JUSTICE DELAYED IS JUSTICE DENIED

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Historical acknowledgements of delays in the justice system often recognise the perspective of the accused or the disputant, and suggest that for a person seeking justice, the time taken for resolution of their issue is critical to the justice experience. In essence, these acknowledgements are consistent with more recent research which has shown that the time taken to deal with a dispute is a, and in many cases the, critical factor in determining whether or not people consider that the justice system is just and fair. This article considers issues in the justice system that are related to timeliness and the interconnectedness of the definition of delay and contends that the nature of delay in the current justice environment is contingent on many aspects and mechanisms utilised by the modern justice system. The question of whether justice delayed is justice denied appears to depend on whether delay is inappropriate, out of proportion or avoidable.

I: INTRODUCTION

William E Gladstone, former British statesman and Prime Minister in the late 1800's, famously said 'justice delayed is justice denied'. However he was not the first to express this notion, and it is arguable that its meaning has been articulated in many different ways for thousands of years.[1] Historical acknowledgements recognise the perspective of the accused or the disputant, and suggest that for a person seeking justice, the time taken for resolution of their issue is critical to the justice experience of this person and can render their treatment wholly 'unjust' in circumstances where finalisation of a dispute takes 'too long'.

In essence, these acknowledgements are consistent with more recent research which has shown that the time taken to deal with a dispute is a, and in many cases the, critical factor in determining whether or not people consider that the justice system is just and fair.[2]

Recent research by the Australian Centre for Justice Innovation's ('The Centre') about timeliness and justice has taken place in the context of recognition that the justice system has breadth beyond more formal justice processes that operate in courts and tribunals. In particular, civil dispute resolution mechanisms include many processes and institutions which are focused on justice, such as external dispute resolution ('EDR'), broader alternative dispute resolution ('ADR'), as well as the sort of 'everyday justice' that is used when disputes are either avoided or resolved directly.[3] This article considers issues in the justice system that are related to timeliness and the interconnectedness of the definition of delay, whilst also

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1 The idea is said to have first been expressed in the biblical writings of Pirkei Avot 5:8, a section of the Mishnah (1st century BCE – 2nd century CE) in which it is stated 'Our Rabbis taught: ...[t]he sword comes into the world, because of justice delayed and justice denied...'; as well as in the Magna Carta of 1215, cl 40 of which reads, '[t]o no one will we sell, to no one will we refuse or delay, right or justice.; Martin Luther King Jr also said 'justice too long delayed is justice denied' in his Letter from Birmingham Jail (August 1963).

2 T Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Australian Centre for Justice Innovation, 2009) 117–18; T Sourdin, *Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts* (Australian Centre for Justice Innovation, 2012) 127–47.

3 T Sourdin, *The Timeliness Project: Background Report* (Australian Centre for Justice Innovation, 2013).

considering the impact of delay on the experience of the justice system user. The article also considers the innovations that have been introduced to address the issue of lack of timeliness in the justice system (including ADR) and provides an overview of potential innovations that might support timeliness into the future. Initially, issues that arise in the context of a definition of timeliness are considered as these issues have arguably constrained the development of strategies.

II: Defining Timeliness and the User Perspective

In order to explore delay as the critical factor which shapes a user's perception of whether justice has or has not been done, it is important to define timeliness, and by distinction, to define delay. The concepts of timeliness and delay are distinct notions and a thorough understanding of the definition of one is necessary for definition of the other.

Timeliness is a complex and subjective concept, which means that it may be defined differently by disputants, legal and other professionals, academics, court staff, administrators, judges and others.[4] The relevant literature features 'definitions of timeliness', many of which refer to elements of a process, rather than an objective statement about the meaning of timeliness. Most of these definitions of timeliness do not refer to it in the context of the broader justice system but are confined to relevance only in court and tribunal processes and they are usually discussed with reference to 'time standards'.[5] A time standard may measure waiting times and can require, for example, that 90% of all cases commenced in a lower civil court be finalised within six months.[6] Time standards are often the means by which timeliness is measured and these are often regarded as a proxy for timeliness. However, the two are not interchangeable. Generally, time standards are measures of efficiency and effectiveness set by courts and other institutions to support performance standards and indicators that aim to ensure efficient processes and accountability.[7]

Research has suggested that different stakeholders can and do use these time standards in different ways: courts use time standards to set achievable benchmarks and key performance indicators; lawyers and other practitioners can use them as milestone guides; and the public can use them to inform their expectations.[8] As such, it has been said that the purpose of time standards might be a mechanism for addressing the interests of these four principal stakeholders in the justice system: the courts, practitioners, government and disputants who use the system, however, in practice, this does not seem to be the case.

Also where time standards are used and where the definition of timeliness is limited to a consideration of months or days that pass there may not be a consideration of the relationship and appropriateness relating to the dispute and the process, the subjective experiences of the parties involved and the objective fairness of the process itself.

