UNDERSTANDING MAGISTRATES’ WORK

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by

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DECLARATION

I, Garry Francis Hiskey, declare that this thesis submitted in fulfilment of the requirements for the award of the degree of Master of Laws (Honours), in the Faculty of Law, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted at any other academic institution.

Garry Hiskey

12 June 2003
# UNDERSTANDING MAGISTRATES' WORK

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LIST OF SPECIAL NAMES, ABBREVIATIONS AND SYMBOLS

AAM = Australia Association of Magistrates
AIJA = Australian Institute of Judicial Administration
ALRM = Aboriginal Legal rights Movement
AMC = Adelaide Magistrate Court
MCA = Magistrates Court Act 1991 (SA)
MCR = Magistrates Court Rules 1991 (SA)
CAA = Courts Administration Authority (SA)
CLEM = Continuing Legal Education for Magistrates
JCA = Judicial Conference of Australia
‘M’ = A magistrate from a State other than South Australia
NJCA = National Judicial College of Australia
PD = Professional Development
PLT = Practical Legal Training
‘SM’ = Stipendiary Magistrate and identifies South Australia Magistrates

A central theme of this thesis is that decision-making, work environment and communication are the key to understanding of magistrates’ work and that the three concepts are intertwined. Examples drawn from magistrates’ interview material demonstrate this and shaded boxes designate when the one example has been put to multiple use:

In this thesis quotations taken verbatim from the magistrate’s interview data are contained in a boxed form. The first time a direct quotation is used the quotation is boxed with no background.

When an example is repeated for the first time it is lightly shaded as shown:

In this thesis quotations taken verbatim from the magistrate’s interview data are contained in a boxed form. The second time a direct quotation is repeated the quotation is boxed with light shading.

Sometimes the examples are reproduced a third time and the shading is then heavier:

In this thesis quotations taken verbatim from the magistrate’s interview data are contained in a boxed form. The third time a direct quotation is repeated the quotation is boxed with darker shading.
KEY TO MAGISTRATES INTERVIEWED

Pseudonyms are used throughout this dissertation and any correspondence between the names chosen at random with that of a magistrate is accidental. Some readers may find it valuable to be able to ‘trace’ what an individual magistrate has said. The table below provides page references to those magistrates whose material has been quoted verbatim.

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ABSTRACT

Magistrates hear about 98% of the criminal cases and about 90% the civil cases in courts in Australia.

This thesis examines the understanding magistrates have of their work. It provides an analysis of what magistrates do in court and their understanding of this work. The core data is based on reflections by and discussion with magistrates about what they do in court and the data identifies three core aspects of their daily work experience: decision-making, communication and work environment. The thesis shows how these concepts are themselves interlinked.

The thesis examines some (very little) ‘official’ or ‘objective’ information on what magistrates do or are thought to do, prepared by government and other commentators. This is supplemented by other data – some collated in the course of this research and some gathered from public sources described in the thesis. My thesis also relies on the researcher’s own knowledge and experience as a lawyer, a practising magistrate, a participant in this research project and a researcher. These personal sources of information contribute to the interpretation of the data and the conclusions.

The data show that magistrates deal with very heavy workloads in physical and intellectual isolation. They hear many cases in unfamiliar areas of law. Their jurisdiction is expanding. The interview and other data indicate that magistrates are conscious of the impact of their decisions in the lives of the people who appear before them and of community expectations. Such decisions cannot be delegated and
magistrates must accept responsibility for them. These factors contribute to a stressful work environment.

From where magistrates sit on the bench they have, of necessity, a narrow view. The weight of numbers and length of lists is such that they must be active and sometimes pro-active participants in the management of the processes of the court. The data shows how often they must make and communicate their decisions. Most of the time, magistrates are required to make quick decisions with little time for reflection.

The researcher concludes that opportunities for magistrates to appreciate and understand their work are limited. Arising from this a proposal is made whereby magistrates may be able to gain a greater and better appreciation of the work they do. It is suggested that magistrates be encouraged to engage in a process of mutual observation, reflection and discussion subject to agreed protocols.

Unlike much research in this area, this dissertation portrays the view from the Bench.

It is of vital importance that magistrates have a good understanding of their work if they are to do their work well. It is also of equal importance to the community because the first point of contact between an ordinary member of the community and the justice system is likely to be an attendance at a magistrate’s court. This dissertation provides insight into the understanding magistrates have of their work and hence is of value to magistrates, the community and enhancement of the system of justice.
ACKNOWLEDGMENTS

This dissertation would not have been possible without the cooperation of my colleagues both in South Australia and interstate who agreed to be interviewed or to participate in this research project. I thank them for their ready cooperation and for their interview material.

I express my thanks to Judge Moss, former Chief Magistrate of South Australia and to his successor, present Chief Magistrate Kelvyn Prescott, who have encouraged and supported this research project. I also thank the Courts Administration Authority for financial support that enabled me to attend seminars at the University of Wollongong. The Chief Justice of South Australia, Justice Doyle has been aware of and supportive of my research.

I thank the other judges, magistrates, lawyers, academics and members of the Courts Administration Authority of South Australia who provided assistance and encouragement to me.

I particularly would like to acknowledge the assistance of Ms Elaine Barnes in preparing charts and diagrams. Ms Toni Gerrard provided invaluable secretarial support and assistance especially in the final stages of formatting of the thesis.

I cannot sufficiently express my thanks for the support and encouragement provided by my supervisors, Prof Helen Gamble and Dr Rick Mohr of the University of Wollongong. I would not have commenced this course but for the encouragement and
urging of friend and colleague, Dr Andrew Cannon and would not have completed without his cajoling, support, insight and inspiration.

Finally I thank my close friend Yvonne Gerrard, who has been wonderfully patient and supportive throughout this project.
CHAPTER 1. INTRODUCTION

Preface

I graduated as a Bachelor of Laws of The University of Adelaide in 1965 and was admitted to the Bar in 1967. I then engaged in private practice as a barrister and solicitor with a focus on commercial litigation, undertook quasi-judicial duties as Registrar of the Credit Tribunal of South Australia together with public law administrative work within the State Public Service and was retained for four years as Senior Solicitor in South Australia of the Aboriginal Legal Rights Movement (ALRM). I commenced my judicial career in 1984 having had varied experience as a lawyer through private practice, public administrative law and experience in a legal aid organisation.

The transition from lawyer to judicial officer was abrupt. I was a lawyer one week, a magistrate the next. There was little literature to support such a transition. Since 1984 there has been limited structured professional development (PD) available or undertaken. Until recent years, attendance at an Annual Conference of magistrates was the main form of PD.

I had expected that with greater experience the work would become easier. However, by the mid 1990s I realised that cases were becoming more complex. Larger sums of money were at stake as jurisdiction increased. I was required to deal with new and unfamiliar areas of law. There were more unrepresented litigants. The workload was

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1 My commission as a magistrate was on 5 August 1976. I was at that time appointed Registrar of the then Credit Tribunal. Appointment as a Special Magistrate was a pre-requisite to that appointment.
increasing. I was spending longer hours at work. The job became more stressful emotionally. Anecdotal evidence suggested other magistrates were also experiencing these difficulties.

It was against that background that I decided to undertake postgraduate study and to commence research for this dissertation. I set out with the broad aim of defining what magistrates do and of identifying their needs. I sought to use my background and experience to provide support and insight from the perspective of a peer and colleague but based upon empirical research.

As time passed I found it necessary to restrict my subject matter. I decided to focus on the understanding magistrates have of their work.

In this dissertation I do not seek to reach firm conclusions as to the needs of magistrates in terms of resources. The essence of this work is to arrive at an understanding of what the work of a magistrate work entails. Once a clear understanding of this is reached then one can consider what are the needs of magistrates. This dissertation has its focus on the first aspect and the discussion may be a stating point for a later consideration of the question of ‘needs’ — to which the issue of resources is allied.

In Chapter 1, I introduce the subject matter, describing the development of the magistracy in Australia in general and the South Australian magistrate in particular.

\[\text{Over recent years a program known as Continuing Legal Education for Magistrates (CLEM) has been developed. It is described in Chapter 2.}\]
The jurisdiction of magistrates is identified. The importance of their role in the judicial system is explained.

Chapter 2 has as its focus the methodology employed in this research. An examination is made of relevant literature. Both quantitative and qualitative methodologies have been used to collect data. Magistrates are the source of most of the material — interviews with magistrates, conferences of magistrates, surveys of magistrates and group discussions with and between magistrates have been used. The reflective aspects of the research and my own role as researcher and participant are examined.

Chapter 3 explains how quantitative data have been collected. The data come from published sources supplemented by analysis of the way in which cases move through the court system. Flow charts demonstrate this movement. Court data taken from cause lists are examined. The data tell what magistrates do and lead to the three core chapters of this thesis: decision-making, work environment and communication as perceived by magistrates.

Chapter 4 deals with decision-making. Decisions are categorised. Magistrates give examples of the decisions they found most difficult on the day of or week preceding the interview. I examine these examples — they serve to illustrate those aspects of the decision-making process which cause difficulty.
Chapter 5 examines the work environment in which decisions are made. The physical and intellectual aspects of the work environment are considered. The manner in which the environment affects decision-making is examined, as is the issue of judicial stress.

Chapter 6 examines the nature and the various types of communications in which magistrates engage. Magistrates communicate at many levels: with staff, with litigants and lawyers, with each other, with the media and, largely through the media, with the community.

Chapter 7 is entitled ‘The Observation Exercise’ but a fuller statement of the process would be to refer to this as ‘Mutual Observation, Reflection and Discussion between Magistrates’. Five colleagues and myself participated in an exercise that involved mutual observation, reflection and discussion. This exercise emerged from the research methodology; in particular its emphasis was on reflection. The participating magistrates gained valuable insights into their work. The purpose of the observation exercise was to educate the observer. The process is distinguished from ‘monitoring’ or ‘peer review’. The compatibility of the activity with principles of adult learning is considered. This requires a discussion of some of the principles governing adult education. Reference is made to the newly established National Judicial College of Australia (NJCA). I have included a number of protocols to safeguard the observation process.

Chapter 8 provides a summary and discussion of the conclusions to be drawn from the research. A number of Appendices and a Bibliography complete this work.
Against that background and overview I will, in the balance of this chapter, explain
something of the history of the magistracy in Australia and especially in South Australia
– the South Australian magistracy being focus of this research. I will also explain the
significance and value of this research project.

**Magistrates**

In Australia, magistrates are judicial officers who preside over lower or first instance
courts. The office of magistrate developed from the office of Justice of the Peace. Prior
to Federation, magistrates were commissioned in each of the Australian colonies. As a
consequence the history of the development of the Australian magistracy varies from
State to State. In South Australia, magistrates have always been required to be
professionally qualified lawyers before appointment.

Almost all criminal cases have their origins in the magistrates’ court and some 99% of
all criminal matters are finalized within the magistrates’ court. Magistrates also have
jurisdiction over civil matters. This jurisdiction is expanding but the extent of the
jurisdiction varies from State to State. In addition, there is a trend towards devolution
of jurisdiction from higher courts to lower courts.

Magistrate John Lowndes in his paper *The Australian Magistracy: From Justices of the
Peace to Judges and Beyond* traces the development of the magistracy in Australia and
highlights the key stages in this development, which, he argues, has led to a situation in
which the title ‘magistrate’ is anachronistic. He suggests that some other description
incorporating the title Judge, for example Local Court Judge, would be more appropriate. Lowndes identifies these developments as including the evolution of a paid and professionally qualified magistracy from a lay, untrained and unqualified magistracy, its removal from the public service and recognition that it is an integral part of the independent judiciary. That debate is not relevant to this dissertation but the developments are relevant in that they have led to the magistracy being accepted as being the third tier of the independent judiciary in Australia.

Justice Thomas writing in the *Australian Law Journal* in 1989 observed:

The Magistrates’ Courts are for most citizens the only place where direct contact is made with a judicial officer. It is inescapable that the point has been reached where the magistrates must be regarded as a group of judicial officers forming the ground level of a three-tier judicial structure. It is no longer valid to view the magistracy as a hybrid creature, part public servant, and part judicial officer, disadvantaged by inadequate training and with an imperfect understanding of the judicial role. There were times not long distant when such a view was accurate and valid. The times have changed, and in this instance for the better. I take it to be established that the magistracy is here to stay as a primary and clearly identifiable sector of the Australian judiciary.

Although this study focuses on the Magistrates’ Court of South Australia, magistrates from other States have also been interviewed. From research identifying the processes in which magistrates are involved when performing their duties there appears to be no valid reason for distinguishing between South Australian and other magistrates.

*Magistrates in South Australia*

Magistrates in South Australia are judicial officers appointed pursuant to the *Magistrates Act 1982* (SA). They are independent judicial officers appointed by the Governor in Council upon the recommendation of the Attorney General. They must be

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4 Whilst this is true generally it is not true of South Australia where magistrates have always been required to hold legal qualifications as a prerequisite to appointment.
legal practitioners of at least five years standing to qualify for appointment. An independent Remuneration Tribunal fixes the salaries of all judicial officers. Upon appointment magistrates take the same judicial oath, as other judicial officers. That oath requires magistrates to ‘do right to all manner of people after the laws and usages of this state, without fear or favour, affection or ill will’.

At the present time there are 36 magistrates in South Australia, two assigned to the Youth Court. Magistrates, with one exception, are based in the capital city, Adelaide. Magistrates are located at one Central Court in the CBD and there are four suburban courts, each of which has a complement of three to six magistrates. The central court in the Adelaide CBD is divided into a criminal division and a civil division. The civil division is a specialist court and magistrates allocated to that court do not usually hear criminal matters. Magistrates who are allocated to suburban courts deal with both criminal and civil matters. Magistrates travel from Adelaide to carry out circuit duties in the major country towns.

For most of the twentieth century, the jurisdiction of magistrates was exercised in different courts governed by separate legislation. Magistrates in the criminal

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6 The Tribunal is established pursuant to the Remuneration Act 1990 (SA) s4.
7 Oaths Act 1936 (SA) s11.
8 Prior to 1990 there were three resident magistrates. Residencies were abolished in 1990 largely due to the view of the then Chief Justice, Justice King that it was too difficult to preserve both the appearance and reality of impartiality and independence when a magistrate was based in a country town. In October 2002 Fred Field SM was appointed for a trial period to take up a position as resident magistrate in Port Augusta, a large regional town in the North of the State. Current government policy is to reinstate country residencies.
9 The current Chief Magistrate has a policy whereby all magistrates located at the AMC are available to sit on either civil or criminal trials. The existing practice of individual docket control of pre-trial activity by individual magistrates will continue and may be extended to criminal matters.
10 Circuits normally last a week and magistrates travel by car, usually taking their magistrate’s clerk with them. South Australia is a very large State and a circuit to some of the more remote locations requires travel by plane.
jurisdiction sat in courts of summary jurisdiction. Magistrates sitting in Local Courts of limited jurisdiction exercised civil jurisdiction. For most of the twentieth century there was a two-tiered court structure of Local Courts and Courts of Summary Jurisdiction on the one hand and the Supreme Court on the other.

In 1969 an Act was introduced to create an intermediate tier in the hierarchy of courts — the Local and District Criminal Court.\(^{11}\) Magistrates continued to exercise civil jurisdiction as a Division of that new court. In the criminal field, magistrates continued to sit in courts of summary jurisdiction constituted under the *Justices Act 1926* (SA).

The *Magistrates Act 1982* (SA) established the status of magistrates as independent judicial officers. However, they remained in two separate court structures — courts of summary jurisdiction and local courts. This division ended with the passage of the *Magistrates Court Act 1991* (SA) which created one Magistrates Court of South Australia exercising both civil and criminal jurisdictions.

**Criminal jurisdiction**

With the establishment of the Magistrates Court of South Australia as a single entity in 1992, the criminal jurisdiction of the court was increased. Magistrates were given power to hear and determine matters that formerly could only be decided by a jury. In property offences they became entitled to deal with break and enter matters where the value of the property stolen did not exceed $25,000. Magistrates now deal with most offences involving the forcible entry into dwellings or commercial premises (now

\(^{11}\) *Local and District Criminal Courts Act 1926–1967* (SA).
known as various forms of ‘criminal trespass’). They determine most drug offences other than charges involving sale or manufacture of prohibited substances. They also deal with many offences of a sexual nature (other than those involving sexual intercourse). Magistrates hear Work Cover and Social Security prosecutions, some of which involve allegations of fraud and large sums of money.

Magistrates may impose sentences for a particular offence of up to two years. If a person is found guilty of a number of offences, the court may sentence that person to one penalty for all or some of the offences but the penalty cannot exceed the total of the maximum penalties that could be imposed in respect of each of the offences to which the sentence relates. Custodial sentences can be imposed to take effect cumulatively. There is no legislative restriction upon the number of penalties that can be made cumulatively but the ‘totality principle’ may be used to mitigate the effect. This is a principle which allows the court to consider the overall effect of a series of cumulative sentences and to intervene so as to reduce the overall effect in an appropriate case.

Civil jurisdiction

The Civil Division of the Magistrates Court is divided into three divisions, namely the General Claims, Consumer and Business and Minor Civil Claims divisions. When the Court was established in 1992 it had jurisdiction to hear minor civil actions up to $5,000, general claims up to $30,000 and claims for damages for personal injuries arising from motor vehicle accidents up to $60,000. Those limits have now been increased to $6,000, $40,000 and $80,000 respectively and claims for damages for

12 Criminal Law (Sentencing) Act 1988 (SA) s18A.
personal injuries now extend to all claims for personal injuries arising from an accident and are not confined to motor vehicle accident claims.\(^{13}\)

The Consumer and Business Division hears disputes arising from retail shop leases, domestic building work and second-hand motor vehicle warranty claims. In the Minor Claims Division lawyers are excluded in most instances and the court conducts the hearing as an inquiry. The court has more than a dozen specialist and appellate jurisdictions such as strata unit disputes and motor vehicle and firearms licence appeals.

Pursuant to the *Criminal Assets Confiscation Act* 1996 (SA), the Director of Public Prosecutions has power to seek orders restraining the dealing of assets by persons charged with certain criminal offences. Restraint orders can be made relating to property up to a value of $300,000 and forfeiture orders may follow. Under the *Building Work Contractors Act 1992* (SA), the court has an unlimited jurisdiction in awarding compensation, save that if a claim is for a sum in excess of $40,000, it must transmit the matter to the District Court on the application of either party. Unfair preferences claims up to $40,000 can now be heard and determined as a result of amendments to the Corporations Law. Magistrates have jurisdiction to hear commercial disputes between landlord and tenant pursuant to the provision of the *Retail and Commercial Shop Leases Act 1995* (SA). Where the amount in dispute exceeds $40,000 the court must transmit the matter to the District Court on the application of either party.

\(^{13}\) These jurisdictional changes came into effect on 3 February 2002 as a result of the passage of the *Statutes Amendment (Courts and Judicial Administration) Act 2001* (SA) and the extension of the ‘personal injury claims’ to include all accidents giving rise to personal injury came into effect on 1 December 2002 by the passage of the *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA).
The Court was given its own rule-making power in 1992. A case flow management system, designed to reduce the cost to litigants by tailoring case processes to suit the needs of each case, has been established together with a predictable party/party cost scale. The fixed cost scales remove incentive for over-servicing by advisers. The rules and forms are drafted in plain English and multi-lingual statements are required to be given to all litigants.

Since 1992 the court has introduced court annexed mediation and has put considerable effort into ensuring timely and accurate information about the litigation process is put into the hands of the parties themselves. The court has its own panel of experts to advise both the parties and the court in technical matters such as can occur in building and mechanical disputes and disputes concerning professional fees. A pre-lodgment final notice has been introduced to provide a service to small debtors, and also to attempt to divert debt-collecting matters out of the formal court process, thereby saving time and money for parties. This service is available at the counter and over the Internet.  

**Significance of this research**

Magistrates perform the bulk of the court work within the judicial systems of Australia. Without them the systems would be crippled. It is vital that they have a good understanding of their work. It is important that courts administrators and others involved in the administration of justice have such an understanding.

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In Chapter 1 of *The Judges*, part of the Boyer Lecture series of 1983, Justice Michael Kirby noted that little is written or known about the judiciary:

Judges are important in our country. Their importance increasingly extends beyond the courtroom. They are heirs to the traditions of the English judiciary stretching back 800 years. But, unlike other actors in the drama of public affairs, relatively little is known about them. No Judge in England or Australia has yet written a revealing autobiography disclosing ‘all’ about his judicial life. Indeed, few have written anything beyond their judgments. As most disdain interviews — even when they are acting in matters of high controversy such as Royal Commissioners — little is known about them or their ways. No perfidious law clerk has written an Australian version of *The Brethren* — the book that purported to disclose the internal debates, preliminary votes, negotiations, confrontations and compromises in the Supreme Court of the United States. There are few works of judicial biography written in Australia. For most, the Judge emerges in court, hears the case, gives judgment and disappears again behind the curtain. He is, like Churchill’s Russia, a riddle, wrapped in a mystery inside an enigma. (Citations omitted)

At the outset of his series of lectures, Kirby explained that his purpose was to ‘lift the veil’ behind which the judiciary was concealed. He invited listeners and readers to ‘come with me into the world of the judiciary’. In this dissertation a similar invitation is extended — save that this dissertation is confined to one tier of the judiciary, the Magistracy.

