Scanning for Justice

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for the
Department of Justice

Contents

PURPOSE

The purpose of this report is to provide the bases for future-oriented planning. From these scans, scenarios of the future of the Victoria Justice Portfolio can be developed. The scans and scenarios can help determine what strategies should be pursued, how best the needs of the public can be met.

Scanning for the court system was first developed in the 1980s in the Hawaii Judiciary. Through the news journal, *Justice Horizons*, trends, emerging issues and short-term research papers were presented to judges, administrators in the courts and the larger justice system. These scans were specifically used to develop short and long range strategy. Following the success of this project, the Virginia Courts instituted a foresight program. The Virginia Courts regularly scan the future, searching for indicators of change in its areas of concern – the timely and effective administration of justice. Other courts in the United States have followed the Hawaii model as well. Most significant has been the work of the Massachusetts Courts. In 1992, through their scanning activities, they published a major report titled, *Reinventing Justice 2020.* The Pennsylvania courts have followed their example. As well in the 1990s, the US Federal Government's State Justice Institute sponsored Futures Planning conferences and workshops throughout the US. By 2001, 24 American states have had Judicial Foresight Commissions, generally chaired by the Chief Justice, with broad based judiciary and public input. Most recently has been the example of the Singapore Subordinate Courts who engage regularly in Foresight activities and develop scenarios and action plans based on these scans. The United Kingdom has a national foresight commission that has written reports in a variety of areas including health systems as well as the futures of crime.

PLANNING CONTEXT

There are four main approaches to planning the future.

(1) Problem-oriented planning. In this approach, the problems facing the system are assembled and prioritized by the stakeholders. The utility of this approach is the functional efficiency of the system increases, however structural problems are often not noticed (meta-problems) and gains are often for the short-term;

(2) Mission-oriented planning. In this approach, the system's fundamental core missions are determined, for example, the justice system as a bureaucracy with a responsibility to be accountable and transparent, or the justice system as a public

institution with the responsibility to anticipate and respond to the changing judicial needs of the public. The utility of this approach is that there is clarity of core competence and mission – individuals know why they are doing what they do. The weakness in this approach is that it is static, not accounting for technological or economic changes or of the changing needs of citizens.

(3) **Vision-oriented planning**. In this approach, strategic directions of the system are developed by discerning where stakeholders would prefer the system to move toward. While this approach moves the organization forward, it is often difficult to get buy-in from day-to-day mangers who prefer the problem-oriented approach.

(4) **The Future-oriented approach**. Strategic directions are determined by anticipating the short and long-term future. Environmental scanning aids in creating a map of the probable future. This map gives the tools to analyze how specific trends might impact core missions, which missions need to emphasized, which directions need to become a focus of human and budgetary resources. The weakness of this approach is that it can be overwhelming as well it is difficult to ascertain what is relevant versus what is merely interesting.

SCANNING

Scanning seeks to identify issues and trends as evidenced in published material. These, for example, can be speeches by experts, items in newspapers, scholarly journal articles, magazine editorial pieces as well as interviews of leading jurists and administrators. Scanning is both volume driven, seeking to focus on issues wherein there is a great deal of mention (as with ADR) as well as leading indicator driven (searching for new issues of which there is only marginal support in the literature – the cyber judge, for example). Scanning as well seeks to understand which issues are located in the current paradigm and which issues challenge the current paradigm, and which issues are outside current understandings of law and jurisprudence (outside the doxa). Scanning requires an understanding of the micro dimensions of a particular field as well as the macro big picture.

Scanning needs to be conducted on a regular basis, so as to able to track issues from being "beyond the horizon" to "on the horizon" to today's problems. Regular tracking can also help identify anomalous issues. Scanning is similar to the more academic literature review; however, the issues presented are more focused and news item driven. While breadth and depth are important, it is relevance in terms of impact on the Victoria Justice System and the probability of occurrence that are far more crucial.

Relevance for this project is defined by:

(1) Time Horizon.

This is divided into:

(A) Short term (1-3 years);
(B) Medium term (4-6 years) and
(C) Long term (7-9) years.

(2) Impact on the Victoria Justice Portfolio.

This is divided into two areas:

(A) Direct impact on Portfolio Areas and
(B) Indirect impact. That is, there is likely little that the Justice system itself can do about the issue; its capacity to influence the direction of the trend is minimal.

Direct and indirect impact are to be specifically determined by stakeholders at the Department of Justice.

IMPACT FRAMEWORK

There are several approaches to ascertaining the nature of impact.

1. Supply and Demand.

How will the scan (the issue, trend, event) increase or decrease the demand for justice? Demand can be measured by volume of cases as well as the attention needed by a particularly case. Thus, for example, parking violations may increase substantially but this volume can be managed in lower courts or through an automated system, thus leading to no dramatic change in pressure on the Justice System. However, if there was a movement to not pay parking tickets – and seek trial – then volume becomes a factor.

The attention needed for a case can partly be judged by its complexity. Thus, new or novel cases in which the knowledge base is weak may require additional court resources, thus increasing the pressure on the courts, and potentially slowing down justice, and thus negatively impacting the public's perception of the courts, ie justice delayed is justice denied.