4 Ibid.
5 Ibid.
6 See, eg, New South Wales Government, *Local Court Time Standards* (14 March 2012) <http://www.localcourt.justice.nsw.gov.au/localcourts/timestandards_pracproc.html>.
7 Sourdin, *The Timeless Project*, above n 3.
8 R Van Duizend, D C Steelman and L Suskin, *Model Time Standards for State Trial Courts* (National Center for State Courts, 2011), 2 <http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1836>.

The *International Framework for Court Excellence* [9] recognises that 'time' is a relative and subjective concept and that the principal issue in dispute resolution is not the extent of delay, but its reasonableness. This approach is consistent with considering the disputant perspective.

There is limited research which provides insight into the disputant perspective in relation to the time taken for the resolution of their disputes. There are however many reports that have commented on the impact of delay. For example, the Victorian Law Reform Commission has suggested that many litigants in the higher courts are dissatisfied as a result of delay, inefficiency and disproportionate legal costs.[10]

Some past evaluation reports have considered the impact on litigants. For example, research into perceptions of litigants in the Supreme and County Courts[11] noted that in focus groups litigants considered that excessive delay resulted in injustice. One litigant said that his case '… took five years to settle. Each dismissal incurred more costs… [a] simple "unfair dismissal" case'.[12] Another litigant asked, '[w]hy does something that is so straightforward have to go through such a prolonged process?'[13] Other concerns around the delay expressed cynicism and despair. 'We had to go through this dance [issuing writs etc]. He must have seen a mounting legal bill…for us it was quite daunting as we were going to be homeless and could not wait six months to settle.'[14]

Other larger scale studies have shown a positive correlation between delay and dissatisfaction. The Financial Industry Complaints Scheme Review suggested that whilst outcome can be an important factor in determining levels of satisfaction, other factors such as levels of participation, perceptions of fairness, costs, delay and control are important in determining levels of satisfaction and positive perceptions about processes.[15]

More recent research detailed in *Exploring Civil Pre-action Requirements: Resolving Disputes Outside Courts* (2012),[16] also provides some insight into the impact of delay on disputants who were surveyed in relation to Retail Tenancies disputes associated with the Office of the Small Business Commissioner. A small number of disputants reported that they were affected by the length of time their dispute took, and these impacts included their business being affected; personal stress; physical exhaustion, increased legal costs, inconvenience and extra workload.[17]

It may be that the different stakeholders (such as lawyers, disputants, judges and others) have different views about the reasonableness of delay or what constitutes a reasonable time to deal with a dispute.[18] For instance, the lawyer in a dispute might consider that there has been timely resolution via ADR if the matter has been resolved six months after court proceedings have commenced. A disputant who has been involved in the dispute for two

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9 International Consortium for Court Excellence, *International Framework for Court Excellence* (2008) National Center for State Courts <http://www.ncsc.org/Resources/~/media/Microsites/Files/ICCE/IFCE-Framework-v12.ashx>.
10 Victorian Law Reform Commission, *Civil Justice Review: Report* (2008) 10.
11 Sourdin, *Mediation in the Supreme and County Courts of Victoria*, above n 2.
12 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
13 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
14 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
15 J Elix and T Sourdin, *Review of the Financial Industry Complaints Scheme – What are the Issues* (La Trobe University, 2002).
16 Sourdin, *Exploring Civil Pre-Action Requirements*, above n 2.
17 Ibid 131.
18 T Sourdin, 'Using Alternative Dispute Resolution (ADR) to Save Time' [2014] (pending) *Arbitrator & Mediator* 47.

years (including the 18-month period prior to filing with a court) may take a different view.[19] Judges may have differing views again. McClellan J (NSW) has also voiced concerns about timeliness and cited Sir Anthony Mason, stating 'the rigidities and complexity of court adjudication, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice'[20] although it is probable that many judges consider that justice takes time and that the careful consideration of a dispute necessitates slow moving processes.

In Australia and around the world, timeliness and delay are generally measured by gauging the time taken for a dispute to progress from the commencement point of filing or referral to resolution. That is, the time taken for the matter to progress from the filing of some type of documentation to finalisation within a court, tribunal or via ADR processes.[21] It is rare that time is ever measured from the date that the cause of action arose (for example, the event, being an injury or breach of contract). Time standards therefore tend to be oriented towards the business of schemes, courts, tribunals and others, rather than from the orientation of disputants.[22]

The *International Framework for Court Excellence* describes timeliness as a balance between the time required to properly obtain, present and weigh the evidence, law and arguments, and unreasonable delay due to inefficient processes and insufficient resources.[23] In addition, the literature which was considered in the Timeliness Background Report notes that timeliness is and must be related to other factors such as the cost, quality of and access to the justice system.[24] It is important to acknowledge that, 'in striving for timeliness, other aspects of quality must not be disregarded'.[25]

Research undertaken by The Centre relating to Timeliness resulted in the creation of the following definition of timeliness, which is intended to take into account the objectives of the broader justice system and the passage of disputes by reference to the needs of the disputants and others: The extent to which;

a. those involved in the dispute and within the justice system consider that every opportunity has been taken to resolve the matter prior to commencing or continuing with court proceedings;
b. processes are efficient and avoidable delay has been minimised or eliminated throughout the process on the basis of what is appropriate for that particular category or type of dispute; and
c. the dispute resolution process that has been used is perceived as fair and just and where adjudication within courts and tribunals has taken place, the outcome supports the rule of law.[26]

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19 Ibid.