Interviews with magistrates are at the core of this research. Magistrates are able to reflect on what they do. Quantitative and qualitative data, some from published sources and some collected during the course of this research, are analysed to assess the nature of magistrates’ work. The collection of the qualitative data has involved interaction between colleagues and myself and interaction between colleagues, all directed at the questions of what do magistrates do and what do they think they do. The process has been reflective; a group of magistrates engaged in a collaborative exercise involving

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mutual observation, reflection and discussion. That process was successful in giving the participants insight into their work.

In this thesis I have set out to discover what magistrates do — through the best means available to me — all the above — and made special and unique because I am doing it using and relying upon my background as an experienced magistrate.

**Summary**

I have explained the rationale for this research and how I came to embark upon it. An outline has been provided of the content of each chapter. The role of the magistrate in the judicial system has been touched upon and will be developed throughout the dissertation. The establishment of the Magistrates Court of South Australia, its evolution and the extent of its criminal and civil jurisdiction of the Court have been explained. The significance of research of this nature is explained and the special and unique nature of my research asserted.
CHAPTER 2. METHODOLOGY

Introduction

In this chapter I explain and justify the methodologies used in this dissertation. The differences between quantitative and qualitative methodologies are discussed. A literature review is described.

This dissertation uses a number of methodologies to obtain information about the work of magistrates. This results in a kaleidoscope of images. From this mass of information I have drawn out the common strands to arrive at conclusions about the understanding magistrates have of their work.

Much of this research is qualitative. Interviews with 19 magistrates provide the main source of information. Undertakings were given as to confidentiality and anonymity. Appendix 1 shows how the interview material was tabulated. It becomes apparent that issues raised could be classified in a number of ways. The final classification is under the three headings: decision-making, work environment and communication.

The result of the literature review is primarily to put matters into context, as there is little published material arising from research of the nature carried out here. The Australian Association of Magistrates (AAM) in conjunction with Flinders University is currently undertaking research directed at the Australian magistracy. The two researchers, Associate Professor Kathy Mack and Professor Sharon Roach Anleu, have interviewed magistrates throughout Australia. That project has received a substantial
research grant to enable research on a much broader scale than has been possible for this dissertation.

By contrast this research is from within the magistracy. The material collected from magistrates is supplied to a fellow magistrate. I employ a mixture of methodologies. By this means I seek to counter-balance the possibility that my ‘insider’ status as a working magistrate may colour my interpretation of interview material.

**Quantitative and qualitative research**

Leedy distinguishes between quantitative researchers and qualitative researchers:

Specifically, quantitative researchers, on the one hand, usually start with a preformed hypothesis to be tested. They isolate the relevant variables, control for extraneous variables, collect standardised data from a large number of participants, analyse data in such a way that the original hypothesis can be supported or not, and then state conclusions related to generalisability. Qualitative researchers, on the other hand, start with more general questions, collect an extensive amount of verbal data from a smaller number of participants, and present their findings with words/descriptions that are intended to accurately reflect the situation under study.16

My research is primarily of the latter type — qualitative research based upon collection of an extensive amount of verbal data and subsequent analysis of that material.

Leedy states:

The qualitative research process is more holistic and ‘emergent’, with the specific focus, design, interview instruments, and interpretations developing and changing along the way. Researchers enter the setting with open minds, prepared to immerse themselves in the complexity of the situation. Researchers interact with their participants; categories (variables) emerge from the data, leading to ‘context-bound’ information, patterns, and/or theories that help in explaining a phenomenon.17

Magistrates were interviewed with the particular focus provided by their daily lists. This starting point provided a common framework for all interviews. It ensured that

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each magistrate, when interviewed, talked about matters that they were dealing with on the days preceding and on the day of the interview. The interview day was chosen at random and to meet convenience rather than being chosen from prior knowledge of the nature of the work assigned to the magistrate on the day.

**Analysis of lists**

In March 1999 I took a ‘snapshot’ of the work being listed before magistrates in all courts other than the civil division of the Adelaide Magistrates Court (AMC) over the course of a week. In the course of the week commencing 8 March 1999, magistrates dealt with 11 lists with more than 100 files listed. This does not mean there were an equivalent numbers of people appearing before the court because some defendants appeared with multiple files.

Justice Mullighan when addressing the 13 Biennial Conference of the Australian Association of Magistrates (AAM) in June 2002 made this point about the length of lists:

> I do not think any Magistrate, no mater how efficient or experienced, can do justice to people appearing in long lists. Even if a Magistrate is to sit eight hours a day, which is not uncommon in some courts, there may be an average of only a few minutes given to each case. Of course, some cases require only a minute or two, an uncontested adjournment or a remand without any issue as to bail are examples. However, most cases take longer or should take longer. There may be quite complex issues in a bail application or in granting a further remand. Submissions on pleas of guilty, if undertaken responsibly and adequately, will require much more time. In each case, for justice to be done, the Magistrate must have time for reflection and consideration. Haste usually stands in the way of a just result. Decisions should be made after receiving all relevant information and adequate reflection.\(^\text{18}\)

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\(^\text{17}\) Ibid 106.

In the tables and discussion that follow a number of aspects of the lists are explained. The data collected in April 1999 have been compared with similar data collected in the week commencing 22 July 2002. Lists in general courts in January 2003 have also been examined.

During the week commencing 8 March 1999, a ‘snap shot’ was taken of files dealt with in the civil division of the AMC. The data were tabulated according to the nature of the court process and show the numbers of trials and the numbers of interlocutory applications, directions hearings, conciliation conferences and other applications being dealt with. The manner of disposition of trials is shown. Minor civil actions were the only actions listed for trial during the week of 8 March 1999. In the following week (15 March 1999) general actions were listed for trial and again the outcomes were tabulated to enable a comparison to be made between the two sets of results.

Another more detailed analysis was carried out of matters dealt with in the AMC (Civil) division during the week commencing Monday 1 May 2000. All files dealt with on the Monday to Thursday of that week were examined. Data were collected under various headings. The results were later charted to show numbers of files and case types, attendances, whether represented or not and directions hearings outcomes.

**Literature Review**

Castles, in *An Australian Legal History*, traces the development of the court system in Australia especially in the nineteenth century. In Chapter 1 of *Summary Justice South*...
Peter Kelly traces the origin of the modern magistrate and the evolution of this branch of the judiciary in South Australia. Golder has examined the history of the New South Wales magistracy in depth; Weber the origins of the Victorian magistracy. The early development of the Queensland magistracy is the subject of a paper by the Justice BH McPherson written in 1990. Justice Wells traces the history of the South Australian magistracy in *R v Moss Ex parte Mancini* (unreported, 25 March 1982, SA Supreme Court, Full Court).

No discussion of literature on the topic of magistrates, and in particular of the Magistrates Court of South Australia, would be complete without reference to the work of my colleague, Dr Andrew Cannon DCM. Dr Cannon is the Deputy Chief Magistrate of South Australia. Both his Masters thesis and his Doctoral thesis are written against the general backdrop of the Magistrates Court of South Australia especially the civil jurisdiction of the Court.

In his Masters thesis Dr Cannon analyses the way in which cases proceed through the civil division of the Magistrates Court and considers alternative, less costly ways of conducting litigation. In his doctoral dissertation he identifies the desirable features of lower courts in the verification and enforcement of civil obligations. In this dissertation the focus is the personnel of the Court, in particular the magistrates, rather than the

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20 The Law Book Co, *Summary Justice South Australia*.
23 This case arose as the result of Alan Moss SM (now Senior Judge Moss of the Youth Court of South Australia) stating a case to the Full Court arising from the fact that magistrates at that time were public servants and answerable to an administrative head. The decision provided impetus for the ultimate separation of magistrates from the Public Service.
purpose or processes of the system. This research is complementary to Dr Cannon’s and is in areas that do not overlap to any marked degree.

A paper prepared by Neil Milson entitled ‘Magistrates’ Decision making’, is more directly relevant. At the time of writing (1997), Milson had 18 years experience as a magistrate and almost 40 years spent observing them. General impressions of the decision-making processes used by magistrates were assessed in the light of data he collected. A tape recording of one day’s hearing in a magistrate’s court was analysed and the frequency of decision-making noted. This was followed by an examination of the court records of four magistrates sitting at the Parramatta Local Court over a period of five consecutive days chosen at random. He prepared a questionnaire for NSW magistrates asking open-ended questions about what decisions were difficult and why. Milton used a mix of quantitative and qualitative methodologies to evaluate what was involved in the decision-making processes of magistrates. This dissertation builds on his work.

The previously mentioned Boyer Lecture series of Justice Michael Kirby raises similar issues to those considered here. Kirby draws on his own knowledge, experience and his interchanges with other judicial officers. His personal reflections give insight into the personality of the judges, their judicial method and related matters. To the greatest extent possible in this dissertation I seek to allow magistrates to speak for themselves to

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27 Kirby, above n 15
give their own understanding of their work using the idiom they would ordinarily use. Their verbatim quotes have not been edited for grammar or felicity of expression.

A number of authors have written about lower courts and how they operate. Carlen’s *Magistrate’s Justice* is an account based on observations of the conduct of lower courts by Justices of the Peace and by magistrates in the United Kingdom.\(^{28}\) The picture painted of busy courtrooms, unrepresented litigants and long lists is familiar. But the picture remains that painted by an artist rather than a participant. The comments concerning *Magistrates Justice* are apposite also to *The Process is the Punishment*\(^{29}\) by Feeley, which has its focus upon the lower court in New Haven, Connecticut.

In 1980 members of the Faculty of Law at La Trobe University carried out a study of Victoria’s Magistrates Court.\(^{30}\) That however has its focus on the comparison of outcomes recorded in different court locations by different magistrates where the offence(s) are similar. The paper is not directed at the magistrates’ understanding but concentrates on results, similarities and differences in outcomes.

A more contemporary discussion of the magistracy is that of Willis in his article entitled ‘*The Magistracy: The undervalued workhorse of the court system*’.\(^{31}\) Willis traces the history of the development of the magistracy noting the changes from what he categorizes as the early colonial period to the public service period and into the modern period. He identifies the court as the ‘the People’s Court’ — a term that at Ian Gray, Chief Magistrates of Victoria described as ‘uniquely fitting’ when he delivered the

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\(^{30}\) Legal Studies Department, La Trobe University, Guilty, Your Worship — *A Study of Victoria’s Magistrates Court*, Occasional monograph (1980).
AIJA Oration in September 2002. Willis examines the manner in which magistrates’ courts throughout Australia have adapted their procedures to new forms of dispute resolution and argues that they are less bound by tradition and formality with one desirable outcome being that they have been very innovative. Willis shows that there have been different developments in different States. A disadvantage of a federal system of Government such as applies in Australia is that innovation in one State will not necessarily flow to another. Willis notes that there have been significant increases in the criminal jurisdiction and that magistrates in Victoria deal with the ‘vast majority’ of indictable offences.

This dissertation recommends that magistrates engage in a process of mutual observation, reflection and discussion based on a group of magistrates in turn observing a colleague at work. Chapter 6 explains how such an exercise was carried out in the course of this research. The results of this exercise are contrasted with suggestions made by others for performance appraisal and peer review of judicial officers. Handsley, in her Issues Paper on Judicial Accountability, discusses performance appraisal and suggests one method by which it might be carried out by judicial officers. Molony discusses ‘peer review’ in a paper entitled Peer Review for the Judiciary I compare those approaches with that recommended here.

33 Willis, above n 31, 139.
My literature research has not revealed any research project in relation to the judiciary generally or the magistracy in particular which is empirical and conducted on similar lines to this.

My goal has been to present the understanding that magistrates have of their work from their particular perspective. This may not be the same perspective as that of an outside observer or of some other participant in the process such as a lawyer, a litigant or a witness.

**Reflection**

Reflection and interaction between colleagues and myself has been used to assist in this work. I have sought to be an academic researcher and have gathered quantitative and qualitative data from a number of sources. As the research has progressed I have taken the opportunities presented from time to time to explain what I have been doing and the insights gained. The bibliography sets out a number of the papers presented mostly to meetings of magistrates or the local legal profession but sometimes to a wider audience. This has been supplemented by deliberate self-reflection of my own. I established a daily diary in which I recorded my reactions to the work done that day. An example is shown in Appendix 5. This was done in the very early days of my research. I occasionally sat at the back of the court of a colleague — with the knowledge and consent of the colleague — and later made a note of what I observed. Appendix 6 contains one such reflection — a note made on 7 March 2000 — after attending the ‘special interest’ court at Port Adelaide. The process was so revealing that I decided to use it as part of my research methodology.
My research has thus been self reflective, self-evaluating and inter-active. The research methodology became intertwined with one of my ultimate conclusions — that magistrates need the opportunities to reflect and evaluate their work in a communal and intellectually honest environment to allow them to better understand the importance and immense difficulty of the work they do.

**Interview material**

Bell states:

Raw data taken from questionnaires, interview schedules, checklists etc need to be recorded, analysed and interpreted. A hundred separate pieces of interesting information will mean nothing to a researcher or to a reader unless they have been placed into categories. We’re constantly looking for similarities and differences, for groupings, patterns and items of particular significance.  

Identifying ‘similarities and differences’ within the interview material and then establishing ‘groupings, patterns and items of particular significance’ is the basis used to categorise interview material. Each interview was transcribed verbatim, and the magistrate concerned checked the transcript. On each page the key word or phrase — one that captured the issue or subject matter being discussed by the magistrate — was identified and tabulated. Words or phrases, where there was a common theme, were grouped. As a result I arrived at twenty-six ‘themes’. These ‘themes’ were found to fit into three broader categories: decision-making, work environment and communication.

Leedy identifies three approaches to analysis. Those three approaches are referred to as the ‘interpretational, structural, and reflective analyses’.

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36 Appendix 5, 166 - the diary was maintained between 18 January 1999 and 5 February 1999.
Gall et al. describe three approaches to analysing case study data: Interpretational analysis refers to examining the data for constructs, themes and patterns that can be used to describe and explain the phenomenon studied. Structural analysis refers to searching the data for patterns inherent in discourse, texts, events, or other phenomena, with little or no inference made as to the meaning of a pattern. Reflective analysis refers to using primarily intuition and judgment to portray or evaluate the phenomenon. Gall et al and Tesch provide more information on each of these analysis methods (citations omitted).38

The methodology employed to analyse the transcript of interviews fits well into the concept of ‘interpretational analysis’. The content of the interview material is based upon the magistrate interviewed engaging in ‘reflective analysis’.

**Interviewing**

In March and April 1999 I interviewed eight magistrates from South Australia and in January 2000 four Victorian magistrates. Later in 2000 I conducted interviews with six South Australian colleagues and one magistrate from Queensland. Thus 19 interviews were conducted — 14 being South Australian colleagues, the balance from interstate.39

Interviews with magistrates from other States acted as a ‘check’ against the possibility that the South Australian magistracy was not representative of the Australian magistracy. Jurisdiction varies from State to State and the resources supplied to magistrates vary likewise. Despite these differences, magistrates everywhere appear to have the same concerns as South Australian magistrates in terms of what they find difficult, how they are affected by technological change, how they deal with a stressful work environment and how they communicate with each other.

38 Leedy, above n 16, 158
The fourteen South Australian magistrates who were interviewed represent a cross section of the magistracy. The group interviewed had spent an average 14.4 years on the bench at the time of interview compared with the SA magistracy as a whole which had spent an average of 14.6 years on the Bench. Of the South Australian magistrates interviewed three were female and 12 were male. However, the tape recording of one of the female magistrates interviewed was damaged and unable to be reproduced. Out of a complement of 36 magistrates in South Australia, six are female. Of the interstate magistrates interviewed one was female and four were male. This dissertation does not deal with the issue of how gender may affect magistrates’ understanding of their work.

**Use of Pseudonyms**

Magistrates were interviewed on conditions of confidentiality and anonymity. Accordingly, in this dissertation the names of all magistrates are altered to pseudonyms as have the references to the courts at which the various magistrates sit. The names of lawyers or parties have been altered, as have the names of towns or suburbs where such information may lead to identification.

The use of pseudonyms rather than, say, numbers or letters of the alphabet allows the reader to ‘track’ what particular magistrates say. Quotations from magistrates are set in ‘boxes’ to distinguish these quotations from quotations from other sources. The quotations are based upon the verbatim transcript of the interviews conducted.

It is the usual practice in South Australia to refer to magistrates by using their name followed by the letters ‘SM’ to signify their title: ‘stipendiary magistrate’; hence, ‘Garry Hiskey SM’. In the eastern states the letter ‘M’ is used. The interview material follows this convention to distinguish between South Australian magistrates and magistrates
from interstate. The reader is thus alerted to the possibility that the example given may reflect a different jurisdictional limit or some other factor peculiar to the interstate magistracy.

**Interview methodology**

Interviews were tape-recorded with the consent of the magistrate and the transcript was then returned to the magistrate who was invited to check it for accuracy. Some of the magistrates were fastidious in their editing whilst others made little or no change. Interviews were loosely structured around a discussion of the magistrate’s cause list in the week preceding the interview, and ranged freely over all issues that arose.

Each magistrate was requested prior to interview to keep a note on their list of matters that they had dealt with during the preceding week. Not all kept notes. Some had notes only in relation to a day or two prior to the interview. Some had detailed notes.

Open questions were asked and the interviews were unstructured apart from the inclusion of discussion of lists and notes made by magistrates upon them. Also, each magistrat e was asked what had been the most difficult decision they had made over the week or so preceding the interview. My intention was to highlight issues of difficulty that were common to groups of magistrates.

All interviews were then consolidated into one master document and each page was considered. Key words or phrases were highlighted on each page.
Figure 1. Magistrates interview data grouped

A = Resource needs of magistrates
B = Stress and emotional pressure
C = Matters of difficulty and hardest decisions
D = Listing issues
E = Role of magistrate
F = Decision making
G = The magistrate and the community
H = Clerks and orderlies
I = Pro-active role and speed
J = Change which has occurred
K = Devolution of jurisdiction
L = Communication
M = Magistrates co-operation
N = Clerks and orderlies
O = Miscellaneous
Grouping was not easy. Some words or phrases could fit into a number of categories. The next stage was to categorise the various key words and phrases, seeking to group common words or phrases under particular headings. Appendix 1 sets out the four hundred and twenty seven words or phrases identified. The left-hand column ‘counts’ the number of references. The right-hand column identifies the page of the master document with corresponding page references showing where they were drawn from the master document. Figure 1 below shows the grouping made and the number of ‘words’ and ‘phrases’ used:

Over 30 references were made to ‘resource needs of magistrates’, ‘stress and emotional pressure’ and ‘matters of difficulty and hardest decision’. Between 20 and 30 references were made to listing issues, role of magistrate, and decision-making. Between 10-20 references were made to ‘clerks and orderlies’, pro-active role and speed’, ‘change which has occurred’, ‘devolution of jurisdiction’, ‘communication’, ‘co-operation between magistrates’ and ‘continuing legal education (CLE)’.

The heading ‘miscellaneous’ refers to a range of issues. Among those, the subjects ‘positive aspects of a magistrate’s work’ and ‘aspects of daily work of a magistrate’ received eight mentions each whilst the remaining issues were referred to five times or less. These issues are ‘pre-trial conferences’, ‘court structures’, ‘specialist courts’, ‘unrepresented parties’ and ‘reserved judgments’.

The categories identified above are not hard and fast. The assessment as to how to characterise and group issues is subjective. Often a particular word or phrase, in the
context in which it appears in the interview material, could fit into a number of categories. When categorising I had regard to the context in which the word or phrase appeared. A word such as ‘clerk’ is relevant to ‘resources’; but it is also relevant to communication.

‘Decision making’ encompasses the following issues identified in Appendix 1: matters of difficulty and hardest decisions, decision-making, listing issues, pro active role and speed, pre trial conferences, reserved judgments and continuing legal education.

‘Work environment’ encompasses: stress and emotional pressure, the magistrate and the community, clerks and orderlies, change which has occurred, devolution of jurisdiction, court structures and specialist courts.

‘Communication’ encompasses: communication, co-operation between magistrates and unrepresented parties.

This explains why this dissertation has its focus around the three issues of decision-making, work environment and communication. According to the magistrates interviewed they are the keys to an understanding of magistrates’ work. After considering all the material prepared for the thesis, I agree.

**Continuing legal education for magistrates (CLEM)**

CLEM is an acronym for ‘continuing legal education for magistrates’. In SA a newsletter is sent out from time to time to magistrates containing information relevant to continuing legal education. Meetings are called periodically on a Friday afternoon at
about 3:30 pm and magistrates are encouraged to attend though attendance is not compulsory. The meetings usually involve presentation of a short paper followed by a discussion. I used a CLEM meeting held on 30 June 2000 as a vehicle for collecting data of a qualitative character for this research project. The meeting provided the opportunity to gain further feedback in a group setting.

The magistrates present were divided into groups of 2 or 3 persons and asked to discuss the two issues:

The first issue:

The group is requested to talk about what needs they perceive themselves to have as magistrates — in particular what needs they have which are not being met. Please prepare a short list and set them out in short form below.

The second issue:

Would the group talk amongst themselves and then prepare a list of those areas of work you find most difficult. Please try to encapsulate the issue in a sentence. Rather than list everything, perhaps you could as a group set out say five or six serious issues where there is a general perception that this aspect of your work as a magistrate is generally difficult.

