as they may feel inclined to adopt.

87 I have in the past been sceptical of the need for legislative protection of human rights. My views changed as a result of the High Court's decision in *Al Kateb v Godwin*.[12] It became clear that the common law could no longer be relied upon to protect even the most basic of values. I shall say no more about that judgment.

88 I understand that there are strong, and principled, arguments against the introduction of bills of rights. They can give rise to many difficulties. However, given the choice of embracing such legislation, or leaving those most vulnerable and least able to protect themselves to the tender mercies of bureaucrats and politicians, I know which way I would now lean.

Ascertaining the law

89 Regrettably, I believe that legislation will continue to be drafted in a manner that almost defies comprehension. Statutes will be longer and ever more prescriptive. Attempts at simplification, including drafting in 'plain English', will achieve little.

90 Indeed, the problem may even worsen. There is a movement towards codification currently on foot. The criminal law is well on the way towards becoming a complete code. That has its own problems. Anyone familiar with the work of State legislatures will see how frequently the substantive criminal law, rules of criminal procedure and evidence, and sentencing are amended. Statutes, whether designated as codes or not, are amended on an ad hoc basis. This ignores the fact that a change to one section may have unforeseen and unintended consequences to other provisions of the same Act.

91 Regrettably, judges themselves may contribute to the uncertainty and

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12 (2004) 219 CLR 562. I should declare an interest in this case. I was a member of the Full Court in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54. That case held that the particular provision of the *Migration Act 1958* (Cth) that was in question in *Al Kateb* did not permit mandatory and indefinite detention of asylum seekers in circumstances where they could not, in the foreseeable future, be returned to their countries of origin. *Al Masri* was overruled by the majority in *Al Kateb.* I remain respectfully unrepentant.

complexity of our laws. The cases which present themselves for resolution in the courts are becoming more complex. However, we as judges bear our share of responsibility for what has been apparent over recent years, namely, that appellate judgments, in particular, are becoming more difficult to follow.

92 The criminal law provides a useful example. Appellate courts have required trial judges to direct juries in terms that most sensible people would regard as gibberish.[13] That fact is now coming to be recognised. It has led the Victorian Law Reform Commission, under the tutelage of former Justice of Appeal Geoffrey Eames, to suggest the recasting of a number of such directions so that they actually make sense.

93 Appellate courts have failed in other ways. Judgments that are heavily nuanced, and point in very different directions, are of hindrance to those who have to engage with them.[14]

94 I well remember when the High Court cast the law of self-defence into a series of double and triple negatives that few, if any, could comprehend.[15] That was finally undone some years later, but great harm had been done in the interim.

95 Appellate courts, at all levels, must bear in mind that a judgment should not be written as though it were intended to be published in a scholarly journal. Appellate judges, as well as resolving the particular case before them, are expected to provide guidance as to the state of the law. In doing so, they must bear in mind those to whom their reasons are addressed. These include the parties to the case, practitioners and judges. They also include the wider public, who may not read the judgment, but learn something of the principles laid down through media commentary, or in other ways. Importantly, an appellate judgment, and particularly one written by an intermediate appellate court, should not be written with a view to

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13 Two examples are the charge required in relation to propensity evidence and that which must be given in relation to lies as consciousness of guilt.

14 The decision of the High Court in *HML v R* (2008) 245 ALR 204 provides a useful example.

15 *R v Viro* (1978) 141 CLR 88.

demonstrating the erudition of its author. It should rather be written in a style that provides as much assistance and clarity as practicable.

Conclusion

96 The year 2020 will be an Olympic year. It will be the year presently fixed for climate control emissions targets to be achieved. Less likely, it may even be a year in which Collingwood wins an AFL Premiership.

97 On the whole, I think that 2020 will be a better year for our justice system than 2008. Despite the many problems that we face, there is nothing to suggest that we will find ourselves returning to the travesties of *Bleak House*. Our system of justice will be more efficient, more transparent, and fairer than it is today.

98 As with so much that is troubling in society, the problems that we confront will not be easily resolved. It is not simply a matter of throwing money at them, though targeted spending would undoubtedly help.

99 I am confident that the trend I can discern among young lawyers, in particular, of seeing themselves first and foremost as professionals, whose goal is to serve society, will continue. I think that the era of lawyers seeing themselves predominantly as part of big business is coming to an end. In that regard, the next generation will be better than my own.

100 I hope to be alive to see at least some of this happen. You may rest assured that I shall do my best to do so.

101 If my predictions prove to be correct, it may be said of me, by anyone who cares to remember what they were, that I had great foresight. If they turn out to be incorrect, I will at least be in distinguished company. Prophecies seldom turn out to be accurate – even Nostradamus was wrong more often than he was right.