20 P McClellan, 'The Australian Justice System in 2020' (2009) 9(2) *Judicial Review* 179 and P McClellan, 'ADR – An Introduction' (Speech delivered at the Chinese National Judges' Conference, Kunming, April 2008) citing A Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th Australasian Institute of Judicial Administration Annual Conference, 6-8 August 1999).

21 Sourdin, *The Timeliness Project*, above n 3.

22 Ibid.

23 International Consortium for Court Excellence, above n 9.

24 Sourdin, *The Timeliness Project*, above n 3.

25 European Network of Councils for the Judiciary Project Team, *Timeliness Report 2010–2011* (May 2011), 7 <http://www.encj.eu/images/stories/pdf/GA/Vilnius/report_on_timeliness.pdf>.

26 Sourdin, *The Timeliness Project*, above n 3.

III: THE 'LAPSING OF TIME' AND DELAY

Some commentators have referred to the need to distinguish between a 'lapse of time' (which is inevitable) and 'delay', thereby distinguishing between a necessary lapse of time and the lapse which is avoidable.[27] Delay is therefore used to refer to a situation where time has elapsed that is avoidable.

The extent to which time elapsed can be avoided must be considered within the context of the changing nature of the justice system. Martin CJ from Western Australia has discussed the 'vanishing trial' and the fact that only 3% of cases actually result in a court hearing.[28] That is, 97% (or more) of civil cases are resolved without a court hearing and some research has suggested that cases often settle when they are 'ready' rather than when they are compelled to do so.[29] That is, the lapsing of time can be an advantage in allowing parties to come to terms with emotion or other feelings associated with the dispute, and in these cases, whether they are settled via ADR, negotiation or court processes, a lapse of time can lead to the more likely settlement of the dispute. In these cases, where parties are forced to participate in interlocutory case management processes, thereby incurring costs and also undertaking adversarial processes which are antithetical to consensual resolution of a dispute, it might be said that interlocutory proceedings designed to 'speed up' the resolution of the dispute can actually impede the course of real justice.[30]

Another instance where the notion of minimising delay to maximise justice might be said to be unclear has been referred to by former Chief Justice, Murray Gleeson. Despite the overwhelming evidence that suggests that where disputants or accused people have to wait an unreasonable amount of time for resolution of their issue, they have not been granted a just process, it is important to consider arguments which highlight the complexity of this issue, and the possible undesirable consequences which might arise where justice is 'sped up'. This conundrum arises from the notion that attempts to speed up the justice system, might lead to self-defeat, whereby courts who develop better systems for minimising the lapse of time and enacting more efficient disposition of certain kinds of cases (for example, mega litigation) simply 'make room' for and promote more of those cases.[31] Further, the Honourable C J Spigelman famously stated that 'not everything that can be counted matters, and not everything that matters can be counted'.[32] That is, just because time can easily be counted, it does not mean it should be counted. Time standards, which are a counting of time between one event to the next, is therefore a questionable approach to determine whether timeliness or delay is appropriate. Standards and court data currently merely measure the lapse of time. In fact time standards, measuring the median lapse of time for a

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27 Chief Justice Wayne Martin, 'Because Delay is a Kind of Denial' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014) <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1015&context=timeliness>; Sourdin, *The Timeliness Project*, above n 3.

28 Chief Justice Wayne Martin, 'Managing Change in the Justice System' (Speech delivered at the 18th AIJA Oration, Brisbane, 14 September 2012) 28.

29 Justice PA Bergin, 'Judicial Mediation: Problem and Solutions' (2011) 10(3) *Judicial Review* 306, 309.

30 Martin, above n 27.

31 Murray Gleeson, 'Managing Justice in the Australian Context' (2000) 77 *Reform* 62, 63-4.

32 J J Spigelman, 'Judicial Accountability and Performance Indicators' (Speech delivered at the 1701 Conference: The 300th Anniversary of the Act of Settlement, Vancouver, 10 May 2001) 7; Martin, above n 27.

great variety of cases often will not provide any accurate measure of timeliness, as they may not take into account the type of case (for example, criminal, civil, personal injury), the degree of complexity of the case nor the process of finalisation.[33]

Another example of measurement without qualitative considerations of case characteristics, can be seen in the criminal justice setting, where the tendency to measure overall court delay without acknowledging the vast differences in cases and situations has led to some misleading conclusions about delay. For example, where criminal trial matters are finalised in different ways (for example on a guilty plea or by a 'no-bill' where the prosecution decides not to proceed with the matter), the time taken is generally shorter than where a trial is actually held and a determination of guilt or innocence is reached.[34] The measurement of the court delay in each of these instances without distinguishing between the two types of cases would provide a misleading illustration of the performance of criminal courts.[35]

IV: WHAT CAUSES A LACK OF TIMELINESS?