The groups suggested the following issues to be difficult:

- Working in a ‘hostile’ environment (in reference to the physical and safety aspects)
- Fact-finding and issues of credit
- Dealing with litigants in person — especially in stressful circumstances such as where domestic violence is alleged
- Imposition of a custodial penalty
- Taking evidence from young children, determining the admissibility of that evidence and deciding the weight to give it
- Making decisions in unfamiliar areas of law
- Having to deal with too many matters simultaneously and having to make decisions too quickly without time to reflect.
The groups were invited also to make an open ended comment as to what they found most challenging about their job and why. Appendix 2\textsuperscript{40} sets out a compilation of their comments. Milson conducted a similar survey in New South Wales.\textsuperscript{41} His data are set out in Appendix 4.

**Annual Conference, November 2000**

A further opportunity to obtain qualitative data arose at the Annual Conference of South Australian magistrates held in November 2002.

Magistrates were given a list of issues and asked to categorise them in terms of the challenge they posed. They were handed a form and asked to circle the numbers opposite each process assuming that 1 represented a routine or straightforward matter and 5 represented a very challenging matter. The tabulated results appear as Appendix 3.\textsuperscript{42} Twenty-five magistrates responded. Sixteen magistrates ranked imposition of a custodial sentence, taking evidence from children and cases involving unfamiliar areas of law towards the ‘very challenging’ end of the spectrum. Fourteen magistrates placed decisions involving children’s punishment and deciding whether or not to suspend a sentence as also fitting this category. At the other end of the spectrum, a majority of magistrates (16 out of 25) rated interlocutory applications in the civil area as ‘routine or straightforward’ matters. There was not a ‘majority’ who rated the other issues raised as fitting this category. Twelve magistrates rated managing a general list and pre-trial conferences in the ‘routine or straightforward’ category and eleven magistrates rated minor civil actions and drug offences in this category.

\textsuperscript{40} Appendix 2, 157
\textsuperscript{41} Milson, above n 26.
The Observation Exercise

My own reflection as the research proceeded, and the opportunity given to magistrates to reflect, had revealed much about magistrates’ work. Reflection and interaction between colleagues and myself had proven to be revealing. In November 2000 a group of colleagues agreed to participate in an exercise that involved them in mutual observation, reflection and discussion. Magistrates were invited by email to all magistrates to nominate themselves to participate if they were interested. This gave all magistrates the opportunity to participate and was a convenient means to make the offer to all magistrates. It resulted in a self-selected group. The Chief Magistrate agreed that volunteers have leave of absence from their court for a day and managing magistrates from the courts affected adjusted their lists accordingly.

For convenience, I will refer to this as ‘the observation exercise’ but in reality it was much more than that. Discussion and reflection were vital components. Magistrates were able, from the well of the court, to observe and feel the tensions and anxieties of those who were waiting for their cases to be called. They came to realise that there were alternative ways of performing certain aspects of their work. They thought about the nature and purpose of their role.

After the observation exercise the six magistrates involved (with the exception of one who was not able to attend) met informally to share what they had learnt by observing a colleague from the well of the court. Their conversation was taped with the knowledge and consent of those participating.

42 Appendix 3, 159
Summary

Qualitative and quantitative methodologies have been used to collect data. The research has involved self-reflection by and interaction between magistrates. Relevant literature has been reviewed. The way in which magistrates were interviewed and how the information obtained was analysed and categorised have been explained. From some 400 ‘key words’ or phrases this material was categorised under 26 subject headings. These in turn have been drawn into three major topics: decision-making, work environment and communication. As the dissertation unfolds, the manner in which these concepts are themselves interlinked emerges.
CHAPTER 3. QUANTITATIVE DATA

Introduction

In this chapter I identify the various sources of data collected in the course of the research. Flow charts demonstrate the ways in which cases progress through the criminal and civil justice systems. Analysis of lists and outcomes provides a productive source of material demonstrating the frequency of decision-making, the outcomes, the rate of attendance and the length of lists. One observer characterised magistrates as ‘Prisoners of the System’. 43

43 In 1997 a ‘Search Conference’ was held instead of the usual form of annual conference at which speakers present papers. Consultants Tony Richardson and Jock McNeish facilitated the Conference. As Richardson encouraged contributions from the floor McNeish listened and drew cartoons on large pieces of paper. My acknowledgment also for the cartoon Echos from the Past produced at p101 of the text and illustrating ‘communication’ and its relationship to decision-making and work environment.
**Numbers of Judges and Magistrates**

There are more magistrates than judges exercising State jurisdiction in Australia. Figures published by the AIJA, as updated on 22 May 2002 by the New South Wales Attorney-General’s Department, show that in the various States and Territories (leaving aside the High Court, Federal Court and the Family Court but including State Industrial courts or Commissions) there were 410 magistrates compared with 369 judges. In South Australia the numbers were 36 magistrates and 38 judges.44

**Profile of matters heard in the criminal division of the magistrates’ court**

The Australian Bureau of Census and Statistics reports ‘of all the criminal cases filed in Australia during 2000-2001, 99% were filed in the Magistrates' Courts, with Victoria and Queensland contributing 60% to the national total. A large proportion of cases in the Magistrates' Court in most States and Territories are minor traffic matters’.45

These figures expressed in absolute terms are apt to mislead. An analysis of all criminal files processed in the South Australian court system in April shows that some 40% of all files were traffic matters or driving offences as Figure 2 below demonstrates. The chart suggests that uncritical reference to ‘numbers’ without regard to the nature of the matter or complexity of task is apt to mislead. Traffic offences for example would fall at the lower end of the scale in terms of time spent and complexity of work.

Figure 2 which follows is data collected and analysed by the Courts Administration Authority (SA) on a regular basis. The files have been categorised according to the

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most serious charge. Each file may contain more than one charge. Driving offences constitute more than 40% of the files processed in the month.

On the other hand Willis claims that although many matters are minor there are now a range of quite serious offences dealt with:

It is true that a significant number of criminal cases in the summary court jurisdiction are of a comparatively minor nature. However, this is not the whole picture. The nature of the summary court jurisdiction has changed very considerably, particularly over the past decades. The use of Infringement Notices for a range of offences (particularly offences connected with motor vehicles) has removed from the summary courts a large number of comparatively minor traffic matters. At the same time, the jurisdiction of the summary courts was changed to include a range of quite serious offences that were formerly heard in the Higher Courts. The result is that, while Magistrates Courts are still hearing a high volume of cases, a large number of those cases are now quite serious.46

46 Willis, above n 31, 139.
South Australian magistrates’ court data

In the early stages of this research I carried out a snap shot identifying the number and types of matters passing through the court system over the course of a week. The week chosen was the week of 8 March 1999: Figure 3 (below) shows that in that week there were eleven lists with more than one hundred matters listed. During the course of that week, magistrates sat in courts in the Adelaide metropolitan area and, in addition, circuits were conducted to Port Lincoln, Port Augusta, Berri and Mount Gambier. [AMC (Civil) not included].

A similar analysis was carried out of the length of lists during the week commencing Monday 8 July 2002. The figures are based upon the cause lists of matters heard in AMC (Criminal) division and in the various metropolitan courts plus courts sitting at Pt Lincoln, Mt Gambier, Ceduna, Pt Augusta and Clare.
There were eight lists with more than 80 matters in the week of 8 July 2002 compared with 16 lists with greater than 80 matters in the week of 8 March 1999. There were only two lists with more than 100 matters listed.

Registrars of courts are now required to provide a monthly report of the length of lists with explanations of any lists of more than 70 matters. In January 2003 in three of the major courts (Adelaide, Christies Beach and Holden Hill) the data supplied by Registrars indicated:

- Two lists over 100
- Two lists 90–100
- Ten lists 80–89
- Twenty four lists 70–79
- Seven lists 60–69
• Six lists 50–59
• Six lists less than 50

Of the lists with over 100 files it was noted in one case that there 49 files between six defendants and on the other list the Registrar noted ‘defendants with numerous files’. In the lists of 80–90 the reports of the Registrars included these notes: ‘drug court — 51 of these files for only six defendants; ‘drug court — 63 of these files are from only six defendants’; ‘no explanation — only two matters in the ‘pm’ list’.

I note that in the Adelaide Magistrates court in January 2003 there was no general list with less than 70 matters in it. The comments — not all of which are noted above — indicate that defendants with multiple files are one of the main reasons for the lists exceeding 70 in number.

**Files compared to persons**

The number of files listed in the week of 8 March 1999 has been compared with the number of people and because some defendants have multiple files there are more files than people required to appear. The ratio of files to people is shown in Figure 5.
**Persons appearing without legal representation**

A breakdown of the files passing through the AMC Criminal on 8 March 1999 shows that there were about equal numbers of persons appearing in person (unrepresented parties) as appeared with lawyers (legally represented) or who failed to appear. The pie chart in figure 6 demonstrates this:
**Disposition of matters**

Figure 7 shows the manner of disposition of matters heard in the AMC (Criminal) court on 8 March 1999.\(^{47}\)

![Figure 7. Criminal File dispositions 8 March 1999](image)

The figures show that almost two thirds of the matters that were listed in the AMC criminal court on 9 March 1999 were either adjourned or remanded for a subsequent appearance. Figure 7 does not show trials listed. Four were listed, though one was withdrawn on the day, two were adjourned to the following day and were then withdrawn. The last proceeded and was part heard at the end of the day.

**Profile of civil matters**

During the same week commencing 8 March 1999 a ‘snap shot’ was taken of files dealt with in the civil division of the AMC.\(^{48}\) The data are tabulated in Table 1 according to the nature of the court process and shows the number of trials and the number of

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\(^{47}\) The figures were arrived at by hand counting the files after they left the court at the end of the day and noting the outcomes. My appreciation is expressed to George Haig of the Adelaide Court Registry. This was a very time consuming task.

\(^{48}\) The work in the central Magistrates court at Adelaide is divided into criminal and civil work. At the time of this survey five magistrates were attached to the civil division at Adelaide. In the suburbs, magistrates carry out both civil and
interlocutory applications, directions hearings, conciliation conferences and other applications being dealt with.

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<tr>
<td>Trials</td>
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<td>Applications</td>
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<td>6</td>
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<td>1</td>
<td>1</td>
<td>6</td>
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<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
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<tr>
<td>Conciliations</td>
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<td>-</td>
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<td>3</td>
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<td>Mediations</td>
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<td>-</td>
<td>-</td>
<td>-</td>
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<tr>
<td>Appeals</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>20</td>
<td>16</td>
</tr>
<tr>
<td>Others</td>
<td>4</td>
<td>-</td>
<td>4</td>
<td>3</td>
<td>7</td>
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</tbody>
</table>

Table 1. Processes listed during the week of 8 March 1999 in AMC (Civil)

In terms of number of files being dealt with for different reasons it can be seen that ‘appeals’ in terms of numbers are substantial. Most of these would have been appeals by drivers for exceeding the number of points on their licenses. Such matters are routine and take very little time or intellectual energy. This demonstrates one of the dangers of counting by numbers when assessing workload.

**Civil trial outcomes**

The outcomes of trials conducted in the week commencing 8 March 1999 in the AMC (Civil) court demonstrates that magistrates deal with many matters on an extemporaneous judgment basis. The outcomes for the week concerned are set out in Table 2:
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<tr>
<td>Default Judgment</td>
<td>3</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Consent Judgment</td>
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<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
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<tr>
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<td>7</td>
<td>7</td>
<td>1</td>
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<tr>
<td>Reserved Judgment</td>
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<td>-</td>
<td>-</td>
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<td>-</td>
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<tr>
<td>Adjournments</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
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</tbody>
</table>

Table 2. Outcomes of minor civil trials week commencing 8 March 1999

Twenty-seven extempore judgments were delivered that week. Delivery of extempore judgments is an art in itself. The magistrate needs not only to decide what the final decision will be but needs also to express the reasons in a form that the litigants can follow. In this week of minor civil actions there were no judgments reserved. It ought not to be assumed that this is typical. Having sat in the civil jurisdiction for some 10 years and having heard minor civil claims for at least one week per month over that time, the statistics do not match my own experience. But even allowing for the fact that the particular week may be unusual in that there were no reserved judgments, an assertion that most claims in the minor civil jurisdictions are dealt with ex-parte is a safe generalisation to make.

49 ‘Adjudged settled in Table 2 refers to a case that has settled in principle but which is adjourned to enable the terms of settlement to be carried out.

In the following week — commencing 15 March 1999 — general actions were listed for trial and the outcomes again tabulated so enabling a comparison to be made between the two results.

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</tr>
<tr>
<td>Default Judgment</td>
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<tr>
<td>Consent Judgment</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Adjourned For Term To Be Carried Out</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dismissed</td>
<td></td>
<td>1</td>
<td>1 (1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extempore Judgment</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Reserved Judgment</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
<td></td>
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<tr>
<td>Adjournments</td>
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<td></td>
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<td>1</td>
<td>(1)</td>
</tr>
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</table>

Table 3. Outcomes of general trials listed week commencing 15 March 1999

One notes that here there were five extempore judgments and three reserved judgments. The number of trials is also fewer. A rule of thumb used when listing is that four minor civil trials can be listed to each general action. There were 17 general actions listed in the week commencing 15 March 1999 compared with 67 minor civil actions in the preceding week. In both weeks there were four available magistrates to hear those trials.

**The different stages of civil processes**

An analysis was made of files enabling a profile to be drawn of the numbers and types of matter dealt with in the AMC (Civil) court over the period of four days from 1 to 4 May 2000. The stage reached by files were is shown in figure 8 below:
The figure demonstrates that in terms of the numbers of files being heard there are relatively few ‘trials’ contrasted with the number of interlocutory hearings, whether interlocutory applications or the giving of directions. The data also point to the numbers of matters that arise post judgment and lead to the issue of an investigation summons or examination summons. This is a reminder of the different sorts of decisions magistrates make illustrating that there are many more ‘other’ decisions than there are ‘final’ decisions.

**Interlocutory decisions**

Figure 9 below shows the manner in which interlocutory applications were disposed of in the period 1 to 4 May 2000. The chart demonstrates the variety of decisions and different outcomes that may follow an interlocutory hearing:

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51 Investigations summons and examination summons hearings are conducted pursuant to the *Enforcement of Judgments Act 1991 (SA)* s4. They are a procedure whereby a debtor is summoned to attend court to be examined as to his/her means to pay the judgment sum. Most hearings of this nature are conducted by Registrars of the Court. Cannon discusses the effectiveness of such processes to verify debt and enforce judgments in his doctoral dissertation, n 25.
Directions hearings outcomes

At a directions hearing there may be a variety of outcomes. There were 58 directions hearings convened over the period from 1 to 4 May 2000. Fourteen matters were set for trial. Twenty matters were finalised either being dismissed, settled or subject of a default judgment. Five were diverted out of the system and into mediation. Thirty nine of the 58 matters proceeded to a point of finality in the sense that either they were resolved or they were set for trial — and hence were brought to the stage where they would no longer be ‘circulating’ within the system. The figures demonstrate the importance of the role that magistrates play as ‘case managers’. Effective case management leads to many cases resolving prior to trial.
Flow chart — Criminal Court

Figure 11 shows the manner in which matters progress through the criminal court and the different levels of decision-making. At the outset a decision is made as to the ‘stream’ to which the matter should belong. If the charge is a major indictable charge, or a minor indictable charge in which election to have the matter heard by Judge and jury is possible, the matter is heading towards a committal hearing. If the offender fits into the category of person who should be diverted to one of the specialist courts that option will be considered. If neither of these applies the case is assigned according to whether the plea guilty or not guilty?
Figure 11. Flow chart — criminal jurisdiction

If there is no attendance, upon proof of service of the summons (if applicable) the magistrate may decide to direct a warrant to issue. At the time such an order is made the magistrate may decide to have the warrant endorsed ‘not certified for bail’. This may occur if the prosecutor advises that there have been previous non-attendances or the like. The consequence of such an endorsement is that, upon apprehension, the offender will not be granted ‘police bail’ but will be held in custody until brought before the court. Plainly, for the individual involved this is a decision of consequence. For the community likewise the decision is important — it may leave a repeat offender free in the community. The magistrate must make this decision quickly based on limited information.
The matter may be minor — a traffic offence for example. The magistrate may have service of the summons proved, proceed to record a conviction and order that a notice be sent to the defendant advising that a period of licence disqualification is under consideration and give the defendant the opportunity to be heard. Before proceeding to convict the magistrate will check the proof of service to ensure that service is in order. Each of these steps is procedurally required and ought to be carried out with care — yet the pressure upon the magistrate to keep the matters flowing is immense.

Often the defendant will seek and obtain a remand or adjournment to a later date to obtain legal advice or to enable processing of an application for legal aid. Sometimes defendants are remiss and seek a number of adjournments upon this basis. The magistrate may decide that enough adjournments have been given and refuse the further adjournment and require the defendant to intimate a plea. In so doing the magistrate makes a decision knowing that if a wrong assessment has been made of the defendant the decision may have a profound effect upon the defendant. It may lead to a guilty plea upon a false basis. On the other hand it may lead to a not guilty plea with the matter put in the trial list with a guilty plea finally being entered on the day of trial. This may mean that valuable magisterial time set aside for the trial is wasted.

**Bail decisions**

A decision about the grant of bail is one of the most important a magistrate must make. The magistrate is guided in that decision-making process by the provisions of the Bail Act. A presumption in favour of bail exists. If bail is opposed but granted the magistrate will need to consider the imposition of conditions or whether to call for a bail
report. If bail is refused, reasons in writing must be given. Although this is a decision of an interlocutory nature there is a statutory right of review.\textsuperscript{52}

**Flow Chart — Civil Jurisdiction**

Figure 12 shows the manner in which cases flow through the civil jurisdiction of the Court. It illustrates the stages at which decisions are made and the alternative options that are open.

An action is commenced in the civil jurisdiction with the filing of a claim. Available data demonstrate that most civil claims in the Magistrates Court are not defended.\textsuperscript{53} About 90% of claims issued are not defended. For the 10% or so of claims which are defended and a defence lodged, the Magistrate Court Rules (MCR) provide for the court to issue a notice of directions hearing. At the directions hearing the magistrate may make a variety of orders. The flow chart that follows shows the options for diversion to mediation and possibility of orders for discovery, appointment of experts and other steps in the process.

\textsuperscript{52} Bail Act 1985 (SA) s14.
\textsuperscript{53} Cannon, above n 25, 14.
The magistrate will give consideration to the possibility that the parties might agree to the issue between them being referred to a mediator for mediation. In South Australia, most magistrates have been trained and are accredited mediators. However, in the main, magistrates leave the mediation process to lay members of the court staff trained as mediators.

The matter could be one where there is an issue of a technical nature and the court might consider the appointment of an expert. Unlike the superior courts in South
Australia, and unlike courts in most other jurisdictions in other parts of Australia, the South Australian Magistrates' Court retains its own panel of experts. If an expert is appointed a report will be prepared after the expert has carried out whatever inspection is necessary and desirable. The formulation of such an independent and expert report will often lead to a resolution of the dispute.

At the first directions hearing the magistrate will evaluate the matter to decide which of these options should be pursued. If none of these options is chosen the magistrate will give directions designed to enable the matter to proceed expeditiously. Typical orders would be orders for discovery and in the case of a claim for damages for personal injuries orders will be made for the filing of what are known as form 22 particulars, if such have not already been filed and served.

Ultimately the matter is likely to be set for a conciliation conference. At such a conference the parties are required by the MCR to consider potential settlement and, if there are no prospects of that, to consider ways whereby the trial of the action may be expedited. Eventually, if the matter is not resolved, it will be listed for trial.

Summary

The numbers of matters passing through the Magistrates’ Court are large but statistics must be seen in correct perspective. A significant percentage of the files are traffic matters. Lists have been analysed for outcomes. What emerges is that magistrates are constantly making decisions. The role of the magistrate as case manager is demonstrated by the flow charts. These identify that well before the final outcome is determined a range of decisions has been made. In civil litigation the orders made following directions hearings or interlocutory applications can vary. Figure 12 for
example shows nine alternate outcomes from directions hearings. There were 20 results that were final — categorised as matters that were either ‘settled’ or ‘dismissed’ or that led to ‘default judgment’ — in the sense that the file was closed. This highlights the significance of the case management role of magistrates. The quantitative data concerning extempore judgments are data to be borne in mind when decision-making is considered in the next chapter and ‘communication’ in Chapter 6.

The data concerning length of lists provide a foundation for the discussion to follow about decision-making (Chapter 3). Counting numbers in absolute terms may be misleading because the number of files listed assumes that all defendants appear and all matters are of equal consequence. The data as to file disposition, the manner of procession through the court system and the number of interlocutory decisions and alternatives that are considered before a final outcome is known serve as the background to the qualitative data based upon the experiences of magistrates.

In the next three chapters I examine what it is about the decisions that magistrates find difficult and how such decision-making is affected by the work environment and the need to communicate at many different levels and for a variety of reasons. The data in this chapter show what magistrates do in fact. The data to follow show what magistrates believe they do.

Figure 10 in text at p47.
CHAPTER 4: DECISION MAKING

Introduction

The noted American jurist Benjamin Cardozo observed:

The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth.  

The term ‘decision’ has different meanings depending upon context. For clarity and better understanding of the text to follow, I explain at the outset the ways in which decisions can be characterised. Qualitative data concerning decision-making are discussed. Reference is made to some of the quantitative data identified in the previous chapter.

Decisions categorised

Final decision

A ‘final’ decision is a decision that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs and enforcement of the judgment. Some decisions such as sentencing decisions or delivering judgment finalise a matter. There may be consequential orders to be made such as orders as to costs or orders relating to enforcement of judgment or the like. But once that ‘final’ decision is announced the magistrate cannot thereafter change his/her mind as to the merits of the decision.