Supply can be measured by the different methods the Justice system used to resolve cases. This could be preventive, that is, community policing, neighborhood justice systems or general positioning systems to regulate society or other early monitoring and actions methods or pre-trial such as court mandated mediation or the trial itself or automated systems.

The supply of justice again can be understood in terms of volume (the range of methods in which cases can be heard) and complexity (the different types of methods).

The following scans generally attempt to focus on specific theme areas (the courts, emerging forms of dispute resolution, organizational efficiency) as well issues of supply and demand. However, and this is crucial, scanning is as far as possible an objective assessment of the social, political, economic and technological environment. Scanning is generally less concerned with the search for specific information bits and more with gaining a thorough understanding of the future justice terrain. While individual scans are important, far more noteworthy are the trends that emerge from environmental scanning.

<center>**SCANS**</center>

THEMES

The following themes have emerged from the scans. Following each theme, some of the key ideas/issues are noted. They are not presented in any order of priority. Details are provided in the full scan.

Theme one – Administration of Justice and Court Reform

- Jurimetrics. The need for the development of more sophisticated methods to count not just a case but a case event (the range of issues associated with a case) and the complexity or weight of a case.
- The increased need for using social science methods to determine social and legal policy and in legal education.
- Changes in the jury system including their empowerment (more information, power to ask questions) and improvement (mixed juries, lay and professional, for example) – generally jurors as active participants in the process.
- The development of a multi-door and multi-place courthouse. The courthouse could have a range of doors including: an electronic mediation door; an electronic arbitration door; face-to-face mediation and arbitration (court mandated, court annexed); traditional litigation; culturally appropriate dispute resolution; and, virtual courthouses; as well as, home judicial chambers.
- The reduction of adversarial excess.
- The strengthening of court and community links. 1. Increased use of web for informational and access purposes. 2. Court monitoring of trials by community groups. 3. The legitimation of a new concept called, user-friendly justice.
- Structural innovations, including a single tiered system (unified court)
- Elimination of barriers for self-represented litigants
- The development of the balanced scorecard and triple bottom line as indicators for a responsive, transparent and accountable justice system.
- Development of foresight as central to the increased effectiveness of the administration of justice
- Restorative justice
- The development of Sister Courts
- ADR courses in law school and in primary and secondary schools.
- Judicial education to help judges adapt to a multicultural and globalized world.
- Creation of a Science and Technology Court.

Theme Two – Crime and Justice

• Increased crime and changing nature of crime because of globalization
• Increased crime associated with the new internet technologies – identity crimes and well as increased health related fraud
• Changes in drug policy, generally decriminalization
• A new category of crime – State crime.
• Rethink institutionalization given the link between recidivism and time spent in jail
• Development of international criminal courts – among the many challenges to national sovereignty
• The use of new technologies to solve crime, enhance security – biometrics, for example.

Theme Three – Future of Lawyers

• Increased competition to lawyers from artificial intelligence technologies and globalization. Commodity services predicted to decline.
• Competition from alternative dispute resolution
• Generally the loss of exclusive professional monopoly that attorneys have held.
• The possibility of the lawyer as knowledge navigator.
• The Internet both as a channel and content provider.
• The urgent necessity for lawyers to question and then change their skill sets to adapt to a rapidly and dramatically changing world.

Theme Four – From IT to Artificial Intelligence

• Use of IT for caseload management
• Use of the Net for mediation and arbitration
• Use of the Net for delivery of information to citizens as well as communication.
• Citizens as active participants in the developing strategies for change, for enhancing efficiency and effectiveness.
• Development of expert systems for the rationalization of judicial decisionmaking.
• Development of law or just-bots, following the development of health-bots.
• The eventual development of cyberjudges.
• The eventual development of virtual juries, holographic courthouses, and tele-judging.

Theme Five – Increasing rights and complexity

• Long term trend of increased human rights throughout society (form equal pay to human rights) and litigation to ensure this.
• Long term trend of increased rights for animals and to some extent nature and litigation to ensure this.

- Discussion of rights of indigenous people in new areas, copyright, for example.
- Discussion of rights of liminal persons (as being created by the new genetics) and discussion of rights of future persons (as possible through human germ line intervention) as well as other issues related to genetic engineering.
- Creation of a national human genetics advisory committee to deal with complexity from new technologies and rights issues they raise.
- Development of a science court to deal with the complexity of new technologies and a whole range of novel legal issues they raise.

Theme Six - Macro-Societal Trends

- Long boom and prosperity – the peace dividend and productivity gains from new technologies.
- The Long Deep Recession – globalization of markets, speculation, over capacity and fear caused by 9/11 terrorism tear the world economy apart
- Aging of Australia leads to concerns over pensions, worker-retiree ratios, loss of societal innovation as aging become even more politically entrenched and increased depression from lack of meaning and health problems.
- Continued lack of balanced and gender and ethnic representation in the courts.
- Rise of cultural creatives focused on gender partnership, ecological sustainability, community identity, spirituality and integrative balanced planet – a demographic shift.
- Rise of tortocracy – increasing use of the court system to institute social policies without legislative authorization.
- Judicial foresight and activism given legislative gridlock
- Healthy organization – health and learning as defining in organizations instead of traditional measures of profit and/or productivity.