There are many reasons for a lack of timeliness in the justice system. In the criminal court system time wasting may take place where there has been a failure to isolate the issues requiring determination before the trial commences.[36] The result of this is that jurors may lose track of the evidence and the trial judges are unable to exert influence over advocates to ensure that the trial runs efficiently, as the issues are not clear.[37] Another identified cause of inefficiencies in the criminal court system is the use of information technology in the form of electronic surveillance. Whilst this may seem to contradict the notion that information technology ('IT') can provide efficiencies to minimise delays (as discussed in relation to innovation and the current climate of timeliness in this paper), electronic surveillance can impose significant burdens on jurors, if they are forced to watch hours of footage.[38]

In the broader justice system, including civil and family areas of law, cultural factors often play a major role in a lack of timeliness. The factors may include a lack of interest in courts or the creation of a 'slow speed' culture. This can be linked to judicial and court cultures as well as litigant and representative cultures. For example, a particular concern for courts relates to situations in which parties attempt to cause strategic delays in order to 'wear the claimant down to accept a lower settlement'.[39] Other aspects of cultural factors relate to litigant and representative behaviour, which might demonstrate a degree of 'bad faith', whereby delay is caused deliberately, or where the culture of a particular jurisdiction is such

33 Sourdin, *The Timeliness* Project, above n 3. In addition, whether a registrar, judge or other person is involved in the administration of a case is another element which can affect the amount of time to resolution, and these types of variations are not taken into account in the measurement of time in existing standards.

34 Yeh Yeau Kuan, 'Long Term Trends in Trial Case Processing in New South Wales' (2004) 82 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1, 2.

35 Ibid, D Weatherburn 'Measuring Trial Court Performance: Indicators for Trial Case Processing', (1996) 30 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1.

36 McClellan, above n 20, 186.

37 Ibid.

38 Ibid 187.

39 S Tan, L, *Resolving Disputes without Courts: Commentary from Law Council of Australia* (22 June 2012) Civil Justice Research Online, 6 <http://www.civiljustice.info/access/5/>; Sourdin, *Exploring Civil Pre-Action Requirements*, above n 2, 39-40. ; Sourdin, *The Timeliness Project*, above n 3.

that 'settlement' and speedy resolution (perhaps outside of courts) is simply not part of the legal 'culture'. For example, in respect of Federal Court of Australia proceedings, it has been suggested that '…in Melbourne, we'll settle and in Sydney, they just won't … it reflects on time to trial …[40] and:

> [i]n the Northern Territory, everyone was very polite with each other … in Darwin you can't write one of those letters telling someone to […] off because you are going to have to deal with them and they might even be on the same side. In Sydney you know you are never going to deal with them again so the correspondence can be a bit more robust. I see a difference – I find Darwin and Hobart very polite jurisdictions, they all know their style and history, if you do something that puts your reputation in issue, everyone will know, but in Sydney you can hide behind layers of partners … there is a different vibe.[41]

To combat some of these 'bad behaviours', measures such as the introduction of obligations to encourage 'reasonable' or 'genuine' behaviour have been imposed on disputants and their lawyers. At times, the obligations are also extended to courts.[42] This has been done, in part, to promote efficient and at times more cooperative cultures within the justice system.[43] Outside the litigation system and in the broader justice system, obligations can be imposed by contracts, regulatory requirements, Legal Services Directions, legislation and requirements to engage in ADR to attempt to resolve differences before litigation is commenced. Within the court and tribunal system, extensive overarching obligations have been introduced in almost all Australian jurisdictions.[44] The objectives of these measures include the creation of a more efficient and effective process for the resolution of disputes, often resulting in more timely closure.

A: The Use of Obligations to Reduce Delay

As noted in the *Timeliness Background Report*, the obligations referred to above are intended to foster a more cooperative or collaborative approach to dispute resolution and litigation and therefore result in more timely finalisation of disputes. Some obligations are directed at specific groups within the justice system. The 2010 guide by the National Alternative Dispute Resolution Advisory Council ('NADRAC'),[45] was directed at cultural change by government (as a significant litigator) and encouraged the development and review of dispute management plans by federal government, including by ensuring appropriate use of ADR principles and processes. The guide sets out the essential topics and issues that agency-

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40 Comment at Federal Magistrates' Court Focus Group (conducted at Federal Magistrates' Court, Melbourne, 30 July 2012) in Sourdin, *Exploring Civil Pre-Action Requirements*, above n 2, 127-47.