In the criminal jurisdiction ‘final’ decisions include the finding of a charge as proven or otherwise and the subsequent decision as to sentence. In the civil jurisdiction the Magistrates Court Rules (Civil) 1992 (MCR) distinguish between ‘judgment’ and ‘final judgment’. Some judgments are able to be set aside by further application in the magistrates court but a ‘final’ judgment can only be set aside by an appellate process. A ‘final’ judgment is a judgment on the merits.

**Interlocutory decisions**

Interlocutory decisions are decisions that do not finally dispose of the matter but relate to some intermediate step. Often these can be difficult and it is tempting to deal superficially with what is a difficult matter. A decision whether or not a matter could be classified as ‘trifling’ can be difficult, as in the following example. Here the decision was one the magistrate found difficult. Perhaps it was not only the nature of the matter but the ‘courtroom environment’ — the magistrate dealing with a general list whilst needing to take evidence on oath to decide the ‘trifling’ application.

Roy Preston SM: The Speed Dangerous in Tuesday's general list had enough substance in it for submissions on the question of it being trifling so I reserved it. Also, you have to have evidence on oath, which is very difficult to do in a general list, so I adjourned to this morning at 9.30. I've had the evidence and I've given my decision. It was a difficult, borderline application.

Many interlocutory decisions are made as the case progresses and they can affect litigants greatly. Decisions as to bail, issue of warrants, and the making of diversion orders are illustrations from the criminal jurisdiction. Decisions to set aside a default judgment or an order for discovery of documents are examples from the civil jurisdiction.
Other decisions

In addition to these decisions magistrates make many other decisions — these include decisions as to management of their list of cases and decisions concerning their staff. Many of these decisions are difficult to categorise but they raise practical issues the magistrate must determine. They might be called ‘administrative’ or ‘management’ decisions.

An illustration is the following taken from the transcript of interview of Phil White SM.

Phil White M: Yesterday I had a lady caught on a minor traffic matter who wanted to plead not guilty but had absolutely no defence. I heard what she had to say and found the charge proven. She then made a comment to me about how terrible the justice system is and how aggrieved she was. As it turned out she had no priors and she seemed to me to be not a criminal, just someone at the end of her tether. So the method I used to cope with her was just to say 'Look, you don't need to make those comments. You should really wait until you get outside of court and of course I haven't finished yet. I still have one more thing to do and that is to sentence you and you don't want to create a problem for yourself. Fortunately for you I don't take what you say personally and so I'll move on.' I then explained to her a bit about the system. In the end she went away quite happy.

Phil White was dealing with a matter at the lower end of the scale. —a minor traffic charge. The offender was ‘aggrieved’ and thought the justice system to be ‘terrible’. It was apparent to the magistrate that the defendant had no defence. He formed the view that the woman was not a criminal but ‘someone at the end of her tether’. Such judgments are made quickly — this was a minor traffic case and it is most unlikely that the magistrate had time to mull over the decision. Then he decided on the ‘approach’ he would use. He decided not to react to the hostility displayed but said instead, ‘Look, you don’t need to make those comments.’ Through a series of thoughtful and insightful reflections, the magistrate turned an angry person, frustrated by the system, into a person who left ‘quite happy’. The work environment was tense; the magistrate was able to defuse the situation by sensible use of communication skills.
At the 1997 Conference of NSW magistrates, Milson asked the 47 magistrates present to identify the decisions they found hardest to make. The results are shown in Appendix 4. Finely balanced factual decisions, sentencing to prison, and children’s punishment were rated as most difficult by the NSW magistrates. At the Annual Conference in November 2000, South Australian magistrates placed imposition of custodial sentences and children’s punishment as amongst the most challenging. There is correspondence between the survey results in this regard.

In the South Australian survey ‘factual decisions’ in both the criminal and civil areas appear more towards the ‘routine’ or ‘straightforward’ — at the lower end of the scale. Dealing with unfamiliar areas of law was regarded by a majority of the South Australian magistrates as fitting the most challenging category. In the New South Wales survey ‘unfamiliar fact or law’ were near the top of the matters listed as difficult.

The South Australian magistrates were invited to comment on the issues they found most challenging and to say why. Fifteen of those completing the questionnaire responded to this request. Their responses appear in Appendix 3. Seven of the fifteen respondents identified aspects of decision-making as the most challenging aspect of their work. Comments included ‘decision-making — too many’ and ‘the relentlessness of decision-making — wears you down’ and ‘the fact that it is unrelenting’.

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57 Appendix 4, 164.
58 The surveys are not conducted on the same basis. The NSW survey does not disclose what the magistrates who chose a particular issue as difficult would have said about other matters of difficulty.
What the interview material shows as being most difficult

During the course of interviewing magistrates I asked all magistrates to say what decisions they had made that day, or week, which they had found most difficult. In the next paragraphs I consider in detail and comment on some of the examples given by magistrates indicating why they classified the decision as difficult.

The numbers in the list were a factor identified by Arthur Brown as the source of his concern:

Arthur Brown SM Monday’s list had ninety-seven or one hundred matters in it. There were some multiple file matters for certain defendants, some of which I think resolved. Some pleas were taken in the 11.30 lists, which continued until 2.15, but the results were very good. I managed to save four trials by, I suppose, pushing and prodding the prosecutor, the lawyer and a particular defendant. There were four potential trials that were due to be set down. Some were going to be pleas and some were teetering. I recognised the ones, which were teetering because their remarks indicated that there was room to move. What seemed to shift the balance was intimation from me that as this man had been in custody for a long time awaiting the outcome of these matters, he wouldn’t receive a very severe punishment at all on this day. I think that got through to the defendant more than anyone else.

What made the decision hard for Daniel Walters was the fact that there was new law involved allowing the magistrate to defer sentencing combined with the fact that the offender had on the previous day been dealt with by another magistrate:

Daniel Walters M: The most difficult matter I dealt with today was just the young blokes or the one fellow who was dealt with yesterday at another Court and, having got a community-based order, went out immediately and committed a number of offences from railway stations. There are fairly new provisions under the Sentencing Act in Victoria which came into effect only last week enabling us to defer sentencing of an offender between 17 and 25 years of age. In this case I propose to defer the sentencing of those two fellows and see how they go in three months on the community-based orders that they are currently undergoing.

Walters was dealing with new provisions of the Sentencing Act (Vic) 19 that had come into effect the preceding week. He was dealing with unfamiliar or new law. Barney Bryant SM, identified sentencing and fact-finding as his most difficult decisions.
Barney Bryant SM: I find the most difficult task in being a Magistrate is sentencing in some cases. It takes a fair amount of time in preparation. I find hearing and determining cases such as indecent assaults difficult, both in terms of fact-finding and sentencing. The fact-finding is not necessarily whether you believe the person is telling the truth but in assessing the reliability of a person's evidence, particularly when it is a youthful witness.

Barney Bryant implies that pressure of time is part of the reason for the difficulty. Lillian Graham M in another example echoes the concern that time is needed but the pressure to dispose of matters is great. Her statement underlies the need for reflective decision-making even where the stakes in terms of money are not high.

Lillian Graham M: You absolutely need time to think because no matter what it is, these are really important issues to the people, even in small claims. I'm sure all Magistrates say 'you should have heard this small claim I had today. It was a waste of my time', but the minute you make the decision against the person, they are writing to the Attorney General about it. Any form of litigation affects people and all litigation is important to those who are involved in it.

Another difficulty about decision-making is demonstrated in the example below in which Susan Gray SM identifies an issue of ‘loss of perspective’ — loss of perspective in the sense that the magistrate may fail to acknowledge the importance of the process to the litigant and the need to accept that it is important to the litigant to ‘feel the process acknowledges them’. The example is an illustration of the significance placed by the magistrate on communication.

Susan Gray SM: One of the hardest things a Magistrate must take on board is that because it is so busy and so much is happening all the time, we tend to lose the perspective that for most litigants and parents and others it might be the only time they come to court, so for them to leave that time without having had an opportunity to say something very important to them would be a failure of the process. Even if at the end of the day it does not affect the decision-making one way or the other, it is important that they feel the process acknowledges them and that you hear what they have to say.

Deciding the credibility of a witness requires careful evaluation not only of how the witness has presented but perhaps more importantly it requires the magistrate to
consider the witness’ version of the facts in the light of other facts established and their consistency or inconsistency with the version of the witness. This is a difficult intellectual exercise. It is interlocutory in that is a question of evidence which could be subject to an application within the trial. It is part of the mental process undertaken in the course of deciding whether or not to accept a particular piece of evidence.

Two magistrates nominated decisions in minor civil actions to be the most difficult decision they had made in the week preceding their interview. The examples given are set out below.

Colin Saunders SM: Over the past three days the most difficult matter I did was a small claim on Monday involving repairs on a Porsche motor vehicle. It was a matter of understanding some of the evidence about the electronic system of this car and dealing with competing evidence between two automotive electricians and it was ultimately a matter of deciding between two competing expert witnesses and hoping that I made the right decision and backed the right expert.

The magistrate is dealing with a technical matter and a subject with which he is not familiar. There is difficulty in comprehending the evidence he must choose from competing experts.

Janine Johnstone SM: The hardest matter I dealt with this week was a minor civil claim at Agatha’s Bay, which required some intellect to understand the issues. It involved ostrich eggs being agisted and records as to hatching rates. It was a factual situation that I had come to terms with in half an hour. I didn’t understand a word of the claim and defence documents. I didn’t understand the concept nor the set-up between two proprietary companies and farmers transferring their eggs to be agisted and incubated elsewhere, tagging systems or record-keeping, and prices to be paid and tags to be retrieved. It was difficult in that it was intellectually challenging, but it had a good result. Having actually concentrated and done a bit of active perusal and active listening to the parties, I got on top of it and once I knew what they were talking about the matter was sorted out by mediation.

The example given by Janine Johnstone SM illustrates well the three themes running through this dissertation. The decision involves an understanding of an unfamiliar subject. Fact-finding is difficult. The work environment allowed the magistrate ‘half
an hour’ to make the decision — presumably because of the number of other ‘small claims’ waiting to be heard. It required ‘active listening’ — an aspect of communication discussed in Chapter 5.

**Changes in legal culture**

The ‘adversarial model’ of litigation is a model in which the magistrate or other judicial officer stands aloof whilst the parties conduct their cases in their own way and the judicial officer waits till the end of this process and then announces a decision.

In a paper entitled *The Future of Adversarial Justice*, a former Chief Justice of the High Court of Australia, Sir Anthony Mason, noted:

> My purpose in this address is to evaluate the future of adversarial justice in the light of its decline and the rise of alternative dispute resolution (ADR) mechanisms. In making that evaluation, I take account of the convergence which is taking place between the common law adversarial system and the European civil law procedural system (the so-called ‘inquisitorial’ system) and examine the possibility of adopting that system. In rejecting that possibility and concluding that adversarial justice has an important, though less pre-dominant, role than it has enjoyed in the past, I shall make the point that the future success of adversarial justice depends, to a significant extent, on the role and attitude of the judges.  

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![59](https://example.com/image)

The interview material suggests that magistrates have embraced this proactive role.

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**Kevin Cosner SM:** I believe my role as a Magistrate has changed over 22 years. There are about five of us in that same sort of category. The work started off in an adversarial mode and one's part was never to descend into the arena, as the old phrase used to go. The volume of work now is so great and the expectations of the Magistracy so huge that you cannot stand back and allow the system to just march along.

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**Dr Cannon** in his doctoral dissertation discusses the proper role of lower courts in determining disputes and observes:

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“… the primary role of the Magistrates Court remains to decide factual matters and apply established legal principle to them. For the court to fulfil this role it must provide a practice and procedure that determines a factual dispute with reasonable accuracy and ascertains correct legal principle and applies it to the facts in a principled, non-idiosyncratic way. It must also be sufficiently prompt to deliver the result in a time frame that is useful to the parties.”

The concept of case flow management was developed well before Dr Cannon’s comment. Nonetheless, that description is a useful summary of why the principles of case management have come to be accepted, resulting in the magistracy making ‘management’ decisions to ensure that matters proceed with expedition and at the least cost possible.

When making his comment, Cannon was referring to a court such as the Magistrates Court when exercising its civil jurisdiction. But similar considerations apply to the conduct of criminal proceedings.

Whereas in times gone by the court was content to leave the conduct of matters very much in the hands of the litigants or their advisors, the court today accepts it to be part of its responsibility to ensure that matters progress as smoothly and as quickly as is reasonably achievable.

There is now a greater emphasis than in the past on this ‘management’ aspect of the processing of files. This in turn affects decision-making by magistrates. The traditional role of all judicial officers has been to preside at a trial hearing conducted in the context of the adversarial model of decision-making. Their role is changing to being pro-active.

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60 Cannon, above n 25, 15
participants in the conduct of matters in the Court. Their decision-making assumes new dimensions as a result.

The interview material points to them ‘hurrying’ cases along and generally being pro-active participants rather than aloof spectators.

Henry Fielding SM: With the new Practice Directions (requiring matters to be completed within 26 weeks and with a strong bias against adjournments) there is even greater pressure because if you are seen to be weak about that in court 12, the defence will walk all over you — “This bastard's soft. We can get an adjournment any time.”

In November 1998 the Chief Justice of the High Court of Australia, Justice Murray Gleeson noted the trend towards devolution of jurisdiction from higher courts to lower courts and said:

‘There are already clear signs that governments are turning to the expansion of summary justice as a means of responding to some of the pressures to which I have referred. Although it has not attracted a great deal of public attention, in recent years there has been, in State jurisdictions, a clear trend towards increasing the number of criminal offences which may be dealt with summarily, rather than at a trial before a judge and jury. There is little doubt that this has been driven mainly by cost considerations.

Similarly, in the area of civil justice, the jurisdiction of the Local Courts has expanded greatly. Once again, I have no doubt that this has been influenced by a desire, in the interests of costs and access to justice, to extend the range of civil disputes which may be dealt with by summary litigious procedures. The practical importance of the role of magistrates in the administration of civil and criminal justice is constantly increasing, and it is vital that organisations which aim to be representative of the judiciary should be alert to the concerns and interests of magistrates.’ 61

A consequence is that magistrates are making more difficult decisions. Magistrates recognise that devolution of cases has made their decision-making more difficult.

James Snell SM: Over the past ten years I think the workload has definitely changed a lot in terms of volume and difficulty. The workload in the civil court is very intense and the difficulty level is much higher. We’ve inherited a lot of the District and Supreme Court work. It’s a rare case where you know the answer immediately. I prefer to, if in doubt, reserve it and get it out of the way as quickly as I can but at least have a look and try to make the correct decision.

Colin Saunders SM, speaking of work in the criminal jurisdiction, expressed similar sentiment. He identifies the factors causing decision-making to be more difficult as ‘greater volume’, ‘more legal argument’ and greater expectations of the magistracy.

Colin Saunders SM: I think we’re expected to work harder and be more efficient than we were ten years ago, and we are. Subject to all the deficiencies I just mentioned, we are more efficient. I think it’s more difficult because it’s a greater volume of work and there’s more legal argument. We’re expected to be better qualified, better read in the law and organise our time better. We don’t have a better quality of counsel than we had 10 years ago. It’s still a cutting ground for younger practitioners.

All Australian courts have adopted the principle of case management. The rationale for it, and a good overview of the development of case flow management, is to be found in the decision of Justice Kirby in *Queensland v J L Holdings Pty Ltd*:

> Although ‘some form of case management has always existed’, the role of judges in Australia in directing the progress of at least large and complex litigation has increased greatly in recent years. Such functions are now regarded as a necessary and orthodox part of the judicial function. The view has been expressed by experienced Australian judges that, without more effective management of litigation, the system would be likely to collapse. The conviction that accumulating delays occasion serious injustices has led to a greater use of case management as the only effective means by which judges can respond to their ever increasing case loads without benefit of commensurate increases in judicial numbers and resources.

Magistrates are now ‘managers’ of cases who supervise the progress of matters to trial and give ‘procedural’ directions to the parties to ensure matters are settled at an early stage, diverted to another forum (for example to mediation) or brought to trial quickly.

Magistrates now have a variety of diversionary options open to them. Justice Gray in *R v McMillan* traces the history of such programs and explains the rationale for them:

> The concept of diversion involves a realisation that traditional criminal sanctions are not effectively reducing the criminal activities of certain persons within the community. The aim is to divert or channel those persons out of the court process into programs with a rehabilitative treatment focus. This is with a view to their long-term rehabilitation and the prevention of further offending. The conventional criminal process will usually be stayed on the condition that the person enters an appropriate, approved treatment program. If satisfactory progress is made then the ‘criminal

*Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146.
proceedings’ may be discontinued or alternatively a lesser penalty may be imposed than would otherwise have been after the period of treatment has been effectively undertaken.\(^\text{63}\)

Diversion opens a new option to magistrates when deciding how to deal with a matter.

Peter Williams M: With the Diversion Scheme I can say to them 'You've acknowledged that you've been in possession of drugs. It is sufficient for both our purposes if you go to one of the local drug agencies. We can book you in and you can do some drug counselling or assistance or whatever is required.' I would then ask them to come back in three months and I would get follow up from the people we have sent them to in order to explain what has happened and how they have been taken care of. If they follow that through, the protocol deal with the police is that they will withdraw the charge, although they might keep an internal diary of the fact they were given that opportunity.

Joseph Domino SM explains the value of such diversionary techniques in a manner reminiscent of the statements made in *McMillan*.

Joseph Domino SM: I thought we could readily develop and set up a Domestic Violence Court, so I transplanted the idea back here, made a few changes to what they were doing there and it's progressed from there. From the Court's perspective, one of the reasons behind getting involved in it from the Court is because these people come back to Court in a cycle. Trying to stop people coming back to Court, snapping the connection of people saying "We solved it at the first hearing and made an appropriate order", but then going out the door and coming back in a month, has a huge benefit for the populace and for the running of the Court.

The development of case management requires the exercise of a new range of skills, for example, skills allied with ‘counselling’ and skills in knowing at what stage to suggest possible alternatives to the trial process and diversion to an alternative system of dispute resolution.

\(^{63}\) *R v McMillan* [2001] SASC 73, [60].
Bail decisions

Even before the file begins its progression through the system the issue of bail may arise. The person may have been admitted to bail or bail may have been refused. In the latter case the offender appears in court from custody and a bail application may be renewed. If a person is arrested over the weekend or at night and bail is refused, a telephone application may be made to a magistrate who will review the order refusing bail under the *Bail Act*. Such applications can be made at any time. Bail decisions are difficult in any event and contentious applications heard by telephone can be doubly so:

Bob Jones SM: I received a phone call from the Police Station advising me that they had refused bail to a man who was charged with breaching a restraint order. It was explained to me that he had breached this restraint order on a number of occasions. The beneficiary of the restraint order was his former fiancée, and I was told that he was making life miserable for her. I was told that on the previous Thursday at another car park where she worked, he had driven his car towards her and narrowly missed her and had warned her to drop the restraint order proceedings. I then arranged for the applicant for bail to come on to the telephone, and he explained to me that he was a quite successful businessman who had the contract for the distribution of newspapers from a number of local newspapers in the Northern Triangle region. He sounded quite desperate on the telephone, and one can imagine just how difficult it was at that hour of the day over the telephone to make a proper judgment about that.

The ‘difficulty’ was identified as the hour of the day. But added to that is the fact that the hearing was conducted ‘over the telephone’. The decision to grant or refuse bail is a decision that affects the liberty of the citizen. The decision is made prior to the accused person being convicted of any offence. The presumption of innocence applies and there is a presumption in favour of the grant of bail written into the *Bail Act*. In the example given the allegations were serious but of course at that stage not proven. If bail was refused the loss financially to the applicant was likely to be considerable. If bail was granted there might be the risk of a further offence with potentially life threatening consequences. Bail decisions often involve finely balanced judgments. The

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64 *Bail Act 1985 (SA) s15.*
presumption in favour of bail and the need to protect the community from possible future offending can never be far from the mind of the magistrate. Janine Johnstone spells this out:

Janine Johnstone SM: In bail applications where you are dealing with murder, rape, armed robbery or drug offences, there is a feeling of responsibility to make sure you get it right so that you’re not subjecting the community to further offending.

The decision usually has to be made immediately. Even if the magistrate wants to think about the matter, a decision has to be made about what happens to the accused in the interim — released or held in custody? The consequences can be far reaching and one magistrate recounts his experience of refusing bail to a youth who committed suicide thereafter:

Matthew Perkins SM: The most difficult part of my job is remanding youths in custody, which is personal to me and a problem, which I bear the burden of. You may remand a youth in custody and, as has happened to me, the youth committed suicide. I remanded him in custody, not to be hung or to die, and it is very worrying indeed when youths have nowhere to go, no family, no support in the community and they are remanded in custody.

The magistrate ought not to think of it as ‘a problem that I bear’. The magistrate was entitled to assume that the Correctional Services authority would ensure the youth was safe in a Detention Centre. But human nature being what it is such an event is likely to leave its mark. The example is an extreme one but underlines the importance of bail decisions.

