Access to law in the year 2525

Simon Rice

The legal system can benefit from a managed approach to change.

This article describes a process. At a time when the rhetoric is concerned with outcomes, and short-term ones at that, process tends to have less value than it might. Neither market needs nor political expediency allow for long-term commitment.

It is not surprising therefore that little time is spent on developing policy that will remain sound in the long term. While it cannot be of greater value than the outcome, the need for sound process to produce sound product is sometimes overlooked.

As an exercise I have considered the application of a long-term planning method — scenario planning — to an issue of substantial social importance: access to law. In the space available I describe in only the broadest terms how access to law might be planned for in the long term. I describe the aim, the method and the results of a process that could give coherence to the community's relationship with law in a time of dramatic change.

With support from the NSW Law Foundation I conducted a stakeholder survey of perceptions of law and the legal system. The results form the basis of a possible substantial scenario exercise. This description is of 'work in progress'; I have taken the first steps in a scenario planning exercise, and I invite readers to consider for themselves where the full planning process might lead.

The issue

Many national and international forces are changing the way the legal system in Australia meets the community's legal needs: competition policy, consumerism, urbanisation, information technology etc.

What sense can we make of the effect of these forces on our legal system, and of the many related local phenomena? The list is long, including the Dietrich right to a fair trial, the decline in legal aid funding, 'law and order campaigns', law-making by the High Court, deregulation of the legal profession, and the potential of information technology.

In the face of these forces of change, there is no single plan in Australia for the operation of the legal system and its service to the community. There could be such a plan. A detailed description of how the legal system might develop in response to change, so as to best serve the public, would be a powerful tool for all players in the system to use in their own planning. They include State and Commonwealth Governments, Attorneys General, Courts, Law Societies, Bar Associations, the Australian Competition and Consumer Commission (ACCC), news media and commentators etc.

Is it reasonable to seek a single plan? After all, we live in a Federation which, of its nature, recognises diversity in governance. But, Federation or not, domestic territorial boundaries should be no barrier to an equitable, efficient and effective legal system. Federation only makes this goal, as it does so many others, more difficult to achieve.
Further though, even within a single jurisdiction — state, territory or federal — there are different and sometimes competing organisations responsible for the delivery of legal services: different professional bodies, government departments and autonomous agencies. Indeed a cause of this problematic division of responsibility is one of the very tenets of our legal system — the division of powers between the court and the legislature.

Among the multiplicity of responsible agencies there is a further, perhaps fatal issue: to what extent are any of those responsible for the delivery of legal services concerned first about ensuring public access?

These thoughts are merely to tease out the many obstacles to achieving a single plan in Australia for public access to legal services: none is a reason for not aspiring to such an end.

Such a plan would be a perception, a picture, a design, of the dynamic between the rule of law and the community. It would be a detailed and agreed statement which defines the ideal relationship between law and its community, and towards which those who manage and shape that relationship can work together. In short, a plan for the means of access to law.

Such a plan would serve as a blueprint within which the extensive and repeated efforts towards cooperation and coherence could operate. The deliberations of the Standing Committee of Attorneys General (SCAG), and of the Council of Australian Government (COAG) (for example, their Working Group report on the Reform of the Legal Profession 1996), the efforts of the Law Council and of National Legal Aid, the discussions between professional associations, government and consumer groups: all might benefit from the focus that would come from a broad, and broadly agreed, structure and design for the operation of law, developed from the perspective of those who use it.

But if there hasn’t been national consensus on a fair means of access to law to date, why look for it now?

We live with a legal system that is the result largely of evolution. We have arrived at the current relationship between law and the community through a mixture of planning and happenstance; where there has been planning it has been in the hands of dozens of different authorities.

Whatever opportunities and efforts there have been to take and shape the legal system, our evolved system is always less than perfect, and sometimes too much so. In a time of intense change there is now an opportunity to take and shape the legal system towards an agreed standard for fair public access.

The opportunity exists because society is undergoing substantial change at an unprecedented rate, at the same time that it has an unprecedented sensitivity to change, an unprecedented capacity to obtain and analyse information about change, and an unprecedented level of resources to manage change.

