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Justice in the docket

As jurisdictions around Australia tackle delay in the civil and criminal justice system, the Law Society's Access to Justice Committee is investigating the extent of court delay in the Northern Territory. Committee convenor Mr Alan Lindsay discusses with Balance, possible ways of improving case speed and efficiency.

The headlines screamed "Mammoth wait for NT justice". Figures released by the Australian Bureau of Statistics found higher courts dealing with criminal matters in the Territory and NSW took the longest to deliver justice.

"There are three reasons for the committee to examine delay. First, the community perceives the court system to be slow and unwieldy," Mr Lindsay said.

"Secondly there is a perception amongst the profession that the system is slow and thirdly, there is a feeling, irrespective of the accuracy of this perception, that the profession can take steps to improve the delivery of justice."

"Just how slow, or fast the criminal and civil system is, and how that compares to other places is the starting point for our investigation," he said.

The committee will begin with civil Supreme Court matters.

The issue of delay has been examined extensively by the Australian Law Reform Commission. Its work followed the release in 1996 of radical reforms by Lord Woolf, a member of the United Kingdom's House of Lords.

At the end of this month the Commission will release its discussion paper analysing the case load and results of management systems introduced by the Family Court, Federal Court and the Administrative Appeals Tribunal.

The paper titled *Review of the Federal Civil Justice System* , reveals that in contrast to public perceptions about the Family Court, most cases were settled fairly early. The median time from commencement to finalisation was 5.2 months for dispute matters and eight days for consent orders. The report shows just over 50 per cent of cases were settled at the directions hearing stage.

According to the paper the introduction of the Individual Docket System (IDS) by the Federal Court has resulted in an improved processing time.

Figures show the median time from commencement to finalisation of a case in the Federal Court was seven months.

Other sources of data include the COAG *Report on Government Services, 1999*.

This report found that in 1997-98, 50 per cent of civil cases in higher courts were concluded in less than six months. This compares with 41 per cent in the Northern Territory.

However the Northern Territory lags behind model jurisdictions Victoria, the Commonwealth and Western Australia.

In Victoria 71 per cent of matters were concluded in less than six months, followed by 69 per cent in the Commonwealth and 63 per cent in Western Australia.

The Northern Territory compares favourably on the national level regarding cases that took more than 18 months. In line with the national scene, about 30 per cent of cases in the Northern Territory extended beyond the 18 month period. But again the Territory is behind the Commonwealth at 8 per cent and Victoria and Western Australia, both at 10 per cent.

Mr Lindsay warns that these statistics needed to be treated with caution.

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Different benchmarks have been set by various data collection agencies and it is difficult to compare across jurisdictions.
The final report of the ALRC, due out at the end of the year, is expected to call on the Australian Institute of Judicial Administration to establish a national data base, providing a true comparison of delay in higher courts across Australian jurisdictions.
Meanwhile the Law Society Committee is exploring the option of improving case flow management.
"The committee is interested in the benefits of IDS," Mr Lindsay said.
"There is evidence gathering that the system works well in other jurisdictions where it is being used."
Mr Lindsay warned there was a down side to the system.
"It raises issues of resources, increased costs to practitioners and ultimately their clients as well as an increased work load for the judiciary," he said.
The committee is also looking at how best to use case management principles.
"It is our perception that the profession will have to change its attitudes towards case management," he said.
"One of the ideas we are considering is for parties to prepare a litigation plan that will set out what is actually in dispute, what evidence might be called, when the parties think the matter might be ready for trial and to get an enforceable committment to having the matter ready," he said.
"The present situation doesn't focus on the end result of getting a trial. It focuses on the steps along the way. What this idea does is make the parties think about the trial first and then work backwards from that," he said.
In a recent speech to the Australian Institute of Judicial Administration Conference, Sir Anthony Mason highlighted the importance of judges exercising their powers over practitioners.
Mr Lindsay agrees courts need more power to enforce orders.
"Without committing ourselves to detail the Committee is looking at having effective sanctions, which might include some of the ideas canvassed in the public arena," he said.

It's the wooluff! It's the wooluff!

The United Kingdom's Lord Woolf challenged the foundations of legal jurisdictions worldwide with his landmark report on the defects of the civil justice system Released in 1996, the Woolf Rules observed that "the key problems facing civil justice today are cost delay and complexity."

Lord Woolf recommends tackling these problems by the introduction of new rules that propose judicial ownership, instead of judicial control, of cases.
For this concept to work a scheme was introduced to promote the pre-action exchange of information in the form of letters in the more prolific areas of dispute, such as personal injuries.
Lord Woolf realised to be effective, participants of the system had to be responsible for cases. He went further than ascribing the role traditionally to an "officer of the court" and recommended enacting rules directing all paid participants in the system to owe their first duty to the Court and their second to the client.
He recognised the classification of cases could be expanded to consider speed of resoslution as well as money.
One of the cornerstones of the philosophical position of the changes is to introduce a concept with the ugly title of 'proportionality' meaning that one solution to the problem was to tailor the provision of justice to the value of the claim.
Six elements stand out as major departures from the standard model of the Northern Territory Supreme Court Rules.

1 Pre-action protocol

The new UK rules provide for the exchange of information by letter prior to the initiation of proceedings. The letters are, in effect, given the same requirements as pleadings - there is a requirement to state what is relied on in either claim or defence and to provide the other party with information. There is a three month period for the exchange to take place, and in the event that the matter proceeds further, the court may implement cost penalties for failing to perform.

2 Tracking cases

Parties are given the option to select which 'track' they wish their matter to travel down. There are three models: small claims, fast track and multi track. Each has benefits and problems. Costs are limited in the first two but trial dates are swift, i.e. within 21 days of close of case management. The approach is relevant to all civil courts in the Northern Territory.

3 Limitation of expert evidence

Experts' duty lies to the court and not to the party that retains them. Steps are taken to reduce the number of experts so the multiplicity is avoided. Experts can only be called with the leave of the court. The court can set questions for the experts for more information. Experts are encouraged to resolve their differences pre trial. There is room for some of these ideas in the NT system.

4 Targeting the client

In shifting a solicitor's primary duty from the client to the court, a declaration of truth must be provided with statements of case such as pleadings and witness statements. Tied with positive pleadings, the intent is to ensure the court is not used as a holding yard for disputes. Such a step in the NT requires legislative action.

5 Limitations on discovery and other pre trial procedures.

Discovery is reduced, for example to a duty to make a "reasonable search" for "relevant documents". Aspects of "reasonable" are the amount of claim, cost of the search and anticipated relevance of the document. On the other hand there are stricter requirements to discover documents damaging to the party's case. There is room for some improvement of this sort in the NT, especially in the lower jurisdictions.

6 Costs

There is provision for lump sums in some categories, introducing a natural limitation on over servicing.
The NT's cost system lends itself to rewarding superficially necessary, but actually needless, work.
The Woolf Rules require an acceptance by the courts of a more active role and a realisation that the legal profession's first duty is to the system and not the client.
The affect is a half way house between adversarial and inquisitorial systems that exist in Western countries with an active determination of 'truth' by the courts and their servants rather than a passive adjudication by the courts of 'truths' advanced by the parties.

By Ian Morris, member of the Law Society's Access to Justice Committee.