If there are a number of bail decisions to be made the pressure rises considerably. Domino gives an example of dealing with numerous bail decisions in the context of a general list. Each bail decision has the same consequence for the offender as the
imposition of a custodial sentence. The term may be short — unlike that which may eventually result. But each bail decision does involve the exercise of a power to grant or deprive the subject of liberty. It is a legitimate expectation of the community that such a power will be exercised with considerable care. The example below provided by Joseph Domino highlights how difficult this is:

Joseph Domino SM: The hardest thing I did in the past week was on Tuesday when we had 27 custody cases at Hammond … These are people who have been arrested on the weekend, who come in to Court because of previous custodial orders. I have to decide whether they stay, go, or what, so you're dealing with multiple bail issues and many unpaid fines and warrants … So issues of pressure of numbers rather than complexity of individual cases are the things that strike me, and the desirability of changing the way we handle multiple cases so that in fact we give ourselves a better slice at them. I think we can do that, but I don't know that as a group of people there is sufficient common mental approach to cases to be able to carry that out across the whole body of Magistrates.

Domino identifies ‘pressure of numbers’ as the main issue. The fact that the magistrate dealt with 27 custody matters in addition to the general list was a further difficulty. These were people in the main who had been arrested over the weekend. When lists were set it could not have been foreseen that there would be such a heavy load of overnight arrests. As the people were in custody it can be assumed they had been denied bail on arrest. The magistrate refers to the fact that ‘you get a bit longer now’ to make the decision. This interview took place upon Sunday 20 June 1999. It was not long after home detention became available in South Australia as a bail condition. The magistrate refers to the ‘social issues’ surrounding grant of bail. Refusal of bail means loss of liberty. Such decisions cannot be taken lightly and they are the sorts of decision which is emotionally draining. These are the factors I would identify as those which led to the categorisation of this as Domino’s most difficult decision.
Ordering a pre-sentence report

A request for a presentence or psychiatric report might be thought to involve one decision — to order or not to order a report. The reality is far more complex. The magistrate indicates what the report should contain. The resulting report is likely to be more helpful to the Court than a general request for information.

Barney Bryant SM: In the psychiatric report I focus on particular aspects. Last year a survey of Magistrates was done by Dr Kevin Leary and other people concerning their patterns of ordering psychiatric and psychological reports, exploring the reasons for ordering them, what sort of information they sought and what use was made of them. In the course of that he prepared a questionnaire which I found to be extremely useful in identifying exactly what information is sought from a psychiatrist or psychologist, such as what sort of information you want about their history, what sort of assessment you want, what purpose it is sought for, what sort of opinions you are seeking and on what topic. It enables the author of the report to know much more clearly what is being sought, and if you are that specific, the information you get is more likely to be very useful. The magistrate in the criminal court may be made aware of circumstances that indicate the particular offender would be better dealt with in some alternative court system. A separate court is held where only ‘family disputes’ are dealt with. That is to say it is to this court that a person will be referred to if the person has a history of domestic violence or there is an application for a ‘restraint’ order.

The example demonstrates that there are a variety of thought processes undertaken, leading to the inclusion of some items and the exclusion of others. In the example the magistrate considered a variety of matters that could be included in the report:

- Personal history.
- Opinion as to likely recidivism.
- Medical history.
- Psychological aspects.

The magistrate, whilst sitting in a busy court and with other offenders waiting to be heard, gives directions as to what is to be included into the report.
Setting aside a default judgment

Henry Walters SM identified his hardest decision to be the conflicting interest the court has in supporting a regularly obtained judgment against the need to ensure that a party with a genuine defence is given the opportunity of presenting that defence.

Henry Walters SM: I think the hardest decision I had to make arose in one of the most frequent occurrences of setting aside a judgment. You are confronted with a situation where, more often than not, a person has a lawful judgment and frankly, I suppose that with the sheer volume of cases we get, we rarely approach a defence application without an air of scepticism. The blandishment of bad debtors makes one wary of all applications of this nature. To set aside a judgment lawfully obtained is, in itself, a pretty serious thing to do but, by the same token, you must bear in mind that, whilst the person may well have a genuine defence and a genuine explanation for not having complied with the rules of court, they may well want their day in court.

Application to estreat the bond of a guarantor

An application to show cause why bail ought not to be estreated as a consequence of an offender failing to attend court would ordinarily be regarded as a routine application not requiring major decisions by the magistrate. I examine one such application.

Janine Johnstone SM: In one matter a bail was breached and the guarantor was called to show cause why their guarantee should not be estreated. In your assessment I think you must take an overview of the file in case there have been a number of bails. You must determine how that guarantor fits into the scheme of things, at what stage he or she was required and for what reasons. I usually try to assess that and explain that position to the guarantor to see if they accept whatever is my summation. I ask them for their view as to what were their responsibilities and discuss the fact that, for example, they were required because the defendant was thought to be a bad candidate for bail or failed to turn up in the past. I may comment as to whether it's a serious or run-of-the-mill type of offence and what effect the non-appearance of the defendant has had. I would ask them about what efforts they've made to secure the defendant's attendance before the court.

In this example the magistrate ‘took an overview of the file’. She looked through the file to find out whether there had been many remands or other instances of failure to attend. That was for the purpose of deciding the significance or otherwise of the defendant’s failure to appear. She considered ‘where the guarantor fitted into the scheme of things’. She had to decide how much fault or responsibility lay with the
guarantor for the failure of the defendant to appear. Lay people do not always understand the concept of a ‘guarantee’. The magistrate asked questions to determine whether or not the guarantor had understood the nature and extent of the obligation accepted when agreeing to act as guarantor. The magistrate decided to ‘ask for the view’ of the guarantor and decided what weight to give to that view. She explained why the guarantee had been required. That requires the magistrate — being in all probability a magistrate other than the magistrate who made the initial order — to decide why the guarantee had been required. Was it because it was a serious matter? Was it because the offender had failed to answer bail on previous occasions?

The magistrate decides what weight to attach to any explanation offered by the guarantor. Only then is the magistrate in a position to decide whether or not to estreat the bond. What would usually be considered a straightforward matter turns out to be a matter requiring a number of different decisions or assessments.

**Sentencing**

A more graphic example of the mental processes accompanying the making of decisions is that of Barney Bryant SM. This is an example on an extraordinarily difficult sentencing matter. The example is lengthy and I have broken it down into small segments:

Barney Bryant SM: I had an unusual case this morning where the defendant had eight files and more than 105 offences including 48 consideration offences, all committed from 17 December 1998 to 3 December 1999 when she was remanded in custody. They were all offences of dishonesty …
Barney refers to this as ‘an unusual case’. What Barney was referring to was the number of charges and the number of offences. There were a number of cases that were referred to by other magistrates as ‘unusual’ or ‘extraordinary’ or the like. The days on which magistrates were interviewed were chosen at random and not because of any foreknowledge that something exceptional would arise in the list. No two cases are alike. Barney continued his example — what appeared to be offences of dishonesty were really drug related:

Upon reading the apprehension report, from the allegations and her admissions to the police, they were all drug-related offences. She was using heroin at the time and candidly told the police her habit cost her between $400 to $500. She was in desperate need of funds and resorted to dishonesty, with the victims including her parents. In this case the fact that two of the victims were the defendant's own parents certainly created difficulties in the management of the case at various stages … When I announced my decision she obviously blamed her parents and screamed at them in court that she hated them.

Barney’s description of the case raises issues of management, communication and work environment as well as decision-making. The example demonstrates the number of matters and issues requiring consideration:

The major sentencing issue is perhaps whether or not to suspend the substantial period of imprisonment that I intend to impose. The prosecutor says that because of the seriousness of the offending and the prevalence of it, deterrence to her and the public in general should be the predominant purpose, and he suggests the only way that can effectively be achieved is by imposing an immediate custodial sentence with perhaps a shorter than usual non-parole period, particularly having regard to the four months she has already spent in custody. The defendant's counsel says that I should suspend the sentence and in fixing penalty obviously take into account the four months she has spent in custody.
The alternatives required Barney to consider all the material before him and to make an assessment of prospects of rehabilitation:

> What I do will certainly depend on my assessment of her insight into her underlying problem, her motivation to do something effective about it and to continue to do that in the future with professional assistance, which she clearly needs.

The examples above are but particular illustrations of decisions being made constantly throughout the day. One magistrate summed it up in these words:

> Bob Jones SM: Court two is quite demanding for a week. I find that extraneous work such as reading and writing reserved decisions must go by the wayside for that week, and I have to concentrate only on being in court over the course of the day, dealing with the matters and focusing on those particular files for the whole day. It involves lots of small and large decisions that must be made quite quickly on a fairly constant basis. It is almost very much a case of dealing with a sea of people from a myriad of backgrounds and ages on a fairly quick basis; interacting and speaking with them, asking them questions and making decisions about them.

This example not only signifies the numbers of decisions being made but also captures the work environment — ‘the sea of people from a myriad of backgrounds and ages’ — and is relevant also to communication.

Another example of multiple level decision-making is that given by Kevin Cosner SM:

> Kevin Cosner SM: By the same token, last Tuesday there was an enormous number of repetitive offences in the Youth List and an absolutely remarkable case of a young man of 16 or 17 whose parents had refused to pick him up at 3 a.m. He broke into a leading motor car retailer's premises, went right through the vehicles, found one with a key in it which happened to be a brand new Daewoo, drove it through the front doors... The victim was asked to come to court and give evidence of what it was like being a victim and the trouble he went through. He came straight away, excited by the prospect, and the first thing he announced was that he felt this would be just another case of a slap on the wrist and that would be the end of it... By the time the victim had given his evidence and chatted, I asked them to adjourn outside the court because the victim said that instead of money he was quite prepared to have the defendant come and work to a value of what he had to outlay from his pocket to see some of the problems the victim experienced with vandalism and things of that kind. They came back and I adjourned it for nine months, basically a Griffith's Remand.65
This is an extraordinary case in which the magistrate made a large number of decisions. In effect he was advocating ‘restorative justice’ as being the most appropriate manner of dealing with the particular offender. The decision to contact the victim and ask him to come to court showed initiative. The magistrate discerned from the ‘reply’ that the victim had sent the offender in answer to an apology that there was something worth following up. He proved to be right. The victim came to court expecting the court to impose a ‘slap on the wrist’. It would appear likely that the magistrate’s decision restored that person’s faith in the system of justice.

Kevin Cosner describes this as ‘an absolutely remarkable case’ and Barney Bryant referred to his matter as ‘unusual’. Yet both cases occurred during the week or so preceding my interview with them — an interview arranged randomly without any foreknowledge of what might be in the magistrate’s list. This suggests magistrates make extremely difficult and complex decisions without necessarily appreciating the difficulty of their undertaking.

**Summary**

This chapter demonstrates that magistrates have different views about what makes a decision difficult. I note that two of the magistrates nominated a decision in a particular ‘small claim’ as their most difficult decision. I make the point that it is not necessarily the amount of money at stake or even the length of the hearing that affects the difficulty of decision-making. The chapter distinguishes between interlocutory and final decisions. The change in approach brought about by case management and diversionary

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65 *Griffiths v The Queen* (1977) 137 CLR 293.
court options adds to the number and types of decisions magistrates now make compared with what they were called on to make 20 years ago. Even in the last 15 years there have been many developments of this nature. South Australian magistrates at the time of commencement of this research in 1999 had spent an average of 14.6 years on the Bench. This raises the question of how well magistrates are trained to recognise change and adapt in the performance of their work. This will eventually lead in this thesis to the conclusion, enunciated in Chapters 7 and 8 hereof, that magistrates have power to help themselves to change by reflecting on and observing the changes from a viewing position other than the Bench. This chapter suggests that whether lists are long or short, there is constant demand to make decisions and that each decision may have dramatic consequences. The consequences are part of what is identified in the following chapter as an aspect of work environment.

In the next two chapters I look at the way in which decision-making is related to and affected by the work environment and by the need for constant communication.
CHAPTER 5. THE WORK ENVIRONMENT

Introduction

Kenneth Lewis in an article entitled ‘Building Courts for Dignity and Community’ has noted:

The courthouse is one of the most potent symbols of our way of government, representing faith in the rule of law, the peaceful resolution of disputes and a democratic system of government. The composition of the courthouse as well as the organization of the elements within reinforces those beliefs…a courthouse should express society’s highest aspirations.66

The sentiments expressed in this paper come from an American context. Nevertheless it is apposite to most courts in Australia.

The interior of most courtrooms has a distinctive appearance. Not only are there the elevated benches and two sets of tables for staff and lawyers but there is in addition a separate ‘box’ or enclosure from which witnesses give evidence, and the ‘dock’ where the prisoner or defendant stands or sits as the charges are read, the plea taken and submissions heard. The Coat of Arms hangs on the wall behind the bench where the magistrate sits. An air of formality pervades the workplace environment.

The Chief Justices of Australia have issued a Guide to Judicial Conduct in which they discuss the manner in which judicial officers (judges and magistrates) should conduct themselves.67 Of the judicial role in court they state:

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance

and good humour. The trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness. Indeed it sometimes relieves tension and thereby assists the trial process.  

The courtroom is the setting for the maintenance of these recommended judicial standards. Some formality is appropriate but magistrates have queried whether all of the existing structures should be maintained.

The Chief Justice of South Australia, Justice Doyle, in delivering the eighth Robert Harris Oration in October 1998 soon after his appointment said:

'Being newly appointed as a Judge I felt rather like an actor who steps into the role of Hamlet, with almost no time to prepare; who has been to performances of Hamlet but who has never played the part before; surrounded by a cast who are thoroughly rehearsed in their parts, and facing an audience who have seen the play many times and who know how they want Hamlet played. The rest of the cast know when Hamlet should enter and exit, what he should say. The audience knows how they want Hamlet played. But some of them are traditionalists, some of them think he should be in modern dress, some of them think that since Sir Laurence Olivier there has never been a good Hamlet. Hamlet himself is unsure of everything, but sees that the cast and the audience expect him to act in a certain way. I notice that there are people in the audience who do not seem at all impressed by Hamlet. I can hear the muttering in the front stalls. Not all of the critical reviews are favourable. People are suggesting that the play and Hamlet are outdated, and out of touch. They want change.  

Each day the magistrate comes and goes into the courtroom. The magistrate walks to an elevated Bench rather than a stage. Unlike the actor the magistrate does not have a script and must improvise throughout the day. The ‘audience’ facing the actor attends voluntarily, optimistically looking forward to a good performance. The litigants in court are usually not there voluntarily but by legal compulsion. They are likely to be nervous and anxious. They usually have a lot to win or lose — unlike those attending the theatre.

One magistrate likened the court to a supermarket on a busy day:

68 Ibid 15.
Here the work environment, as described, has a number of components. There is the ‘mad rush’ as those attending seek advice; the magistrate has to ‘usurp’ the function of the lawyer and subsequently to ‘ek out’ the required information. Another reflection upon the work environment and the length of lists is the example given by Bob Jones SM and referred to earlier.  

The ‘sea of faces’ captures the work environment of the magistrate well. The quantitative data referred to in Chapter 3 illustrates.

The courtroom where I have sat now for many years is in the Adelaide Magistrates Court building in the CBD of Adelaide. My court is of medium size — neither the biggest nor the smallest. The ‘public’ area of my court is quite small— just two rows of chairs — enough to seat about twenty people. The courtroom is 8.3 m. in length and 8.1

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70 Bob Jones SM example in text 73.
m. wide. From the Bench where I sit to the witness box is a distance of 4.1 m. and about the same distance separates me from counsel.

**Physical isolation**

The elevated bench creates a physical barrier between the magistrate and the public. A magistrate’s clerk sits below the magistrate’s bench at a separate table. Next is the bar table where the solicitors or barristers sit — another barrier. Finally there are rows of chairs or, in older courts, benches, where the public sits.

Computers are becoming part of the furniture of courts in South Australia as outcomes are beginning to be recorded electronically from within the courtroom. The barriers between the magistrate and the public are becoming more pronounced.

The courts vary in size and different courts are used depending upon the nature of the matter to be heard. A trial court may be quite small. A general court, being the court where members of the public make their first appearance, is often large. This may well add to the apprehension felt by litigants and referred to by Professor Parker in *The Courts and the Public*:

> Court contact is presumptively stressful. ‘For a lot of people — including most especially those who are merely called as witnesses — the whole experience can be found to be terrifying, unnerving.’ In some instances a court appearance is not the basic cause of the stress: rather, a person is before the court for events or behaviour connected with other crises in their lives. There are, no doubt, justifications for reducing trauma to be found in the argument that courts are there to serve the public but there are also pragmatic and justice-based arguments. A litigant in person who is destabilized by a court appearance may not be able to put her or his case in a timely and efficient way, or at all. A witness might not be able to render accurate testimony in these circumstances. A potential plaintiff with a just claim might be deterred from pursuing it by the daunting prospect of
contact with the court, not just the cost and delay. A defendant with a valid defence might be deterred from asserting it for the same reasons. And so on. 71

**Intellectual isolation**

A magistrate is an independent judicial officer whose decision-making responsibility is non delegable. The decision once made is final. If the decision is controversial the magistrate ordinarily cannot defend it in a public way. The proper course is for the disaffected party to appeal and have the decision reviewed.

In his paper ‘The Well Tuned Cymbal’, the Chief Justice of South Australia, Justice Doyle states:

I also put to one side the possibility of a judge engaging in public discussion about a case which the judge is hearing or a judgment given by the judge. It is, I believe, universally argued that this is not appropriate. A case is to be heard and decided upon the facts and submissions presented to the judge in court. To engage in public discussion is to begin to involve others in the process. It will also cause confusion, because of its tendency to undermine the reasons for judgment as the sole record of the reasons for the outcome. And there is the further problem that in discussing a case a judge is likely to be drawn into matters or aspects of the case which are not part of the judicial decision-making process. The appellate process is available to correct error, and that should not be displaced by public debate involving the judge 72.

These admonitions do not prevent a magistrate from discussing a legal issue or an issue of admissibility of evidence or the like and indeed magistrates often gain assistance from one another.

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James Snell SM: I think all we magistrates talk to each other. Most of us do a fair bit of research from time to time in various areas. In a matter I had a couple of weeks ago about bankruptcy a defendant said ‘I’m bankrupt now so you can’t make me pay the costs of these proceedings.’ I found a Full Court case that said he had to pay. There was a decision made on the issue that was appealed. I often pick other Magistrates’ brains.

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Dialogue between magistrates is very desirable. There is no reason why debate on issues of legal, moral, ethical or evidentiary issues should not occur so long as it is dialogue alongside of or after the case and not directed at it.

One magistrate reports that he feels intellectually isolated:

Peter West SM: The ordinary court is your job; you go in and come out and you do not get that much feedback from anybody, in fact in a sense I do not know what any other magistrates do though I have been doing this for 20 years. None of us do. We do our thing but we could be doing something completely different from other Magistrates. I do not know what other people do. I agree that observing another Magistrate's court is a great learning experience. There must be merit in learning from each other, but we do not experience it. We are left to our own devices and in a sense it is a very isolated and very individualistic job. We do not have the experience of watching and observing each other and learning from each other, which is a great shame.

In the course of my research a group of magistrates took turns in observing and being observed by a colleague in his/her court. The results were revealing, each magistrate reporting that he or she gained insight into the nature and manner of their work. Physical and intellectual isolation are factors within the work environment that restrict the capacity for intellectual stimulation, growth and mental renewal of magistrates. Reducing the isolation by encouraging interchange and communication between magistrates on work issues would surely help the magistrate.

The isolation may be ‘cultural’ isolation. Earlier Peter West SM identified the sentencing of Aboriginal offenders as his most difficult task. It is worth repeating the example and looking at it from the viewpoint of the work environment. The magistrate refers to the ‘traditional aboriginal community’. His concerns stem from the difficulty

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of appreciating an environment so different from that of a suburban Adelaide court. I note the worry about how the decision will ‘affect this person within this culture’.

Peter West SM: As a sentencing Magistrate in a traditional Aboriginal community, I am forever thinking things such as ‘How is this sentence going to affect this person within this culture?’, ‘How is it going to affect the community?’ or ‘What does the community think of this sentence?’ It is a much stronger feeling than in the sentencing courts in Adelaide. By far, I find the Pitjantjatjara lands courts and the Nunga Court here at Adelaide the most difficult things I do.

This is an example of the interaction between the decision, the environment and also communication.

**Expectations**

The Chief Justices have noted that in recent years the expectations of the community have been growing:

> Over the last 20 years or so, the conduct of judges has come increasingly under public scrutiny, with a growing interest in standards of judicial conduct. Sometimes public comment on judicial conduct has been influenced by false notions of judicial accountability which fail to recognize that a judge is primarily accountable to the law, which he or she must administer, in accordance with the terms of the judicial oath, ‘without fear or favour, affection or ill-will’.  

The community has high expectations of the courts. The Council of Chief Justices has drawn attention to the need for judicial officers to maintain high personal standards of conduct and behaviour not only in court but out of court as well. Speaking of the need for discretion in the area of personal relationships, social contacts and activities the Chief Justices have said:

> It is the last of these precepts that is likely to cause the most difficulty in practice. As a general rule, it permits a judge to discharge family responsibilities, to maintain friendships and to engage in social activities. But it requires a judge to strike a balance between the requirements of judicial office and the legitimate demands of the judge’s personal life, development and family. Judges have to accept that the nature of their office exposes them to considerable scrutiny and to constraints on their behaviour that other people may not experience. Judges should avoid situations that might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as

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73 The Council of the Chief Justices of Australia, above n 67, 1.
judges. They must also avoid situations that might expose them to charges of hypocrisy by reason of things done in their private life. Behaviour that might be regarded as merely ‘unfortunate’ if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others. 74

The expectations of the community are bolstered by the scrutiny of the Press. The Chief Justice of South Australia, Justice Doyle has noted:

Judges are accountable in various ways. A judge sits in public to discharge most judicial duties. Not many people have to do their work under the public gaze. The work of judges is subject to public and media scrutiny. As you would know from your own experience, it is not uncommon for the media to comment on particular cases, and upon the conduct of judges. A judge must produce detailed reasons for any significant decision. That is a form of accountability. The decision of a judge is subject to appeal. On appeal the decision of the judge is subject to attack by a skilled lawyer whose job is to expose flaws in the decision if the lawyer can. The judges are subject to constant scrutiny by the legal profession, and that is a highly critical audience. 75

The magistrate must decide cases independently of any public outcry or expression of indignation that may follow. The magistrate may not fulfil community expectations but this may be because those expectations are formed without full information:

Peter West SM: In another sense I think it is now more difficult than it used to be to sentence people adequately. When I first started twenty years ago it was easy. The courts were removed from the public eye, in a sense, and we were not as much a part of the community, although we were there. The court is now much more in the public eye because people expect a lot more of the courts, and rightly so. It has changed the environment of the court for the better and I think they are a lot better than they used to be. I think we all try now to be better judicial officers than we were.