Those who share responsibility for different areas of the law/public relationship include Attorneys General, the various Law Societies and Bar Associations, Chief Justices, and the ACCC.

What would each of these say if asked what their plan is for the future structure and management of the delivery of legal services? A more particular question would be: ‘What is your plan to ensure the highest level of public access to legal assistance?’

If any of these organisations or individuals had an answer, the detail of one answer would be unlikely to coincide with the detail of any other. But even if it happened that they were all working towards a very similar model, then the division of responsibilities and the institutional difficulties of coordination would severely hinder, if not prevent, the achievement of that plan.

Could a single plan ever be agreed on? If so, could it ever be realised?

Any agreement on a plan assumes first that the parties agree on a shared vision and on shared values — that they are all involved for the same purpose. Further, it relies on unprecedented levels of consultation, discussion and cooperation; with reckless optimism, I think that that can be achieved.

To realise an agreed plan will require a very substantial, deep, authoritative, comprehensive and consistently current understanding of the forces of change. It also requires a sophisticated process that will develop that understanding into a plan or a model, and the willingness and ability to cooperate in implementing that model. A process is necessary to manage the consultation, discussion and cooperation, and the comprehensive and current understanding of the forces of change. Scenario planning is such a process.

The methodology

The legal system is as amenable to planning and management as other areas of public activity such as health, the environment and transport. For law, as much as for other social policy areas, ‘[w]e can anticipate future developments to a degree that is useful to planning, we can act to encourage the desirable and discourage the undesirable alternatives, and we have a moral obligation to be smart about the future’.

Scenario planning is a method of preparing for possible eventualities. It enables players in a system to plan for possible futures, and to alter their current patterns of thinking. As a methodology it is well established in both public and private sectors. In Australia it has been used to plan public management of, for example, science research, land management, and social policy.

There is a range of methodologies that might be used to make sense of current forces of change and to plan for their consequences, grouped under the name ‘future studies’. As terms of art, the different methodologies are subject to constant promotion, definition and re-definition; the various competing terms are usefully discussed and categorised by Melbourne-based ‘futurist’, Rick Slaughter. Slaughter describes scenario planning as ‘Standard, high quality futures technique … one of the most productive methods’.

Scenario planning is usefully described by Peter Schwartz and is well taught in courses run by the Australian Business Network. In summary, from Schwarz, there are eight steps, each of which is undertaken by the project group in a facilitated process.

First the group identifies the ‘focal issue’, or decision. This is the question that must be answered, the essential point to which the exercise will return in the end.

The second step is to list all the factors bearing on that question: all the facts about the relevant local environment. Next, and most substantially, the group identifies the driving forces that influence the local environment. This is the part where forces of change are identified, requiring substantial research outside the group to support its deliberations: research into changes in politics, technology, the economy, demographics, trade, social systems etc.
The fourth step is for the group to rank these forces of change by two criteria: degree of importance to the focal issue, and degree of uncertainty as to their future. As Schwartz says, "the point is to identify the two or three factors or trends that are most important and most uncertain".6

In doing this the group identifies 'the axes along which the eventual scenarios will differ'.7 This, the fifth step, is the key to scenario planning: it provides the tool by which people can anticipate and plan for possible futures that may result from identified change. In this step, two of the important/ uncertain factors will form the axes of a matrix, in the quadrants of which different scenarios can be described. Different players in relation to the focal issue will select the important/uncertain factors that will define a relevant matrix for them.

Next the group fleshes out the scenarios in each quadrant of the chosen matrix, feeding each of the environmental facts from step two back into the scenario to consider how it will be affected. The scenario becomes a story, a description of a possible future developed by the group.

In the seventh stage the focal issue is tested in each scenario: How does it look? What are the implications for the issue in each scenario? Does the issue have a clear and strong future in only one or some of the scenarios? What strategies can give it a future in those scenarios where it is threatened?

Finally, the group considers the advance warnings and indicators that will show which of the scenarios is developing.

What I have described is a long, tough, intense and expensive process. It is also well tested, well regarded, and very powerful.