41 Comment at Sydney Lawyers Focus Group (conducted at the Law Society of New South Wales, Sydney, 27 August 2012) in Sourdin, *Exploring Civil Pre-Action Requirements*, above n 2, 127-47.

42 See the *Civil Procedure Act 2010* (Vic).

43 Sourdin, *The Timeliness Project*, above n 3.

44 See *Federal Court of Australia Act 1976* (Cth) s 37M; *Court Procedure Rules 2006* (ACT) r 21; *Civil Procedure Act 2005* (NSW) s 56; *General Rules of Procedure in Civil Proceedings 1987* (NT) r 1.10; *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Supreme Court Civil Rules 2006* (SA) r 3; *Civil Procedure Act 2010* (Vic) s7; *Rules of the Supreme Court 1971* (WA) r 4B. The only jurisdiction that does not impose these types of obligation is Tasmania. There are also international examples of obligations, such as *Civil Procedure Rules 1998* (UK) and *Federal Rules of Civil Procedure*, 28 USC (2011); Sourdin, *The Timeliness Project*, above n 3.

45 NADRAC, *Managing Disputes in Federal Government Agencies: Essential Elements of a Dispute Management Plan* http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/managing-disputes- in-federal-goverment-agencies-essential-elements-september2010.pdf.

specific plans should address. In launching the guide in 2010, the Federal Attorney-General noted 'Commonwealth agencies are the single biggest litigator in the federal civil justice system. Agencies should therefore be leading the way in a cultural shift away from litigation, towards actively engaging with disputes early, in a strategic way'.[46]

Another example of the effective introduction of obligations to encourage speedier dispute resolution can be seen in the Northern Territory Supreme Court, *Practice Direction No 6 of 2009 – Trial Civil Procedure Reforms* ('*PD6*') which was designed in part to reduce delays associated with the resolution of disputes. Practitioners surveyed in 2012 in relation to the difference in time taken to resolve disputes before and after the introduction of *PD6* stated that a case that used to take three to four years to resolve before *PD6* could now be expected to take six months.[47] The introduction of *PD6* and the findings in relation to the reduction in time taken to resolve disputes might be seen as a response to the voice of the disputant.

In other jurisdictions, case management approaches have been coupled with 'good faith' requirements or an obligations framework and additional civil procedure rule to enable courts and tribunals to impose cost sanctions on those who unnecessarily delay, particularly if there is a 'good faith'[48] negotiation requirement or other set of obligations set out in an agreement or legislation.[49]

The introduction of the compiled codes of conduct, known generally as the '*Model Litigant Rules*', introduced by the federal and state Attorneys-General, have been more specifically focussed on government as a party in litigation. That is, where government and its agencies are involved in litigation, they are held to a high standard of practice requiring them, for example, to pay legitimate claims without litigation and focus on the real issues in dispute so as not to prolong litigation or incur extra costs by focussing on technical issues.[50] At present these approaches have been the focus of minimal evaluation. For the most part the focus remains on whether time standards are met and there is little linkage between case complexity, the meeting of obligations and data about time standards.

B: Using Case Management to Support Timely Dispute Resolution

Within the justice sector, without doubt innovations that relate to and are sometimes effective in addressing justice efficiency issues can be linked to case management. In the Court system, and in civil hearings, there have been modifications to the adversarial system that have been fostered by managerial case management and that are designed to provide a more efficient case management and hearing process. For example, in the Supreme Court

46 Robert McLelland, 'Getting Ready for Dispute Management Plans' (Speech delivered at the AGS Government Law Group Seminar, Canberra, 16 February 2010) http://pandora.nla.gov.au/pan/21248/20110723-0001/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/page/Speeches_2011_FirstQuarter_18February2011 - AGSGovernmentLawGroupseminar.html.

47 Sourdin, *Exploring Civil Pre-action Requirements*, above n 2, 135-6.

48 See T Sourdin, 'Good Faith, Bad Faith? Making an Effort in Dispute Resolution' (2012) 2(1) *Dictum: Victoria Law School Journal* 19; Sourdin, *Exploring Civil Pre-Action Requirements*, above n 2, 39-40 ; Sourdin, *The Timeliness Project*, above n 3.

49 See Sourdin, 'Good Faith, Bad Faith?, above n 48, and in particular the National Native Title Tribunal ('NNTT') requirements as discussed in S Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (Issues Paper No 4(3), Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, October 2009) <http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip09v4n3.pdf>; Sourdin, *Exploring Civil Pre-Action Requirements*, above n 2, 39-40.