Theme Seven   - Scenarios

- Positive and Negative scenarios from the Hawaii Judicial Foresight Congress. Negative ones based on generic justice; adjudication without legitimation; super surveillance, apartheid justice; and road warrior justice. Positive scenarios include: citizens as active consumers of justice; decentralized bottom up justice; postmodern humanistic courts; green justice; high-tech/high efficient justice; automated courts and global justice.
- National Center for State Courts, USA, offers these scenarios: 1. Global transformation as AI transforms the courts; 2. Cultural mosaic as multi-door courts become the norm; 3. Hard time, generic justice; and 4. High-tech Growth for the Few.
- James Dator of the University of Hawaii offers these alternatives. 1. Teleworking Global justice – all connected, place no longer matters; 2. Green, Native, Feminist Justice - informal and ADR driven. 3. Inertia forever – problems are too tough to solve, justice slowly delayed, changes incremental; and, 4. Judicial leadership – the use of humane, consumer-sensitive and integrative future oriented methods to transform the administration of justice.

TRENDS

The following trends emerge from the themes and scans.

1. **Increased sensitivity to the changing needs of the public,** in the form of court and community out reach programs (court monitoring) as well as in making the courts more transparent (including new indicators, the balanced scorecard and triple bottom line accounting) and in jury and trial reform (for example, empowering jurors and simplifying procedures for those who choose to defend themselves). The community is first seen as the customer and thus the necessity in making the customer happy and secondly, and more importantly, as co-partner in the design of judicial reform. Citizens thus are seen as the vehicles for innovation and not only as case numbers.

2. **Mediation, arbitration** moving toward the multi-door courthouse – increased use of alternatives to traditional dispute resolution, including discussion on culturally-appropriate dispute resolution.

3. **Increased use of Information Technology.** In jurimetrics, in case efficiency, in decision-making, and in dramatically changing the nature of how lawyers and judges search for information relevant to cases and how they resolve disputes. In the longer-term future this may lead to the beginning of what can be called the Cyber Judge. However, in the directly relevant short run, increased use of IT will be via expert systems. These systems will increase the efficiency of the courts, primarily through information management but also through increasing the access of the courts to the public.

4. **Increase in volume and complexity of cases related to bio-informational sciences** – issues of intellectual property, standing of natural persons, liability issues related to gene therapy, increased costs associated with the life and health sciences. This trend will continue in even more dramatic forms in the near and far future.

5. **Increased rights for all disenfranchised persons**, including indigenous persons, women, children, and even future persons. The rights issue will increase caseload, complexity, as well as call into question the structure and legitimacy of the court system, as those previously rightless will call for different types of dispute resolution (mediation, restorative justice, and multi-door courthouses and systems, as well as more localized informal justice).

6. **New channels** for conducting mediation and arbitration, specifically web-based dispute resolution, as for example, in Singapore.

7. **Increased cases, complexity and issues relating to sovereignty and jurisdiction** as capital globalizes and crime grows. At a simple level this means new types of cases – including issues relating to the relationship between Western and Indigenous

law. Further on, this could mean the creation of new types of courts, including international criminal courts.

8. Indeed, this is **the globalization and internationalization of everything**, including crime, courts, and leading even to strategic sister court relationships throughout the world and the selling of dispute resolution services by state courts (from those who either have under capacity and are more efficient to those experiencing delay either from inefficiency or high demand).

9. **Increased attention to restorative justice** as a way to stop the vicious cycle of repeat offending.

10. Increased use of **foresight** through the Judicial Commission mechanism.

11. **Macro issues** – In terms of the overall economy, there remains the possibility of a severe global recession as well as a sustained long-term boom. In addition, globalization through freer movement of capital and knowledge economy labor challenges professions as well as provides new opportunities. New technologies enhance the administration of justice as well as lead to endless new cases. Demographic shifts point to a softer kinder Australia and a social isolated fragmented nation.

Drivers

Finally, to summarize, what is driving the future of the courts?

1. **New technologies** both providing administrative solutions as well as increasing the complexity of the cases the courts must hear.
2. **Social movements** expanding notions of rights and challenging the courts monopoly on justice.
3. **Democratization of the courts**, increased pressures to more accountable, more transparent and follow balanced scorecard and triple bottom line procedures.
4. **Globalization**, including new types of crimes and threats as well as new jurisdictional issues and new relationships with courts, and jurists throughout the world.
5. **Demographic shifts**, including the shift to partnership values and the aging of society.

While these are the pushes to the future, as important as the push is the pull – the desired vision of the Justice system, the preferred scenario of the various stakeholders. Lastly is the weight, that which ensures that there is stability in periods of change (and which mitigates against creating better systems). It is thus crucial that the Department of Justice develop a preferred vision and a clear strategy to achieve that vision (in the context of the push to the future and the weight of history mitigating against new futures).