But anticipating the future is not a science. With all the variables that can be anticipated, and the very many more that cannot, the best that a 'telling the future' exercise can achieve is to identify a range of futures: the possible, the probable, and the preferable. These should enable players in the field to prepare for, or to influence, the future.8

An exercise of this sort has been undertaken in Australia for science and technology by the Australia Science Technology and Engineering Council (ASTEC): Developing Long-term Strategies For Science and Technology in Australia Commonwealth of Australia 1993. The success of that project confirms that long-term policy can be planned using methodologies that attempt to come to grips with current forces of change and to anticipate their effects.

The purpose of the ASTEC study was more market-oriented than the same exercise for law would be. But, importantly, the ASTEC project had a stated aim of giving profile to a process that will manage change and address broad issues of skills, culture, innovation and communications.

Although not as part of a formal scenario planning exercise, forces of changes were identified and analysed in the Wallis Report.9

Similar exercises have been done in law. In the public sector for example, the Commission on the Future of the California Courts produced in 1993 Justice in the Balance 2020, a vision statement and a long-term plan for the development and operation of courts. This was developed using scenario planning, enabling the courts to take account of current and possible social and economic trends in planning their services.

For the future of commercially viable private legal practice, the American Bar Association runs the Seize the Future project <http://www.futurelaw.com> using trend analysis to anticipate the future. By running online discussion groups and convening structured meetings of practitioners, the project assesses the impact of current developments and trends affecting the profession, and gives lawyers tools for gearing their practice towards new demands in a new environment.

Using scenario planning
As I described above, scenario planning is a large cooperative, consultative and resource-intensive effort. It is not properly done alone; indeed much of the debate, analysis and resolution of issues central to the method cannot be done other than in a group.

So consider my approach to date as 'adapted scenario planning': I was informed by the method in undertaking a resource-limited process of my own. The steps I have taken to date are consistent with the method, although some have not been done as intensively, extensively and consultatively as they should be.

Taking the first step myself, after wide ranging consultations, I identified the focal issue as: 'How in the future will the public (corporate, government or individual), get fair access to expertise in, knowledge of, and help with dealing with law?'. My shorthand for this issue is simply 'fair access to law'.

For the second step in the scenario planning process — identifying the key factors that bear on this issue — I undertook empirical research. I went through a form of stocktake, conducting a series of focus groups throughout New South Wales, and at the National Community Legal Centres Conference, with lawyers, community workers, accountants, young people and business people.

These focus groups enabled me to establish community perceptions of current factors that bear on the issue of fair access to the legal system. I asked: 'What do you think are current issues concerning the provision of legal services, ie of the availability to the public of expertise in, knowledge of, and help with dealing with law?'.

Participants had the following further prompts:

- What factors, trends and changes are affecting the providers of legal services?
- What is happening to the recipients of legal services: are they changing in identity, attitude, ability, expectations?
- What is happening to the general environment: demographics, government policy, information technology, competitive providers etc?
- For each of these phenomena, what more can you see happening over the next 10 years?

Current factors: the research data
The research gave rise to a substantial amount of qualitative data: an indication of trends, thoughts, ideas and opinions that have currency in the community, that is, among those whom law serves.

It was sometimes difficult in the focus groups to direct participants' sights beyond the practice, and often the personality, of lawyers. The research canvassed views on the legal system generally, on the operation of law, the responsiveness of law makers, the operation of parliament, the operation of the courts, the dynamic of citizen and the legal system, access to legal information, legal advice and legal
assistance etc. But initial impressions were commonly formed by perceptions of 'personified law': the legal practitioner. I sorted and analysed the data, grouping it and formulating it into a series of statements that reflect the views expressed in the focus groups. Table 1 lists some of the data drawn from the focus groups, recast as statements or observations. The statements sometimes span different groupings, are not always consistent with each other, and are often inter-related. The factors described in the statements are neither "good" nor "bad", although some may seem intrinsically one or the other. These are the factors that bear on the issue of fair access to law: they describe the relevant environment.

This data is the basis for the third step towards designing scenarios: identifying the driving forces of change. At this point the exercise becomes one that needs to be done on a large scale: discursively, informed by a variety of views, and with extensive research. For the sake of illustrating and advocating the method, I have nominated the driving forces that I think explain the data, informed by reading some of extensive current research into change.10

The two steps I have described above are work done to date; what follows is illustrative of work still to be done.