50 Rule of Law Institute of Australia, *Model Litigant Rules* (2014) <www.ruleoflaw.org.au/priorities/mlrs/>.

of New South Wales, all parties are required to provide a statement of the relevant material, including the likely factual evidence, before trial.[51] These innovations are directed at ensuring experts are involved in early evidence gathering (before any hearing) and have resulted in more efficiency of cases, as well as a higher settlement rate of complex cases.[52]

Case management relating directly to court processes have also been shown to reduce delay. For example, in NSW in 2009, Justice Peter McClellan reported a significant reduction, stating that 'problems of delay have now substantially disappeared.'[53] He attributes this efficiency to an abolition of plaintiff's rights in some cases, whereby in the District Court and the Supreme Court, the court is able to offer a hearing date almost as soon as the parties are ready.[54]

Despite the benefits of case management in contributing to greater timeliness, it must be recognised that some experts and commentators see case management as an 'intrusion into the right of a litigant to pursue their own case as they saw fit'.[55] This notion that case management inappropriately intrudes into the adversarial system and unnecessarily burdens litigants, is further evidence of the sensitive balance required in addressing aspects such as timeliness, whilst ensuring the preservation of the course of real justice, as noted above in relation to interlocutory processes and the public interest. To this end, to ensure fairness and 'intrusion' only where absolutely necessary, case management must only be applied to cases which have been carefully analysed and identified according to established guidelines and principles.[56]

It should also be noted that case management may not necessarily be adapted to fit the circumstances of a particular case and may be oriented towards more generic time standards. The variation in approach in different courts and tribunals can mean that in some jurisdiction a 'one size fits all' approach can be used (with exceptions) whilst in other jurisdictions more individualised approaches to case management exist.

C: Innovations in Timeliness: Addressing Delay

The elements which define contemporary delay can also relate to areas of innovation. That is, increasingly, information technology and electronic support, proactive intervention and management including case management systems as well as ADR have been considered as mechanisms which might be harnessed to pursue a more efficient justice system and enable time standards to be met.

At the Timeliness in the Justice System: Ideas and Innovations Forum hosted by the Australian Centre for Justice Innovation and the Australasian Institute for Judicial Administration ('Timeliness Forum'), at Monash University in May 2014, many delegates, including judges, reflected on the focus on time standards and noted that earlier triaging or

51 Supreme Court of New South Wales, Common Law Division, *Practice Note SC CL 5*, 5 December 2006; McClellan, above n 20, 189.
52 Ibid.
53 Ibid 183.
54 Ibid.
55 Ibid 188 and see comments of J J Watling, in G Wallace, 'Speedier Justice (and Trial by Ambush)' (1961) 35 *Australian Law Journal* 124, 143-4.
56 McClellan, above n 20, 183.

'streamlining' and even abolishing of court processes in some disputes, might ensure speedier hearings. For example, it was suggested that hearings 'on the papers' could be used more frequently.

Other ideas for innovation to address and promote timeliness in the justice system, which arose from the Forum are as follows:

1. Judicial leadership is critical in supporting change in court and dispute resolution cultures.[57]
2. Leaders of justice organisations and agencies need to be more skilled in information and communications technology to understand how it is and can be used.[58]
3. Self-help, information, triage and other front-end loading (by way of 'early' action) should be employed in order to avoid entering the formal court or tribunal system if possible.[59]
4. The types of matters that end up in the court system need to be carefully considered. Arguably some disputes could be dealt with at an earlier time and in the pre action environment.[60]
5. There is requirement for clarification and emphasis of the principle and obligations relating to 'genuine effort'. That is, expectations across the system should be clear and better understood.[61]
6. Judges needs to engage with the profession and litigants to ensure obligations are met, that sanctions are imposed on those who don't comply, and address issues arising out of the litigation culture.[62]
7. There is a need to consider the 'invisible' determinants of delay including macro-economic factors and consideration must be had as to instances where delay is beneficial to parties or they have a vested interest in delaying. These must be addressed.[63]

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57 Judge Kevin Burke, 'Achieving Timeliness Requires Judicial Leadership: A Perspective form the United States' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014).

58 Simon Cohen, 'How Technology has Enabled Timeliness at the TIO' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014).

59 Darin Thompson, 'Civil Resolution Tribunal' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014).

60 Jeremy Gormly, 'Obligations: The Nine Other Cases' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014).

61 Andrew Bickerdike, 'Conduct Obligations in Family Law ADR: History, Current Practice, Future Possibilities' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014).

62 John Dixon, 'Reflections on Recent Cases and s 29 of the *Civil Procedure Act 2010* (Vic)' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014).

63 Cashman, Peter, 'Welcome and Introduction, Timeliness in the Justice System: Ideas and Innovations' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014), citing Kim Economides, Alfred Haud and Joe McIntyre, 'Are Courts Slow? Exposing and Measuring the Invisible Determinants of Case Disposition Time' (Economic Discussion Paper No 1317, University of Otago, November 2013).