The same magistrate commented that despite the expectations of the community being great and bolstered by a sometimes ill-informed and critical media the community is better educated and their expectations therefore more realistic:

74 Ibid, 6.
75 Doyle, above n 69, 10.
Peter West SM: I think some journalists portray the judiciary as weak and vacillating, and there are certainly many in the community who think like that, but generally speaking I think the community is becoming better educated. There is more awareness in the community and, in a sense, I think people are looking to the courts to lead them towards different ways of dealing with people and assisting them to rehabilitate. If we do lead them, people will accept it readily, providing they can see some value in it.

A magistrate may also be affected by the knowledge that a complaint to an Attorney General or someone similar may not be far away.

**Consequences**

‘My cat Moochie was attacked 28 Feb it became infected. Ms X’s cat Toby caused it. My cat was taken to Rose Park Veterinary Surgery 12.3.01 and over 85 days was subject to two operations and hospitalised a total of 15 days so Moochie was skin and bone when euthanised [sic] on the 18.5.01. The vet bill is $929.40’.

These are the particulars of claim filed in a minor civil action listed for trial before me in October 2001. I expected this would be a somewhat amusing account of an incident that, though unfortunate, hardly warranted litigation. It turned out to be far from that.

The defendant suffered from a bi-polar functional disorder and she was too frightened of the plaintiff to be willing to be present in the same court with him. A disability worker represented the defendant and I permitted the defendant to stay out of court as the plaintiff gave his evidence.

It soon became apparent that the loss of his cat had affected the plaintiff greatly. An adjective such as ‘distraught’ would be apt to describe the plaintiff’s demeanor. He too
suffered from a psychiatric disorder, and he gave his evidence in an agitated manner and was angry.

Legally, his case had no merit. Whilst there is legislation which imposes a statutory liability on owners of dogs to control them the Act does not apply the same obligations on cat owners. There was no action in tort because there was no established breach of duty of care. The case was dismissed without the defendant being called upon to give evidence. The problem of how she might have done so was thus avoided.

This is an example of a case seemingly of minor significance yet which posed procedural difficulty and led to a courtroom very emotionally charged. The ‘trivial’ claim was to the plaintiff, who lived alone, a claim about distress, loneliness and personal loss worth as much to him as the millions of dollars that might be at stake in a Supreme Court commercial matter.

Lillian Graham M: You absolutely need time to think because no matter what it is, these are really important issues to the people, even in small claims. I'm sure all Magistrates say 'you should have heard this small claim I had today. It was a waste of my time', but the minute you make the decision against the person, they are writing to the Attorney General about it. Any form of litigation affects people and all litigation is important to those who are involved in it.

Fortunately there appears to be an awareness of the importance of ‘small’ decisions although some magistrates acknowledge that the work environment is so busy that constant reminders may be required. The words of Lillian Graham M were referred to earlier in the context of ‘decision-making’ but the same example illustrates how the work environment — in this case the prospect of complaint to an Attorney General — is connected with the decision-making process:
The community may have an expectation that heavier penalties will deter offenders. Not all magistrates agree that such consequences follow:

Peter West SM: Some people have to be locked away. Although some in the community would say that locking up people works, and it probably does for some people, in the twenty years I have been doing this job I have seen a hell of a lot of people come back to court who have been locked up time and time again, and it has not helped them. Maybe the ones it has helped do not come back so we do not see them, but a hell of a lot do come back. You look at their records and you see that they have been locked up time and again. How has it helped them? It has not.

Decisions as to bail can put the magistrate in a dilemma. Refusal of bail may lead to the deprivation of liberty of a person who has been charged but whose guilt has not been established. On the other hand release on bail may have the consequence that the safety of the community is put at risk. Janine Johnstone SM referred to that when talking about ‘decisions’ and an earlier example illustrates another aspect of the work environment viz the ‘feeling of responsibility’ associated with the decision-making process:

Janine Johnstone SM: In bail applications where you are dealing with murder, rape, armed robbery or drug offences, there is a feeling of responsibility to make sure you get it right so that you're not subjecting the community to further offending.

The consequences of each decision may have drastic effects on the life of either the offender, the victim or the community. These consequences can never be far from the mind of the working magistrate. Arthur Brown SM had a list of 72 matters on the Wednesday of that week and he noted:

Arthur Brown SM: There were 72 matters on Wednesday’s list. The 9.30 matters were mainly new matters on complaint and included many traffic matters, minor street offences and regulatory matters. There’s normally quite a high rate of pleas and quite a large number of them are resolved by ex parte means. There are a lot of pleas on Form 3s as well as ex partes where people don't turn up. It requires a lot of speed. You have to keep moving. The 9.30 matters are new and are normally not of a complex nature. The odd ones that are of a complex nature won’t be dealt with at that time, even though they may wish to plead. I would put them off until a later time on that date.
This highlights another aspect of the work place environment namely the demand to keep turning over files — ‘it requires a lot of speed. You have to keep moving’. This is an issue that is relevant to decision-making and communication as well as to the work environment.

In the last chapter Peter West described an application for certification as ‘trifling’ but difficult. One noted when looking again the example that Peter adjourned the hearing to another date probably because of the way in which the matter came to be listed in a general list:

Roy Preston SM: The Speed Dangerous in Tuesday's general list had enough substance in it for submissions on the question of it being trifling so I reserved it. Also, you have to have evidence on oath, which is very difficult to do in a general list, so I adjourned to this morning at 9.30. I've had the evidence and I've given my decision. It was a difficult, borderline application.

It was the inclusion of the matter in a ‘general’ list that led to the application being adjourned — it was too difficult to take evidence in the midst of a general list.

**Unrepresented parties**

Magistrates deal with unrepresented parties frequently. In this respect their work environment differs from that of the higher courts. The magistrate feels the need to ensure that the unrepresented party receives sufficient assistance for their case to be put but must seek to achieve that goal without creating in the mind of the party who has a lawyer that legal representation is either unnecessary or leaves the other party with an advantage. Some magistrates feel that admonitions of higher courts to avoid the dust of
conflict are all very well theoretically but not at all realistic. Certainly Henry Walters is of that view:

Henry Walters SM: The worst thing is the unrepresented litigant up against a good counsel. I don't think the law respects the bench's entitlement to try to help and intercede. The law consistently has this laissez-faire attitude of "You'll be blinded by the dust of controversy", etcetera, which I think is the biggest load of Wah going. That is fine for a purist; it is a nice theoretical analysis of the adversarial system, but in my view the higher courts have to, on appeal, acknowledge the practicality of that position where if an unrepresented party does not get assistance, you are doing a blatant injustice, just as much as if you stepped in and started cross-examining that person yourself. I think that is the hardest thing, and there must be a degree of tolerance.

The example below demonstrates the pressure of the court environment. Henry does not have enough information available to him — ‘only the back-sheets’. The magistrate is seeking to conform to the Practice Direction of the Chief Magistrate requiring files to be brought to a closure within target dates.76

Henry Fielding SM: In each matter in the call over court you have to look at the history of the file on the spot. We have only back sheets to look at. ‘Your Honour, we need an adjournment to negotiate.’ ‘But you’ve had six adjournments already and the file’s been marked by the Deputy Chief Magistrate “No further remands for any reason”. Why haven’t you done the work, why haven’t you completed the negotiations?’ You usually have to make a decision about that in respect to each file because a quarter of these matters would be in that court for the first time, but you could bet your bottom dollar that the other three-quarters are their second or third time. With the new practice directions (requiring matters to be completed within 26 weeks and with a strong bias against adjournments) there’s even greater pressure because if you’re seen to be weak about that in Court 12, the defence will walk all over you — “This bastard’s soft. We can get an adjournment any time.”

Parties appearing in person

In minor civil actions where representation by counsel is usually forbidden the magistrate may be very actively involved. Henry Walters provides an example of his approach. In a minor civil action the legislation accepts that an ‘inquisitorial’ process is

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76 By Practice Direction issued 23 March 1999 the then Chief Magistrate Allan Moss directed that lists of criminal matters for plea/mention must not exceed 70 matters (plus additions) per day. The length of lists is illustrated in Chapter 3 dealing with quantitative data. The Practice Direction set dates for the disposal of matters requiring the holding of a pre-trial conference within 20 weeks of the first court appearance and commencement of trials within 26 weeks of first appearance.
appropriate and the constraints felt by Henry when hearing a routine action are no longer relevant:

Henry Walters SM: With unrepresented litigants, obviously by definition in small claims both parties are unrepresented, and we have the inquisitorial procedure under the Magistrates Court Act that enables us to cut to the chase very quickly. I seat the plaintiff and defendant at the bar table and exclude witnesses. I swear them in simultaneously at the bar table, and then ask them questions in rapid-fire succession or sometimes alternately. I get them to agree all the facts that are not in dispute and then I get to the issue. Having isolated the issue, I grill them on the various factual aspects of the issues as they are relevant to their respective cases.

The presence of large numbers of unrepresented parties in the magistrate’s court is the product of cut backs in legal aid and the rise in the level of legal costs generally. The work environment has changed as a consequence. This is another aspect of the work environment effecting magistrates.

Janine Johnstone SM: In reality, the cutback in Legal Aid means I markedly deal with Unregistered/Uninsured matters more than I did five years ago. The effect, which has been getting worse over the past five years, is that less Legal Aid funding means less representation and less resources being put into duty solicitor services. Instead of experienced Legal Aid lawyers appearing in courts to assist magistrates, they are focused on higher workloads or more serious matters and they're employing duty solicitors on 12-month contracts…. There is no comfort zone to sit back and let somebody else explain rights, bail and possible penalties. The general experience now is that I feel compelled to issue that legal advice, it's within our roles and it's a daily experience.

Of greater concern is the possibility that sheer weight of numbers affects the ability of the magistrate to make the best decision:

Barry Wheeler M: It’s a lot easier to say to somebody who may have a disability, be intellectually disabled, have a drug problem or be from a different ethnic background that they can be sentenced to six months imprisonment or whatever. That's the easy way out of it. In a mention list of 40 or 60 cases it's a lot harder to actually say, “I’m standing this matter down. I want people to look at options. I want to speak to the parallel service providers. I want reports.”

This is a worrying example. The magistrate feels pressured to dispose of the matter even by gaoling the offender rather than explore the matter. It does not come to that.
The magistrate chooses to seek reports. But the work environment has apparently put enough pressure on the magistrate for him to consider a ‘quick fix’.

**Judicial stress**

In 1995 The Hon Justice Michael Kirby delivered a paper entitled ‘Judicial Stress’ to the Annual Conference of New South Wales magistrates. He commenced his address:

> When I first talked on judicial stress at the Inaugural Judicial Orientation Programme of the Judicial Commission and AIJA a year ago, I could see that the very mention of the topic caused stress in some of my audience. Judicial officers have been in a traditionally stress denying profession. I congratulate the magistrates of New South Wales for inviting consideration of the topic. Magistrates have a very high level of stress, both because of the pressure of their work and its high component of crime. I hope that this contribution will help bring stress out of the judicial closet.

Kirby identifies, as one of the contributing factors to stress the fact that the decisions made by judicial officers are non-delegable:

> Kirby noted:

> Another feature of the very nature of judicial work which adds to stress is the limited capacity of judicial officers to delegate their judicial functions. True, some functions may be given to judicial registrars. Other administrative functions may be given to list clerks. Still other functions may be assigned to personal staff. But, at least, in the tradition of the Australian judiciary, the personal obligation of consideration and decision-making rests upon the shoulders of the sworn judicial officer alone. It cannot be shifted. Most judicial officers have a strong sense of that responsibility. It comes with their personal, undelegable duty. But it adds to the stress. Whereas other occupations can shed intolerable workloads, judicial officers have a strictly limited power to do so.

Justice Kirby further canvassed the issue in a paper entitled *Judicial Stress Revisited* delivered in 1997. Justice Thomas of the Supreme Court of Queensland commenting upon the paper by Justice Kirby said that ‘it might be foolish to join the stress

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bandwagon’ and urged his audience “not to treat this subject seriously except upon your own personal level”. He expressed concern less ‘stress managers will be supplied’ and that ‘the less assistance we invite or get from outsiders, particularly departmental bureaucrats, psychiatrists and management consultants, the better’. He went on to say, however:

I am not suggesting it is an easy job. To use the term on the moment, it is indeed a stressful job. You may feel an excitement in the lower intestine as you prepare to walk to court. The reason is that you are expected to perform. It gets worse as you get older. It is so easy to lose whatever reputation you have built up through one silly statement. And there is constantly that pressure to get it right. You need adrenalin, or pressure, to produce your best work.

I do not need to deal with the broader issue as to how ‘stress’ issues should be addressed. But is important that they be recognized at least on the personal level. The matters identified by Justice Thomas — the expectation that the magistrate will perform and the expectation that the magistrate will get it right are related to the earlier discussion in the chapter under the heading ‘consequences’ — are important aspects of the work environment.

Some magistrates interviewed are conscious of stress factors but it has been suggested there is a reluctance to recognize issues of stress:

Peter Williams M: The need to bring the issue out of the closet is something that if you asked all the magistrates whether they feel under stress, they would probably say ‘no’ because you don’t really want to admit that you are stressed, but there are certain times in the year when I find if I have not had that break, I start to get short with people, and that is not the nature of my personality at all.

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80 Ibid 5.
The clue here is the expression ‘if I have not had this break’ suggesting it is the constancy of the decision-making that is the underlying cause of stress. Phil White M thinks it is so:

Phil White M: Some of my colleagues say that after 12 to 15 years, sometimes even nine years, it is a real drag to come in to work each day. They are just sick of it. They do not want to make another decision. One theory put forward was that you only have so many decisions in you and once you have made them, that is it, they are all gone. I do not agree with that. I think the secret is to try to remain fresh and that means you have to have a real break, not just a week here or there, which is what you effectively get when you use your annual leave. We need a couple of months break.

Another magistrate described his experience in a general court in these terms:

Bob Jones SM: Court 2 is quite demanding for a week. I find that extraneous work such as reading and writing reserved decisions must go by the wayside for that week, and I have to concentrate only on being in court over the course of the day, dealing with the matters and focusing on those particular files for the whole day. It involves lots of small and large decisions that must be made quite quickly on a fairly constant basis. It is almost very much a case of dealing with a sea of people from a myriad of backgrounds and ages on a fairly quick basis; interacting and speaking with them, asking them questions and making decisions about them.

This vividly describes the work environment in magistrates’ courts when general lists are being dealt with. Lists are long, the parties are often unrepresented. This is to be contrasted with the situation in the higher courts. There the lists are not as long. Lawyers will usually represent the parties. The judge will have submissions put by counsel. Judges often reserve decisions. The environment of the magistrates’ court is busy and the lists are so long that magistrates usually deal with matters immediately delivering reasons extemporaneously.

The Practice Direction that general lists should not exceed 70 in number is hard to implement. The number of arrests over a weekend and the number of remands in
custody are unpredictable and can cause havoc with the work listed as Joseph Domino explains in the example below:

Joseph Domino SM: The hardest thing I did in the past week was on Tuesday when we had 27 custody cases at Hammond. I sat in the general Court last week, and it is the sheer volume of dealing with those plus all of the ordinary matters in the Court list. These are people who have been arrested on the weekend, who come in to Court because of previous custodial orders. I have to decide whether they stay, go or what, so you're dealing with multiple bail issues and many unpaid fines and warrants.

Arthur Brown SM gives another example:

Arthur Brown SM Monday’s list had 97 or 100 matters in it…. There were some multiple file matters for certain defendants, some of which I think resolved. Some pleas were taken in the 11.30 list, which continued until 2.15, but the results were very good. I managed to save four trials by, I suppose, pushing and prodding the prosecutor, the lawyer and a particular defendant. There were four potential trials that were due to be set down. Some were going to be pleas and some were teetering. I recognised the ones, which were teetering because their remarks indicated that there was room to move. What seemed to shift the balance was intimation from me that as this man had been in custody for a long time awaiting the outcome of these matters, he wouldn’t receive a very severe punishment at all on this day. I think that got through to the defendant more than anyone else.

Here the magistrate’s work environment has been one where he has been ‘pushing and prodding’; he deals with a list of about 100 matters; he ‘recognises the ones to move’.

The example has been referred to in the last chapter because in part it is about ‘decision-making’. But it is also about the environment — an environment wherein the magistrate behaves proactively and pushes and prods, supported by intimations leading to pleas instead of trials.

Magistrates are required to attend at night and over weekends to telephone requests and authorizations of various kinds. One of these is consent to examinations pursuant to the Criminal Law (Forensic Procedures) Act 1998. A forensic examination may involve an intrusive body search. The legislation is complex and contains procedural safeguards
for the protection of the person required to submit to the procedure sought. The work environment is that the decision may have to be made after the magistrate has been aroused in the middle of the night, as the example below illustrates:

Colin Saunders SM: The police now have to get approval for a forensic procedure on any juvenile or youth offender and they must get permission where the defendant will not give consent, so you often must consider an application in the early hours of the morning. You are woken at night and generally they are quite serious charges such as rape, murder or grievous bodily harm where they often want to take blood or DNA samples. You have to take on board what is being said about the seriousness of the charge and you have to give careful consideration as to whether it is in fact an urgent application, because if it is not, then we cannot make interim orders.

James Snell provides a different illustration of a work environment that is emotionally charged and one that occurs often especially if parties are not represented:

James Snell SM: As for emotionally draining matters, one afternoon I had an especially returnable matter where a tenant — this was the business premises in Hindley Street of a nightclub. That went for over an hour and I had to make a decision immediately. The defendant, the landlord, was very excited and in fact yelled out a couple of times. The plaintiff was the tenant. Distress had been levied the day before and he wanted the show to go on that night. I thought the information clearly indicated that whatever he was pursuing, his venture was doomed. He’d put all his money into it and it had swallowed it all up. I couldn’t see how he could turn it around in two or three days.

Here the magistrate describes the situation as ‘emotionally draining’. This was due to the need to ‘make a decision immediately’ combined with the fact that one party became ‘very excited’ and ‘yelled out a couple of times’. It was also a case where one party was represented and the other was not. The emotion of the litigant was passed on to the magistrate and this is what one would expect.

**Summary**

The nature of the work place environment has been considered. The physical and intellectual isolation is a consequence of the nature of an independent judicial office.
Examples have been drawn from the interview material of the link between judicial independence (part of the intellectual environment of judicial office) with communication and decision-making. One magistrate comments that he ‘often pick(s) other magistrate’s brains’\textsuperscript{81} whilst another says ‘he does not know what other people do’.\textsuperscript{82} There is no necessary conflict between these two concepts. But it points to a gulf in understanding. Talking about a legal issue is one thing. Knowing how best to deal with people whilst in a hostile and stressful environment is something else. It is argued in the thesis that knowledge of how to deal with the court environment, if based solely on one’s own experience, is limited.

In this Chapter, the links between work environment and decision-making have been developed. In the following Chapter the importance of communication and its relationship with both decision-making and work environment are explored.

\textsuperscript{81} James Snell SM example in text 80.
\textsuperscript{82} Peter West SM example in text 81.
CHAPTER 6. COMMUNICATION

Introduction

As part of their daily work magistrates communicate with lawyers, with unrepresented parties, with witnesses, with court staff, with each other, with the media and, largely through the media, with the community at large. Magistrates communicate in many forms and for many purposes. Communication may be verbal, non-verbal or written. Its purpose may be to elicit facts, to instruct court staff, to explain a decision or to provide parties with reasons for a decision.

Principles of communication

An example of the way in which the concept of ‘communication’ is dealt with in law schools today is the subject known as LLB 392 Communication Skills conducted by the Faculty of Law, University of Wollongong.

An introduction to the course states:

Good communication skills, both oral and written, are essential to anyone working as a lawyer or in law-related work. …In the subject LLB 392 Communication Skills, we concentrate on face-to-face communications, both verbal and non-verbal. We consider non-verbal communications because, of course, our body language also says a lot about how we are thinking and reacting in particular situations.

The program will focus on the skills of listening, observing, questioning and advising, primarily in interview situations, and will include consideration of the special problems which may arise with the use of interpreters and in eliciting information from children. We should note that most lawyers spend much more of their time interviewing people in non-adversarial situations than in advocacy in court. The program will include a brief introduction to techniques of oral presentation.

The subject is compulsory. It is one of the key components of the syllabus. The first of three subjects — Advocacy, Negotiation and Litigation Practice — follow, then
advanced skills are taught at PLT level. Few, if any, magistrates sitting today would have studied communication as a subject.