Getting to a scenario matrix

Combining steps three and four in the scenario planning process, I suggest that the following are some of the driving forces that explain the data, ranked on the basis of both their importance to the issue of fair access to legal services, and the level of uncertainty as to which way they will develop:

1. Competition policy
2. Information technology
3. Consumerism and the Rights movement
4. The Welfare State and its decline
5. Globalisation
6. The move to business-based planning
7. Urbanisation

Each of these phenomena requires its own detailed analysis. For example, by 'Competition Policy' I refer to policies, advocated in what is known colloquially as 'the Hilmer Report', that are 'specifically directed at promoting competition, and policies which have an indirect impact on competition ... [C]ompetition policy includes issues concerning privatisation, deregulation of public utilities and agricultural marketing boards, occupational licensing, the professions and many others.11

Clearly the reach of competition policy is extensive, and it is an increasingly powerful force driving change in the legal system; as detailed by the perceptions in the focus groups. The other driving forces I have listed are similarly influential, and warrant detailed analysis.

Next comes the crucial fifth stage in scenario planning: establishing the axes of a matrix within which possible future scenarios will be described in detail. For example, the two most important and volatile driving forces form the axes, the extremes of each axis are the predicted extremes of uncertainty. This creates four quadrants, each a possible scenario for the future.

People with different concerns in relation to achieving a system of fair access to law can select different axes, and consequent matrices, according to their particular interests and concerns. To illustrate this part of the process, I have created a matrix, shown below.

| Highiy competitive and fully deregulated legal services | Limited access in the community to IT-based legal information and resources | Universal community access to IT-based information and resources | Some deregulation, and controlled competition |

Fleshing out the four resulting scenarios in each quadrant is, as I described above, the key part of the scenario planning exercise. How, for example, is the focal issue of access to law addressed in the top-right scenario, where the public have extensive access to high quality legal information and services online, and the legal profession is effectively deregulated? Very differently from the opposed bottom-left scenario of limited online access and a conventional legal profession.

Working with these driving forces and the matrix device, and anticipating and detailing the resulting scenarios, can be an effective way to anticipate and plan various parts of our legal system, if not the system as a whole. Players in the system can make their own plans, for their own interests, in the scenario they think most likely. However, I see the best outcome from such an exercise being a comprehensive plan within which all players can make their own plans towards a common goal.

Conclusion

An exploratory exercise of this sort is not a natural one for practising lawyers. Lawyers are inclined very much to a normative analysis: knowing the desired result and working out how to get there. The challenge is to abandon the security of a known destination, and to concentrate on the journey.

Maybe the necessary mix of interests among many players, and the intellectual training of policy makers, militate against such an exercise being undertaken by and within the legal system. Perhaps, despite the desirability of ownership of the process among those being asked to change, the process is better done independently, creating a tool with which to advocate for change.

In any event, those are issues of who should do it, not whether it should be done. Planning needs to be undertaken on a substantial scale, for the long term. As one possible method, a scenario planning process for access to law in Australia would result in a constructive basis for planning the future operation of law and the legal system. It would also generate new and flexible thinking among the key players, engage their enthusiasm and cooperation, and achieve consensus in the design and management of a chosen scenario.

Scenario planning, or any sound method of future studies, is a process that requires time, money, commitment, and willingness to let go of beliefs and interests. Whoever is to do it, and however it is done, a considered and managed approach to change in the legal system, using innovative but established planning methods, would be a major advance in committing the legal system to serve the public interest.