8. Consideration should be given as to whether courts can be subject to independent examination and whether in general, courts are made to become open to examination (potentially challenging the notion of the separation of powers).[64]
9. Better data collection, data analysis and data management and maintenance is required in courts and tribunals, in order to ensure appropriate measures can take place to reduce delay in appropriate cases.[65]
10. There is a need for qualitative assessment which requires engagement with researchers, auditors and statisticians across the sector.[66]
11. Innovation should be supported by frameworks and organisations to ensure that systematic innovation, rather than ad hoc innovation takes place.[67]
12. Specialist court and tribunal lists and subdivisions should be introduced as well as the consideration of steps required for each of those case types. These should be supported by practice notes which set expectations for practitioners and disputants, and can be updated instantly.[68]

The suggested innovation areas can be linked to the material noted in the recent report of the Productivity Commission that also articulates the benefits and drawbacks of the court system by reference to the legal principles of more formal court and tribunal systems which allow a degree of certainty of outcome versus the risks of costs, delays and uncertainties.[69]

D: Data Collection Across the Broad Justice Sector

It is clear that innovation to support timely dispute resolution across the justice sector largely depends on an essential first step, which is the systematic and comprehensive collecting of qualitative as well as quantitative data. That is, the gathering of data, relating to every matter which contextualises the dispute in relation to the complexity, the characteristics of the disputants, the costs involved and the area within which the dispute occurs (for example, tenancy, personal injury or employment). Qualitative data must be kept consistently and across the sector, to allow comparisons and contrasts which will inform further insight into the determination of whether delay in a particular circumstance is avoidable, or not. On this basis, it can then be used to underpin the design of innovations such as those identified above, which should be designed to minimise delays, where delay is actually avoidable.

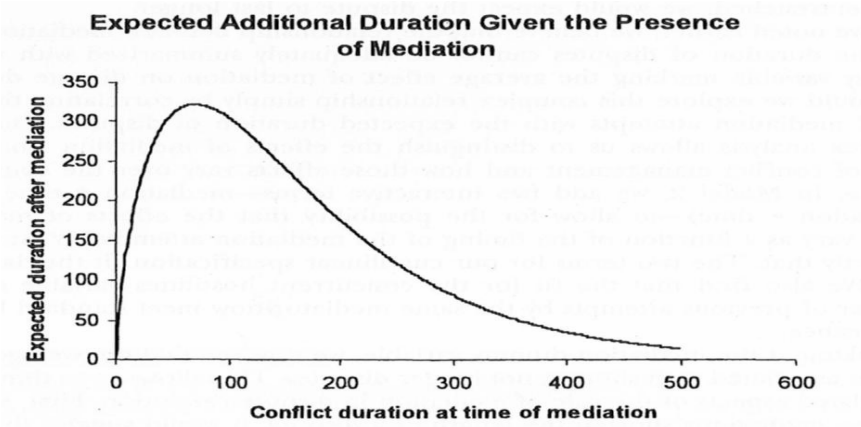
The data collection process is important not only in the context of the formal court and tribunal sector but also across the broader justice sector. For example, ADR is used in many

64 Ibid.
65 General comment made at the Timeliness in the Justice System: Ideas and Innovations Forum (Australian Centre for Justice Innovation Monash University Law Chambers, 16-17 May 2014).
66 Martin, above n 27.
67 Nerida Wallace, 'Timeliness from Above: Latest Ideas, Resourcing and Organisation' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014).
68 Judge Philip Misso, 'The County Court of Victoria: Timeliness' (Speech delivered at the Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014).
69 Productivity Commission (Cth), *Access to Justice Arrangements: Draft Report* (2014).

different contexts and can occur as a result of a diverse array of triggers, including court referral, regulatory schemes or through agreements. At present, the impact of ADR on timeliness and activity in the court and tribunal sector is less clear than the impact in the external ADR environment.[70] This is partly because of the limited and often inconsistent court data and statistics, which is also impacted by the fluctuation in the rate of litigation caused by significant legislative changes that have limited litigation in some areas (for example, in the personal injury area) and increased litigation in others (wills and estates).[71]

However, in the early 1980s, numerous court-led ADR initiatives (for example, the Spring Offensive and the portals scheme) undoubtedly cleared backlogs within courts.[72] The continuing use of ADR has also meant that many civil matters currently commenced within courts and tribunals are likely to be resolved through an ADR process and in less time than through a fully litigated hearing.[73] It should however be noted that the use of time standards to measure timeliness has meant that questions about the reasonableness of delays, or whether ADR processes could have occurred at an earlier time are obscured by reporting which focusses on the percentage of cases resolved within a 12 or 18 month period.[74]

An important aspect in considering the effect of ADR on timeliness in relation to the resolution of disputes, is the consideration of when ADR is undertaken over the life of the dispute. One study has suggested a curvilinear relationship between when the mediation occurs and the duration of dispute.[75] This has shown that on average, mediation shortens dispute durations and there are circumstances when this leads to shortening of dispute duration and times when this leads to the lengthening of dispute durations. That is, initially, mediation can be successful in ending dispute, however, very quickly, the effects drop substantially and the expected duration increases. After the dispute has then continued for some period, mediation begins to work toward shortening the dispute time again.[76]



Source: P M Regan and A C Stam, 'In the Nick of Time: Conflict Management, Mediation Timing, and the Duration of Interstate Disputes' 44(2) *International Studies Quarterly* 239, 253.