Educators such as Binder, Bergman and Price say that communication skills do not develop automatically over time:

Since all people read, listen and speak and observe on a daily basis this poses the question of why the communication skills of each of us do not improve over time. Sadly, in most instances our communication skills do not improve. One of the reasons for this is that we have such fixed prejudices learnt from early childhood which have become such a natural part of our communication process, that it is not only hard for us to recognise them, but once found, it is difficult to motivate ourselves to change them. Furthermore, we do not tend to reflect on our conversations, or on how to improve our communication skills. Our motivation in conversation is to talk, or to formulate a response based on our own story, and not to think about how we are speaking or listening. By reflecting in every legal interview you do, you can assess the state of your communication skills with a view to improving those skills and the quality of your interviews.

This text fits well with the subject of the next chapter where the value of reflective experience is considered. It also suggests that even if magistrates in their earlier practice as lawyers believe they are capable communicators this assumption is not necessarily correct.

Professor Parker has noted that all forms of organisational learning require an exchange of information. For this to occur he identifies that the institution must:

- Have the capacity to sense, monitor and scan its environment
- Relate this information to its operating norms
- Be able to detect significant deviations from it
- Be able to initiate appropriate action to correct any deficiency

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84 Parker, above n 71
The magistrate’s court is part of the court system and part of a broader system of justice. It belongs to an organisation. Because magistrates are expected to process long lists in short spaces of time using summary methods for disposal they often must use a gun barrel approach — disposing of each case as it is called on from the list without having time to ‘sense, monitor or scan’ the environment.

Figure 1 shows the main headings used to group issues arising from the interview material. The headings ‘co-operation between magistrates’ and ‘communication’ raise obvious issues of communication. The heading ‘lawyers and unrepresented people’ is not so obviously connected with issues of communication. But magistrates often deal with litigants in person. Communication with them is an important aspect of a magistrate’s work.

‘The magistrate and the community’ is another heading used. This raises a different aspect of communication. Data demonstrate that members of the community who appear in courts are far more likely to appear before a magistrate than before a judge. One consequence of this is that the perceptions members of the community form of the justice system rest heavily upon their observation of magistrates and what they say. Media reports are a significant means of disseminating information about the justice system. Again how magistrates behave, what they say in court and how they say it are noted by members of the media and must colour their reports.

The final ‘heading’ to which I will refer is that of ‘management of the magistracy’. In this dissertation I do not deal with the issue of ‘management’ or ‘governance’ of the
magistracy in depth. The issue is important and does raise issues of communication. They are touched upon but the issue is of such magnitude that it requires a separate study and is beyond the scope of this dissertation.

**The importance of communication**

One magistrate observed that if communication was ineffective the rest of the process loses much of its meaning and value:

Susan Gray SM: I don't think it matters one jot for anybody's purposes if you get absolutely everything right in the law and everything else you don't get perfect or understandable to the people in Court. That seems to me to be an utter waste of time.

Effective communication is almost impossible according to one magistrate:

Frank Eastwood SM: There is a major problem with communication, even during the sentencing process, because from my observations, and this is something I've thought all along, the offender is not interested in what you say. He doesn't care what you say until you get to that last sentence and then he pricks his ears up and says 'What have I got?' and that's all he's interested in hearing.

Other magistrates perceive communication to be very effective. The illustration below is in the context of the magistrate giving reasons for revocation of an order suspending a sentence of a term of imprisonment:

Bob Jones SM: I also had fairly extensive discussions with him and his parents about the fact that within the prison system drug rehabilitation and counselling is available. I also discussed with him options available outside the prison system once he is released and I had information about him conveyed to the Department of Correctional Services Courts Unit.

This shows another dimension to the communication in which a magistrate may be engaged — the forwarding of relevant information to the Correctional Services
Authority. Their status enables magistrates to pass on information in the expectation that it will be considered and given weight by virtue of their office.

Mathew Perkins SM: I have learnt that you have to prepare, prepare, prepare before going into court and you must be a listener. You have to be a people’s person. You meet so many different people in your time in court, some of whom can be very frustrating and some of who can be exceedingly challenging, intellectually as distinct from other forms of challenge. Some can be downright rude. It is important to remember the majesty of the court, the respect for it, and the importance of being able to ensure that a person can walk away from court saying they cannot complain that they were not given time to be heard.

At the Search Conference in 1997 a magistrate recounted the story of his first experience of imposing a custodial sentence. The magistrate had been recently appointed and says that he very carefully prepared his remarks setting out the facts and referring to the relevant legal principles. The ineffectiveness of his endeavour became apparent to the magistrate only after the offender was led from the dock and was being escorted to the cells. As the offender left he heard an exchange between the offender and the correctional services officer that plainly indicated that the offender not only had not followed the reasoning but also, worse still, had not understood the result. The illustrator observing the Search Conference participants captured the occasion exquisitely and drew the cartoon below.
The example illustrates not only the failure of the magistrate, despite his best endeavors, to communicate but also the example is a graphic illustration of the interrelationship of the three themes identified in Chapters 4, 5 and 6 hereof. In this example one perceives the significant decision taken (to impose a custodial sentence of four years); the failure of the magistrate to communicate why the decision was made (by giving reasons that the prisoner understood) and, even more fundamental than that, the prisoner did not know what the penalty was (four years in custody); finally, the illustration demonstrates work
Matthew Perkins SM is right. Communication is very important. Preparation is important. People can be ‘downright rude’. Identification of these factors, understanding them and knowing how to communicate is essential to the work that magistrates do and vastly more relevant and significant in the lower courts than in the higher courts where communication can be channelled through lawyers and where conventional niceties are more likely to be observed.

Magistrates play active roles in pre trial conferences, conciliation conferences and at directions hearings. They talk directly to lawyers, prosecutors and parties:

Roy Preston SM: In a pre-trial conference I ask 'What's this?' I read the charge and say 'Now is this an issue. Is that an issue, is this an issue?' A quarter of matters resolve at pre-trial conferences, including matters where the parties have already resolved it themselves. Where matters don't resolve, I perceive the value of the pre-trial conference to have been in narrowing the issues and obtaining admissions as to what is in dispute. For example, in a Work Cover matter you ask whether it is in dispute that the D in fact was injured; in fact received Work Cover benefits during the relevant period and whether the parties can agree the amount of benefits?

In small claims an extract from Henry Walters’ interview material has been used to demonstrate ‘decision-making’ and ‘work environment’ and the same example illustrates the need for communication skills.

Magistrates have introduced ‘problem solving’ or ‘specialist courts’. In such a court magistrates communicate in a very direct but relatively informal manner.
Peter West SM: The set-up of the Nunga Court in the metropolitan area permits feedback more so than if we did not have it because in a sense the court is a combination of a lot of people who are involved in what happens. I am not quite as central a figure as I am in an ordinary court. We all communicate and people often come to me after court to talk about things. Sometimes interested white people in the court talk with the aboriginal people and find things out and they then come back and tell me what they have found out. Simon Paxton, who sits with me a lot, communicates all the time with people and he talks to me about what is happening, offers suggestions and tells me whether the court is working well.

Effective communication and getting feedback is an important antidote to the isolation, both physical and intellectual, experienced by magistrates.

Pressure of time and the need to process long lists in short time periods, militates against effective communication. An earlier example given by Susan Gray SM illustrates:

Susan Gray SM: One of the hardest things a Magistrate must take on board is that because it is so busy and so much is happening all the time, we tend to lose the perspective that for most litigants and parents and others it might be the only time they come to court, so for them to leave that time without having had an opportunity to say something very important to them would be a failure of the process. Even if at the end of the day it does not affect the decision-making one way or the other, it is important that they feel the process acknowledges them and that you hear what they have to say.

The same factor can over time alter the approach of the magistrate:

Joseph Domino SM: When I started at Hammond I would have said that I would spend much more time speaking directly to the defendant. I think now that I have had to alter that. I do not now concentrate so much on that, but I do think it is important to do so. You devalue it in the scale of things because of the number of cases and the time. If I had the time, I could potentially speak longer to defendants by virtue of my office, leaving the personality out of it, but there is a difference between having an impact that is measurable and believing that you can have an impact. You might believe you have an impact, but you will never actually find out.

Domino reports that he cannot tell whether his communication is effective or not. This is one of the difficulties identified by magistrates generally identified about their job —
lack of meaningful feedback. Domino here identifies a situation where a previously mentioned aspect of the work environment — pressure of numbers and length of lists — impacts upon his capacity to communicate. The magistrate reports that he receives no feedback. He ‘never finds out’ what happens after a person leaves the court. The magistrate reports: ‘you devalue it (the outcome) in the scale of things because of the number of cases and the time’. Lack of time or opportunity for the magistrate to communicate may compromise the entitlement of community members to receive justice.

Magistrate Phil White provides a further illustration:

Phil White M: At the end of a general list of 80 to 100 matters I usually feel exhausted. Before we start each day I inquire of my bench clerk as to how long is the list so that I know whether to develop a heavy foot. If there is a large list, I will apply the accelerator and speed through as fast as I can. If it is a moderate list, I will indulge people by allowing them to make their Rolls Royce plea.

This illustrates further the manner in which the busy work environment affects the way in which the magistrate conducts the court. The example also demonstrates how the work environment may also affect community expectations. A litigant who has engaged a barrister has a legitimate expectation that the barrister will present a plea as the barrister sees fit rather than in such manner as best fits with the court environment upon a particular day.

**Communicating with unrepresented parties**

In courts of summary jurisdiction offenders often represent themselves. Data referred to in Chapter 4 suggest that a magistrate sitting in a summary court has an about even chance of dealing with a represented defendant as with a litigant in person.
In minor civil actions (or ‘small claims’ as they are often described), in most circumstances, the parties are not allowed representation. The legislature requires these cases to be decided by the magistrate inquiring into the issues and determining the facts — often unaided by formal pleadings. The hearing of small claims requires magistrates to communicate with litigants in person constantly. This adds strength to the argument that ‘communication’ is a vital aspect of a magistrate’s work. The approach of magistrates to dealing with unrepresented parties in this context may vary considerably.

When the small claim hearing gets under way the magistrate may become very direct:

Henry Walters SM: I seat the plaintiff and defendant at the bar table and exclude witnesses. I swear them in simultaneously at the bar table, and then ask them questions in rapid-fire succession or sometimes alternately. I get them to agree all the facts that are not in dispute and then I get to the issue. Having isolated the issue, I grill them on the various factual aspects of the issues, as they are relevant to their respective cases.

Communication between the magistrate and support staff is another aspect. Henry Fielding cited an example:

Henry Fielding SM: In each matter in the call over court you have to look at the history of the file on the spot. We have only back sheets to look at. ‘Your Honour, we need an adjournment to negotiate.’ ‘But you’ve had six adjournments already and the file’s been marked by the Deputy Chief Magistrate “No further remands for any reason”. Why haven’t you done the work, why haven’t you completed the negotiations?’ You usually have to make a decision about that in respect to each file because a quarter of these matters would be in that court for the first time, but you could bet your bottom dollar that the other three-quarters are their second or third time. With the new practice directions (requiring matters to be completed within 26 weeks and with a strong bias against adjournments) there’s even greater pressure because if you’re seen to be weak about that in Court 12, the defence will walk all over you — “This bastard’s soft. We can get an adjournment any time.”

Magistrates Court Act 1991 (SA) s38 (1).
The example following shows how well developed communication between the magistrate and the court orderly can assist to resolve disputes:

Arthur Brown SM: Regarding orderlies and their dealing with litigants and counsel, for the most part I’m happy for them to do that. In my courts they are instrumental in achieving settlements in small claims. When the litigants arrive the orderly says to them ‘The first thing the magistrate will ask you is whether you’ve made any offers or been through each others papers and tried to settle it. I think you’d better come over here and have a talk to see if you can narrow the issues a bit.’ They might take it further than that depending on their exposure to the whole process. The orderly will often say to me ‘These people are talking and I think they’re getting somewhere’ so I give them a further 10 minutes and they may settle the matter.

Magistrates can sometimes bring an early resolution to a matter by listening, observing and then giving an indication as to the likely result:

Arthur Brown SM: There were four potential trials that were due to be set down. Some were going to be pleas and some were teetering. I recognised the ones that were teetering because their remarks indicated that there was room to move. What seemed to shift the balance was my intimation that as this man had been in custody for a long time awaiting the outcome of these matters, he wouldn’t receive a very severe punishment at all on this day. I think that got through to the defendant more than anything else.

This example demonstrates how communication skills can be used. Here there were a number of exchanges. The magistrate listened carefully to ‘their remarks’ and was able then to identify where or whether there was ‘room to move’. What brought about the result was what the magistrate said to the lawyer and client. That result was achieved because the magistrate ‘got through’ to the defendant.

Janine Johnstone SM nominated a small claim recently heard:

Janine Johnstone SM: The hardest matter I dealt with this week was a minor civil claim at Agatha’s Bay, which required some intellect to understand the issues. It involved ostrich eggs being agisted and records as to hatching rates. It was a factual situation that I had come to terms within half an hour. I didn’t understand a word of the claim and defence documents. I didn’t understand the concept nor the set-up between two proprietary companies and farmers transferring their eggs to be agisted and incubated elsewhere, tagging systems or record-keeping, and prices to be paid and tags to be retrieved. It was difficult in that it was intellectually challenging, but it had a good result. Having actually concentrated and done a bit of active perusal and active listening to the parties, I got on top of it and once I knew what they were talking about the matter was sorted out by mediation.
‘Active listening’ provided the key to the resolution of the dispute. This is another illustration of decision-making, work environment and communication being intertwined.

An example earlier referred to shows how a magistrate may defuse an otherwise volatile situation by choosing the appropriate words.

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Peter Williams SM: …In one case I sentenced a man to a few months imprisonment and as he was being led through the cell doors he yelled out something like ‘You're a fucking idiot mate.’ I said to his counsel ‘You really shouldn't let your client speak to you like that’, which defused the situation. That is the way I have tried to deal with it. When someone is being taken out of court it is easier to do a one-liner than when they are actually standing in court. You have to read the person's personality.

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There were several responses that might have been made by the magistrate. At one end of the scale the magistrate might have ignored the interruption — at the other extreme the person could have been cited for contempt. Experience and casual conversation with other magistrates indicate that the most likely response would have been for the person to have been brought back into the court and given some form of admonishment. The option chosen by the magistrate is an illustration of an approach based upon communication that dealt with the situation in an alternative manner.

**Communicating with one another**

In an example referred to earlier Joseph Domino SM explained the difficulty of dealing with 27 bail applications during the course of a general list. I do not repeat the example in full but sufficient to identify it.\(^\text{86}\)

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\(^{86}\) Joseph Domino SM example in text: 68, 93.
Joseph Domino SM: The hardest thing I did in the past week was on Tuesday when we had twenty-seven custody cases at Hammond. I sat in the general Court last week, and it is the sheer volume of dealing with those plus all of the ordinary matters in the Court list. So issues of pressure of numbers rather than complexity of individual cases are the things that strike me, and the desirability of changing the way we handle multiple cases so that in fact we give ourselves a better slice at them. I think we can do that, but I don't know that as a group of people there is sufficient common mental approach to cases to be able to carry that out across the whole body of Magistrates.

The magistrate identifies a lack of ‘common mental approach’ as the reason why the handling of multiple cases cannot be simplified. This illustrates not only the connection between decision, work environment and communication but also shows how important it is for magistrates to communicate with one another. The example demonstrates the effect that the work environment has on the capacity to communicate.

In the interview material, one of the headings is ‘co-operation between magistrates’. Magistrates explain the benefit of knowing what others are doing. If trust between magistrates is established they will help one another. Unless there is effective communication between magistrates this trust may not be established.

Kevin Cosner SM: To my mind a team should be concerned about other people who work within the group. If someone had to do a really bad judgment that was a nightmare, such as is the case in some civil work, then the others should recognise that the Magistrate might not be doing the same amount of court time whilst the Magistrate overtakes that hill. For example, if the Magistrate has to go into a general court, the other members would make sure that the moment their trial collapses they would ask for matters. I did that yesterday.

There is communication between magistrates, but about what? As one magistrate said:

James Snell SM: I think all we magistrates talk to each other. Most of us do a fair bit of research from time to time in various areas. In a matter I had a couple of weeks ago about bankruptcy a defendant said ‘I’m bankrupt now so you can’t make me pay the costs of these proceedings,’ I found a Full Court case that said he had to pay. There was a decision made by a magistrate that was appealed. I often pick other Magistrates’ brains.
This is communication to resolve a legal issue and is valuable and should be encouraged. It is not communication about how a magistrate conducts court or what happens in the courtroom. I suggest that the view expressed by Peter West SM below better reflects the extent of communication between magistrates about how they approach their work and what understanding they have of it.

Peter West SM: The ordinary court is your job; you go in and come out and you do not get that much feedback from anybody, in fact in a sense I do not know what any other Magistrates do though I have been doing this for twenty years. None of us do. We do our thing but we could be doing something completely different from other Magistrates. I do not know what other people do.

Prior to this research, I had not attempted to observe a colleague at work. Indeed I would have thought it was inappropriate and intrusive even to suggest such a thing. We may confer from time to time about a particular issue. But the occasions when we sit down and reflect upon the purpose and nature of our work are few and far between.

**Communicating the decision**

The outcome, the sentence or the judgment is what counts to the persons involved. They are entitled also to know how and why the decision was reached. The law requires reasons to be given and failure to provide reasons may be grounds for appeal. Magistrates have little opportunity to reflect before announcing their decision. This issue has been considered in the ‘work environment’ chapter. In Chapter 7 a proposal is put that will allow magistrates to reflect on issues such as how they communicate their decision and how they might do so more effectively.
Sir Frank Kitto, a former Chief Justice of the High Court of Australia, explained the purpose of judgments in these terms:

> The judgment is written primarily for the parties, particularly for the losing party; the judgment should explain to him why he lost. Depending upon the issue, it may also be written for the legal profession and the community. Even if written for the legal profession, it is not a legal monograph. If written for the community, the reasoning should be comprehensible by an intelligent well-read layperson. The judgment is a principal means by which the courts speak to the community. That is what some judges tell us. Indeed, some judges would say that my statement should be qualified by substituting ‘only means’ for ‘principal means’. If judges want the community to understand what they are doing, then they should write judgments suited to that end. That means writing a judgment which commentators and journalists can mediate to the public.\(^87\)

In court magistrates need communication skills to achieve their objective. The example which follows illustrates different aspects of the communication process and reveals that it occurs at various levels and requires the capacity to listen.

Janine Johnstone SM: In one matter a bail was breached and the guarantor was called to show cause why their guarantee should not be estreated. In your assessment I think you must take an overview of the file in case there have been a number of bails. You must determine how that guarantor fits into the scheme of things, at what stage he or she was required and for what reasons. I usually try to assess that and explain that position to the guarantor to see if they accept whatever is my summation. I ask them for their view as to what were their responsibilities and discuss the fact that, for example, they were required because the D was thought to be a bad candidate for bail or failed to turn up in the past. I may comment as to whether it's a serious or run-of-the-mill type of offence and what effect the non-appearance of the D has had. I would ask them about what efforts they've made to secure the D's attendance before the court.

The magistrate says that she first assesses the position and explains that to the guarantor. The explanation will need to be put in terms the person can understand. She then ‘asks for their view’. The magistrate needs listening skills to understand what the guarantor understood of the responsibilities of a guarantor. The magistrate says that she ‘discussed’ some aspects of the facts. ‘Discuss’ implies that this was part of a two-way communication — a process different from either explaining or listening. Finally there is another period of ‘listening’ to the response to the question ‘what efforts have you

made to get the person to court?’ At the end of that the magistrate decides what to do and communicates that decision to the guarantor.

Summary

This chapter provides examples from the interview material demonstrating that magistrates understand the importance of communication but disagree about the capacity it has to affect those in court through what is said. Some magistrates take the view that it is only the end result that concerns those involved and that otherwise the defendant or party involved pays little attention to what the magistrate says.

The cartoon of the prisoner entitled *Echo from the Past* highlights the problem. The magistrate said since he was imposing a custodial sentence for the first time he thought he took particular care to explain the decision to the Defendant. Despite that, it is apparent from the prisoner’s reaction that he did not understand the result, much less the explanation. The example given in this chapter of Joseph Domino indicates that in his case communication is ‘devalued’ over time because of the number of cases he has to deal with and the time he has for each. This is an illustration of the linkage between work environment and communication, with the work environment militating against good communication.

The quantitative data considered in Chapter 3 demonstrate that magistrates have about an equal chance of dealing with an unrepresented person as they have with a party who
has a lawyer appearing for them. In small claims hearings parties are not allowed to have lawyers appear for them except in special cases.

There are a number of issues highlighted in this chapter. These include the fact that magistrates have limited opportunities to communicate with each other. As a result they have little idea of the way another magistrate may deal with a difficult issue. Good communication skills are shown to be important in resolving some forms of dispute.\footnote{Janine Johnstone SM example in text, 110} Given that communication is important one asks how can that skill be enhanced. The subject is taught to the law student of today and has been for some time. Formal tuition is one option. The observation exercise discussed in the next chapter will highlight the importance to magistrates of effective communication.

This chapter shows the inter-connection between communication, environment and decision-making. The University courses available to law students of today are not likely to be available to judicial officers for two reasons. One is the issue of time. Another is the issue of adult professionals accepting formal tuition. In Chapters 7 and 8 a proposal is made to assist the development of communication skills, by involving magistrates engaging in a process of mutual observation, discussion and reflection.
CHAPTER 7. THE OBSERVATION EXERCISE

Problem identified and solution proposed.