References

Table 1

<table>
<thead>
<tr>
<th>The public</th>
<th>Rural legal practices</th>
<th>Legal practices</th>
<th>Lawyers</th>
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<tbody>
<tr>
<td>are increasingly able and inclined to shop around for legal services</td>
<td>have fewer in number</td>
<td>are increasing their advertising</td>
<td>are always winners</td>
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<tr>
<td>are more aware of legal services through advertising</td>
<td>are concentrating in larger centres</td>
<td>are growing in the cities</td>
<td>are wealthy</td>
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<tr>
<td>are still not aware of legal services</td>
<td>are geographically more removed from clients</td>
<td>are splitting clearly into 'city', 'small', and 'rural'</td>
<td>are oversold</td>
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<tr>
<td>are paying lower legal costs</td>
<td>are encroached on by city-based legal practices</td>
<td>are closing the rural/city gap</td>
<td>are costly</td>
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<tr>
<td>and quality of legal services</td>
<td>have moved into new areas of law</td>
<td>are reducing pay to employed lawyers</td>
<td>are trusted in the community</td>
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<tr>
<td>have no benchmark for cost and quality of legal services</td>
<td>have a smaller pool of available staff</td>
<td>are less financially viable than they were</td>
<td>are not trusted as they once were</td>
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<tr>
<td>and a general decrease in reliability of legal practitioners</td>
<td>are not attractive to graduates</td>
<td>are less profitable than they were</td>
<td>are less trusted by their clients</td>
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<td></td>
<td>have reduced profitability</td>
<td>are inefficient</td>
<td>have a reduced sense of ethics</td>
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<td></td>
<td>are doing less business law</td>
<td>are becoming more efficient</td>
<td>are held in low esteem</td>
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<td></td>
<td>have increased welfare law practices</td>
<td>have increasing overheads</td>
<td>have a declining reputation in the community</td>
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<td></td>
<td>are having an increasingly young client base</td>
<td>are able to lower their operating costs</td>
<td>are the wrong people to be lawyers</td>
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<td></td>
<td>have more clients on social security</td>
<td>are more expensive to operate</td>
<td>are not well prepared by their legal education</td>
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<td></td>
<td>have more recently arrived migrants as clients</td>
<td>carry increased expenses that must be passed on to the client</td>
<td>continue to see themselves as an elite</td>
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<td></td>
<td>have more Aboriginal clients</td>
<td>are subject to greater demands from the clients</td>
<td>are under increased scrutiny</td>
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<td>have more clients with less wealth</td>
<td>are more accountable to clients</td>
<td>are vulnerable to media clients</td>
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<td></td>
<td>help clients cope with reduced government services and support</td>
<td>are expensive by their nature</td>
<td>are good at media relations</td>
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<td>are subject to greater competition</td>
<td>are becoming more productive</td>
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<td>are increasingly competing against each other</td>
<td>are increasingly insular</td>
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<td>are more difficult to manage</td>
<td>are more adversarial</td>
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<td>are better managed than they were</td>
<td>use litigation as a threat</td>
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<td>are becoming more business-based</td>
<td>have reduced rights of appearance</td>
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<td>are increasingly opening</td>
<td>promote personal injury and compensation claims</td>
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<td>are becoming more specialised</td>
<td>are not result-focused</td>
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<td>are becoming less generally able</td>
<td>do not give fixed quotes</td>
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<td>are less able to specialise in poor paying areas of work</td>
<td>are changing their work patterns and practices</td>
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<td>are covering a wider range of potential income-earning areas</td>
<td>are able to engage in increasingly flexible work practices</td>
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<td>have moved into new areas of law</td>
<td>are having to develop new skills</td>
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<td>are less able to support pro bono work</td>
<td>are losing skills in areas from which they are excluded or where there is competition</td>
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Other professionals (eg accountants)

- are increasingly able and inclined to shop around for legal services
- are more aware of legal services through advertising
- are still not aware of legal services
- are paying lower legal costs
- and quality of legal services
- have no benchmark for cost and quality of legal services
- and a general decrease in reliability of legal practitioners
- are more inclined to seek redress and compensation
- have an increased sense of expectation and entitlement
- are increasingly litigious
- have greater self-reliance
- are less willing to take responsibility for their circumstances
- are less able to resolve their own disputes
- are making greater use of legal services
- are less reliant on lawyers
- have a greater need for lawyers
- have greater access to information
- have more options in getting legal solutions
- have access to fewer solicitors in rural areas

2. See, for example, Bell, W., "What Do We Mean by Future Studies" in R. Slaughter (ed.), New Thinking for a New Millennium, Routledge, London, 1996, pp.3-25.
4. Slaughter, R., ref.3 above, p.15.