70 Sourdin, above n 18.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 PM Regan and AC Stam, 'In the Nick of Time: Conflict Management, Mediation Timing, and the Duration of Interstate Disputes' (2000) 44(2) *International Studies Quarterly* 239, 253.
76 Ibid.

Despite the evidence which suggests that ADR generally can assist with decreasing the time it takes for a dispute to resolve (whether within the court and tribunal or outside of it), there are many elements which can obscure the findings in relation to timeliness and these primarily relate to the lack of system wide data.

The lack of data also makes it difficult to examine whether obligations and requirements that have been placed on disputants to act in a 'timely', 'efficient', or 'effective' manner have been effective. In this context obligations also include requirements to act in particular ways if litigation is commenced. The obligations placed on various stakeholders through legislative reform, court-based initiatives and other reforms are often directed at fostering a culture that supports timely dispute resolution and finalisation.[77] Sometimes, obligations can be supported by cost sanctions – for instance, costs may be awarded against practitioners in respect of a failure to comply with obligations (see previous discussion).[78]

The measures relating to the legal environments mentioned above have been referred to as a 'cultural change' exercise and in effect, this forms part of the framework necessary to change approaches to timeliness and civil justice.[79] The continuing lack of data issues make it difficult to determine how and whether these approaches have been effective and if not, what could be introduced to support cultures that foster timely approaches to dispute resolution.

V: Conclusion and Future Directions

The nature of delay in the current justice environment is contingent on many aspects and mechanisms utilised by the modern justice system. These elements include information technology and electronic support, proactive intervention and management including case management systems as well as (ADR) for the resolution of civil, family and other disputes.

The question of whether justice delayed is justice denied appears to depend on whether delay is inappropriate, out of proportion or avoidable. Proportionality and appropriateness of time taken to provide an outcome for disputants is said to form part of the definition of timeliness, as per the definition above.

The discussion about delay and timeliness highlights some of the issues which are being and have been actively considered by stakeholders, commentators, courts and other justice actors. Many innovations have been directed at enhancing timeliness, where implemented with supporting mechanisms and sufficient resources, they appear to support a more efficient and proportionally timed justice experience for users. However, there are some challenges that must be surmounted in order to apply these systems (for example a lack of resources as well as the lack of consistent qualitative data about disputes), and in some cases there must be careful consideration as to the appropriateness of speedier process, versus other important interests (for example, public interest or other justice issues).

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77 Sourdin, *The Timeliness Project* , above n 3.

78 See *Civil Procedure Act 2005* (NSW). Under s 99, the court may take into account a legal practitioner's failure to comply with requirements requiring the parties to assist the court to further the just, quick and cheap resolution of the real issues in the proceedings: *Kendirjian v Ayoub* [2008] NSWCA 194 (14 August 2008); Sourdin, *The Timeliness* Project, above n 3.

79 Sourdin, *The Timeliness* Project, above n 3.

First and foremost, better data collection and maintenance is required to provide the fundamental material for analysis as to what is avoidable and what is unavoidable delay. Only once this contextualisation is available, can innovations then be more logically applied and extended, to ensure that disputes can be resolved as quickly as possible, and with timelines that are appropriate, depending on the complexity and other characteristics of that dispute and the disputants.

In addition, it will be important to ensure that there is an appropriate distinction between the concepts of time lapse and delay and that case management and other mechanisms are employed only in appropriate cases, where the delay is 'avoidable'. Some commentators have suggested that the notions of 'avoidable' and 'unavoidable' are value laden concepts and must not be equated with what is warranted and what is unwarranted to ensure a meaningful and fair analysis of what is 'avoidable' or not.[80] Further, it is imperative that a balance is struck between timelines and quality of the justice experience and this can only be measured quantitatively, by engaging with, and hearing the voice of disputants and participants. Some commentators have suggested that in some instances, delay in some courts and tribunals might be inevitable, or at least are so at the moment due to a lack of court resources. As a result, other options for resolution, such as ADR may be increasingly recognised as a more efficient way to resolve many disputes. However clearly this is not a complete answer, a strong and timely courts based system shapes the broader ADR sector and decision making across the community by shaping parameters and defining rights. Where judicial hearing and resolution of disputes takes place there needs to be recognition that this can be a time consuming and costly exercise.[81] In order to support public confidence in the justice system and the promise of timely justice, future directions must be ultimately geared toward the support required by justice agencies as well as the interests of disputants and participants in the justice system.

[80] Arie Frieberg, comment made at Timeliness in the Justice System: Ideas and Innovations Forum, Monash University Law Chambers, 16-17 May 2014.

[81] McClellan, above n 20.