From their position on the Bench magistrates have little opportunity to appreciate all that is going on around them or all they are required to do. They have no contact with each other as they carry out their work in court or as they adjust to the challenges and changes affecting them.

The discussion about decision-making, the flow charts and quantitative data demonstrate the number of decisions magistrates make as cases proceed. The examples cited in Chapter 4 of ‘difficult’ decisions highlight these aspects: the numbers of matters in the list, application of new law, sentencing, the need for time to prepare sentencing remarks, the fact that ‘we need time to think’, working and making decisions when ‘it is so busy and so much is happening all the time’, dealing with unfamiliar facts such as the mechanics of a motor vehicle engine and coming to terms ‘within half an hour’ with an issue such as agistment of ostrich eggs.

There is a common thread in these examples — that magistrates make important decisions in short time frames. They have little time to reflect. This is hardly surprising in light of the quantitative data referred to in Chapter 3. Those data demonstrate that magistrates hear and decide a very high percentage of all matters heard in all courts. Their lists are long — although reducing as greater controls are instituted over listing.
procedures. Many cases involve parties who have no legal representation. Flow charts of matters in both the civil and criminal jurisdictions demonstrate the various alternatives that are open as cases proceed through the system. These and other data indicate that decisions are being made constantly and that the intermediate decisions — those made prior to trial and final judgment — can resolve matters. Both the quantitative data and examples discussed in Chapter 4 indicate that the time available for magistrates to reflect is very restricted.

Chapter 5 highlights the intellectual and physical isolation of the magistrate. The expectations of the community and the consequences for those who appear in court are great. Magistrates are likely to be under stress. The nature of the work makes that a real probability and in Chapter 5 examples are given of how magistrates cope. For Bob Jones SM ‘extraneous work such as reading and writing reserved decisions must go by the wayside’ as the magistrate sits in the general criminal court.96 Chapter 5 contains a repeat of some examples previously used in Chapter 4 — a connection between environment and decision-making is emerging.97

Chapter 6 is about communication. Magistrates communicate all the time. They do so by way of written reasons but also by way of extempore rulings and extempore judgments. They communicate with lawyers and with parties who have no representation. They communicate with their staff. Communication is linked to

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95 Janine Johnstone SM example in text, 60.
96 Bob Jones SM example in text, 73.
decision-making and environment — graphically illustrated by the *Echo from the Past* cartoon. Examples show the link.\(^98\)

The research indicates that magistrates have little time to reflect upon their work as it proceeds. They have little opportunity to learn from one another. Peter West SM noted that although he had been a magistrate for 20 years, he did not get much feedback and did not know what other magistrates did in their courts.\(^99\)

I gained insight into the understanding magistrates have of their work (including my own understanding) by a process of reflection. During interviews magistrates ‘self-reflected’ on what they had done in court on the day of or during the week preceding the interview. The reflection was inter-active during group discussion. Questionnaires demanded self-reflection again.

As an observer from the well of the court, I was able to appreciate aspects of the work magistrates do which previously I had taken for granted. My understanding of my work as a magistrate was enhanced. I wondered whether, as magistrates, we might be able to help one another gain greater understanding of our work by a process of mutual observation, reflection and discussion.

In Chapter 2, I refer to the ‘observation exercise’ carried out by myself with five colleagues. The chapter provides an explanation of the manner in which the exercise

\(^98\) Henry Walters SM examples in text 88 and 105; Henry Fielding SM examples in text 88 and 105; Arthur Brown SM examples in text 58 and 106; Janine Johnstone SM examples in text 60 and 107.

\(^99\) Peter West SM examples in text, 81and 109.
was carried out. I have used excerpts from the group discussion to illustrate insights gained by the participants.

In this chapter I examine the outcomes of the ‘observation exercise’ in greater detail. I conclude that this is a process by which magistrates can help one another gain better understanding of their work and I recommend that it be accepted as an additional form of PD and become part of PD programs for magistrates generally. It is offered as an alternative to ‘peer review’ or ‘mentoring’. It is not a substitute for these other forms of PD. It is an addition to the range of programs for PD that could be implemented.

However, the observation process is different from those other processes — the essential difference being that in this process the focus is on the observer and not on the person under observation. The goal is to allow the observer to rethink their own approaches to what they do and to enhance their understanding of their work. In this research I reflect the view from the Bench. The thesis concerns what magistrates perceive themselves to be doing — acknowledging that their perception might differ from that of others, such as academic researchers, lawyers, police and those who appear in court as parties or defendants or witnesses. It may not be the view of members of the community generally.

The result of this research leads to the conclusion that magistrates have restricted opportunities to appreciate or understand what they are doing and that the observation process combined with mutual reflection and discussion will add to their understanding.
In the balance of this chapter I highlight the outcomes and examine how the concept fits with established principles of adult learning.

**What each magistrate gained from the observation exercise**

As with the interview material, the names and identities of magistrates participating have been disguised by use of pseudonyms. All but one of those who participated had previously been interviewed. The pseudonyms used in the interview material are repeated for those magistrates. Some of the interchanges between the magistrates are lengthy and initials rather than the full names are used when citing from the transcript. The magistrates are identified as Barney Bryant SM (BB), Frank Eastwood SM (FE), Bob Jones SM (BJ), Susan Gray SM (SG) and myself (GFH).

**What Frank Eastwood SM gained**

Frank made the comment at one stage that he felt the concept of leaving his court to observe in the court of another was unnecessary:

> FE: My personal opinion is it is unnecessary. I found it quite interesting to watch Barney and it made me feel a little bit more confident that what I was doing was run of the mill, standard fare for the job, and I was more pleased the following day when Bob said he’d been observed by another Magistrate and they did the same thing. And he tells me that what I did was basically the same thing as him with slight variations on a theme. So it’s a confidence-building thing that we’re all basically doing the same sort of thing. We’re not rude, overbearing, and offensive to the punters.

Whilst asserting that he felt it was unnecessary, Frank here acknowledges that the experience made him ‘a little bit more confident’ that he was not out of touch. Such reassurance gained by Frank was a valuable outcome in itself.
Frank noted, as did others, that there were a lot of adjournments. This is consistent with the analysis of file outcomes of 8 March 1999 referred to in Chapter 3.

**FE** I firstly noted that we have too many adjournments, pure and simple. They're unquestioned adjournments.

Frank also noted of his own list:

**FE**: I can say that I had 65–70 in the list. I only finished 10 files for the day. We have too many matters that get adjourned time after time and I spend all day telling people they will not get any more adjournments. We should give them the first adjournment automatically, no questions asked, the second one they have to have a reason and the third one is listed for trial.

Frank expanded on that later in the discussion:

**FE**: Bob noticed something I noticed in Barney’s court, that he had a general list of eighty-odd matters. I had a general list of 65–70 matters but at the end of the day I would guarantee that Barney only closed 10 files. At the end of my day I had only closed about eight files, so of my 65–70 matters, eight were closed at the end of the proceedings and the other sixty-odd had to come back on another day. Maybe there's a problem there that we're spending all day in court but not really closing off a matter.

According to Frank’s account, Bob noticed that there were many adjournments; Frank noticed it in Barney’s court and also in his own court as well. Bob’s response to the comment above by Frank is referred to below.

**What Bob Jones SM gained**

Bob observed how matters move with great rapidity and that magistrates work with time constraints:

**BJ**: I learnt that I almost take for granted the fact that you're doing that as one after the other, but it was interesting to watch Frank and see the sort of pressure we're under, that you literally just finish talking to someone about something and bang, the next matter's on. We know that in lots of ways but you actually see it.
Another matter to emerge from the observations of Bob was his appreciation of the importance of communication:

The other thing I learnt about the Magistracy is that it's all about communication. We literally just talk to people all the time and not just that, we're doing two things, first of all eliciting information. I tend to elicit it slightly different from Frank …we're actually eliciting information all the time and we're communicating in a way which people understand.

Bob also noted the impact of the court appearance:

BJ: Every person that appeared in Franks' court on Wednesday would have had a tremendous sense of the fact that they were going through something very, very significant, very important and that certain expectations were required of them in the future. The morning they spent in court I think would have been a very different morning from their usual way of life. When they left the court they would have taken something with them.

Bob’s response to Frank’s observation concerning the number of adjournments being granted confirmed Frank’s view.

BJ: I think by 11.30 you'd closed three but you'd done a lot more than three files. By lunch time you'd closed about five but again you'd done a whole heap of files and an awful lot of time was spent moving people from one date to another. Just watching a whole list in the course of a morning and thinking about what Frank had done, he'd spent a lot of time, some of it quite valuable I might say, in encouraging people to get moving, but nevertheless that's what he'd done for the morning. The sentencing side of it took a relatively small proportion of the morning.

What Susan Gray SM gained

Participation in the exercise led Susan to reflect on the meaning and purpose of the magistracy:

SG: I think it makes you rethink your beliefs at all levels. And the first, most underlying and important level is: What is our function and role in what we do? Are we actually convicting and imposing sentences, speaking to people in order to deter them from committing offences? Is that what we're doing? And if it is what we're doing and are meant to do, then we need to think about the best way we personally can do that.
Susan also found that the experience offered insight into the importance of communication and to the alternate styles as between magistrates:

SG: Having said that, I got a variety of experiences and on the communication level I think there are some pre-communication philosophies that we have to sort out in our heads. I don't think it matters one jot for anybody's purposes if you get absolutely everything right in the law and everything else you don't get perfect or understandable to the people in Court. That seems to me to be an utter waste of time…. I think that comes down to the same thing they say to advocates, that all advocates have to develop their own style. You have a very gentle style, it's very encouraging to people and therefore you probably get people to talk to you at a level and in a way that other people who speak differently don't.

In this instance Susan used her observation to reflect on her own approach. She had the opportunity of reconsidering her approach in the light of the alternative that she had observed.

**What Barney Bryant SM gained**

A major benefit to Barney was that it caused him to reflect upon his manner of communication and of the need to guard against complacency:

BB: I thought I needed to review the sort of practices I'd adopted and followed for years and years without really thinking much about them and to reduce the amount that I say and the way in which I say it. I confess that a lot of it tends to become almost ritual incantations that you just slip into general mode and out it comes without necessarily being appropriate on each occasion.

Barney has emerged with a quite specific goal in mind:

BB: I've resolved to be a little more conscious about what I say in court, to say the least amount but perhaps to use less legalese and jargon. I've tended not to think that I used much legalese in court. But my clerk also informed me of that after Frank made his criticisms. I might one minute be talking to lawyers and using the jargon as a shorthand way of communicating and the next minute you get an unrepresented defendant, and while you're explaining to that defendant what a plea of guilty entails or means, you might unconsciously slip into the jargon of talking about the elements of the offence or something which would be completely incomprehensible to the unrepresented defendant. I wasn't aware of the fact that I do that but apparently I do.
Group discussion following the observation exercise

In Chapter 2 I explained that after the magistrates had in turn observed one magistrate and been observed by another, that we then met in an informal setting and exchanged views. The group discussion following the observation enhanced the value of the process. However, protocols need to be established if the session following the ‘observation’ is to retain its primary focus — that it is a process whereby the observers are stimulated to reassess what their work entails and how they might better perform it.

The debriefing session led to some exchanges that run counter to the primary goal of this proposed form of PD namely that it be a reflective learning experience for the observer. The examples that follow illustrate possible pitfalls:

GFH: So what effect does your job have on you?
FE: Stress, I mean look at me. Huge stress, dealing with crims, not only because of the type of customer but because I don't like dealing with those people.
BB: Does your attitude towards them show through in the way you treat them?
FE: It might well do. I know I strongly dislike most of them. I think what they do is totally and absolutely offensive. I think they're a lower-class human.
BB: They're members of the community who have broken the law, some have had extraordinary setbacks and difficulties in their lives. Aren't there some whom you think 'There but for the grace of God go I'? You'd have to think there would be some offences you wouldn't commit but given the same sort of background difficulties and problems, don't you think you're capable of doing the same?
FE: I look at it differently. I say there are many people who have come from that same background who don't commit those sorts of crimes. I don't accept these people's excuses.

Frank appears to have a stereotyped image of those who appear in court. Barney challenges that and posed an alternative possible way of categorizing offenders. Barney does not accept the alternate categorization. He perceives the alternative categorization as ‘an excuse’.

The process of observation, reflection and discussion is put forward as a desirable form of PD for magistrates. There is a danger that well-intentioned feedback could be taken
the wrong way and construed as destructive rather than constructive criticism. It could also be wrong and/or misleading. The example above, and the one that follows, demonstrate the need for established and agreed protocols if this process is to be developed, as intended, as an experience distinct from ‘peer review’:

FE: You may recall the 18 or 19-year-old girl on a charge of shoplifting from Foodland. She'd pinched some lollies and a drink and you explained 'No priors, good character', she came across quite well, and you explained to her that you have the authority to either convict her or not of the offence. It was patently obvious to me that you'd decided not to convict her but then you said to her 'And I invite you to make submissions about whether I should convict or not convict' and she had nothing to say, so I thought you'd painted yourself into a corner where you then proceeded to convict her but I could see you had already decided not to. I think you could say something like ‘I have in mind not to convict you. Is there anything you would like to say about that?’ so you're actually telling the individual what you're going to do as opposed to inviting submissions about what you should do. I thought it was obvious that you were going to be lenient to her but as it turned out you convicted her, you cruel bastard! I thought she was a nice kid.

There is in this example an unstated suggestion the defendant suffered an undeserved penalty as a consequence of the manner in which the communicated. The ‘alternative’ approach suggested was positive. However, the example could have caused offence in a less tolerant person than the magistrate to whom the comment was made.

My response to the danger of the observer being too critical of the person under observation — “It was patently obvious to me that you'd decided not to convict her …” — is to propose that the observer who engages in discussion with the person under observation raise issues as questions rather than statements. Thus: “I wonder why when you were speaking to that young ‘shoplifter’ you …”

The observation process is improved greatly by the interaction between observer and the person under observation.
**Other ways of learning**

Constructive feedback is something magistrates rarely receive. Commentators have noted this to be something lacking and not available to most judicial officers:

Judicial officers are almost unique in the paucity of feedback they receive on their professional performance. Virtually all they receive are Notices of Appeal from their decision, and then, if a litigant has the resources and will to pursue the appeal, in the long run, a copy of the decisions of the Appeal Court. That feedback is sporadic and haphazard, and when received it is directed, quite properly, not so much to improving the performance of the judicial officer, as to getting the right result for the litigants. It corrects legal reasoning, probably the aspect of judicial work in respect of which judicial officers require least feedback. While the system of appeal is significant in making judicial officers accountable, it is singularly ill fitted to provide constructive feedback to judicial officers. Most other professionals have means of receiving feedback, either formally, through performance appraisals, re-accreditation procedures, or through other formal or informal types of peer review.100

What is said on appeal by the Appeal court is valuable. If the magistrate has been in error in law or followed an incorrect procedure the magistrate can learn from that. I distinguish what is suggested here with what is learnt by reading an Appeal judgment. The Appeal judgment will usually turn upon the particular case and its own facts or applicable law. If the Appeal raises some more general issue, such as the manner of interpretation of a particular section of a statute, that is learning about the content of the law. It is valuable to all magistrates but does not give any one magistrate a better understanding of the nature of their work and how they might do it better.

**Judicial officers and PD**

The need for ongoing professional development (PD) of judicial officers is now acknowledged. There is however concern about the form of PD that is appropriate. One concern is that some forms of PD could interfere with judicial independence. The Chief Justice of the High Court of Australia, Justice Gleeson, has noted:

The development and enforcement of standards of competence and diligence is a difficult issue with which courts and legislatures will have to grapple. The requirements of independence and accountability are not mutually inconsistent but they can, in some circumstances, conflict. The

resolution of such conflict will be a pre-occupation of those concerned with the governance of courts over the next decade.\textsuperscript{101}

Livingstone Armytage, a former Education Director of the New South Wales Judicial Commission, has discussed the application of educational theory and the principles of learning as they are applicable to adults in general and judges in particular:

The educational strategies which underpin any approach to educating judges on equality should rest on foundations of adults’ learning theory. These foundations must, however, be specifically designed to support the distinctive requirements of judges who exhibit characteristics, styles and practices as learners which are distinctive, and which have direct and important implications for educators.\textsuperscript{102}

Armytage identifies that one principle of adult education is that it be facilitative not directive:

Within this understanding, it is argued that any paradigm of adult education should be seen primarily as a process of facilitation based on self-directed learning, where the educator is cast in the role of facilitator in a process centered on the learner, rather than as an authoritarian model of teaching where the educator directs a learning process which focuses on the subject.\textsuperscript{103}

A working party established by the Commonwealth Attorney General in conjunction with State Attorneys General recommended the establishment of a National Training College in May 2001. The working party engaged in wide consultation and had regard to suggestions made in a discussion paper by Professor Christopher Roper which preceded the working party report.\textsuperscript{104}

Roper reviewed the need for such a College and identified that Colleges of this nature had been established in England, Canada and New Zealand. He then considered views expressed in Australia by Sallmann\textsuperscript{105}, by the Sackville Committee in Access to Justice:

\textsuperscript{101} Gleeson, above n 61, 4.
\textsuperscript{103} Ibid 168.
an Action Plan,\textsuperscript{106} in a discussion paper covering proposals for a Judicial Studies Institute\textsuperscript{107} and in the then current review of the Adversarial system by the Australian Law Reform Commission.\textsuperscript{108}

Roper reviewed arguments against such a College and considered the alternatives. From that he turned to consider the basic principles to guide a judicial college’s operations identifying the need for preservation of judicial independence and suggestions made by various commentators.\textsuperscript{109} He identified a number of ‘fundamental principles’ emerging from these views noting:

- That it is essential that programmes are judge-controlled and often judge-delivered
- The college’s activities should be developed in close liaison with courts at various levels and places, so that they reflect the diversity of real needs and interest. Participation in the college’s activities should be voluntary
- There should be a diversity of programmes, including skills and opportunities for reflection on the judicial role
- The activities should take into account that judges are good at self-directed learning
- The College should be clearly professional in its operations, with a comprehensive and coherent curriculum and incorporating educational principles into its activities
- The College’s activities should be flexible, reflecting the variety of ways in which judges learn and professionally develop themselves, and should be decentralised as much as possible.

The Standing Committee of Attorney’s General (SCAG) adopted the proposal and the National Judicial College of Australia was officially launched on Friday 2 August 2002. The first program is to be conducted in Canberra in the first week of August 2003 and it

\textsuperscript{106} Advisory Committee on Access to Justice (Cwth.), \textit{Access to Justice: an Action Plan} (1994).
\textsuperscript{107} Courts Consultative Council (Victoria) 1998. Discussion paper
\textsuperscript{109} Roper, above n 104
will be a program directed at magistrates - some being relatively new appointees and
some more experienced magistrates.

It is my recommendation arising from this research that magistrates should be
encouraged, on a voluntary basis and subject to agreed protocols, to observe one another
in their courts and that Chief Magistrates and managing magistrates be urged to approve
and facilitate this process. This should be done by small groups of magistrates, say four
or five. They should be drawn from different court locations. The focus should be on the
observer and not upon the magistrate under observation. The NJCA could develop and
adopt the proposal as part of the ‘diversity of programs’ advocated by Roper as
appropriate for such a body to conduct.

**Reflective practice**

At the outset of this chapter I explained the important role of ‘reflection’ in the
development of this dissertation. I did not anticipate that a methodology used for
research purposes should not only identify the problem but also emerge as part of the
solution.

Donald Schon\(^1\) introduced the concept of reflective practice in the 1980s. As defined
by Schon, reflective practice involves “thoughtfully considering one's own experiences
in applying knowledge to practice while being coached by professionals in the
discipline”.

In *Educating the Reflective Practitioner* Schon states his goal thus:

In this volume, I propose that university-based professional schools should learn from such deviant traditions of education for practice as studios of art and design, conservatories of music and dance, athletics coaching, and apprenticeship in the crafts, all of which emphasise coaching and learning by doing. Professional education should be redesigned to combine the teaching of applied science with coaching in the artistry of reflection-in-action.\(^{111}\)

Schon writes in the context of academic institutions and their manner of teaching. He regards ‘Law’ as one of the disciplines to which his methodology may apply:

Technical rationality holds that practitioners are instrumental problem solvers who select technical means best suited to particular purposes. Rigorous professional practitioners solve well-formed instrumental problems by applying theory and technique derived from systematic, preferably scientific knowledge. Medicine, law, and business — figure in this view as exemplars of professional practice.\(^{112}\)

Schon identifies a gap between ‘actual competencies’ and ‘prevailing conceptions of professional knowledge’.\(^{113}\) He observed that ‘Law professors have been discussing for some time the need to teach ‘lawyering’ and, especially, the competences to resolve disputes by other means than litigation.\(^{114}\)

At the heart of Schon’s approach is the concept that

Students learn by practicing the making or performing at which they seek to become adept, and they are helped to do so by senior practitioners who — again, in Dewey’s terms — initiate them into the traditions of practice: “The customs, methods, and working standards of the calling constitute a ‘tradition’, and … initiation into the tradition is the means by which the powers of learners are released and directed” (citation omitted).

The student cannot be taught what he needs to know, but he can be coached: “He has to see on his own behalf and in his own way the relations between means and methods employed and results achieved. Nobody else can see for him, and he can’t see just by being ‘told’, although the right kind of telling may guide his seeing and thus help him see what he needs to see” (citation omitted).\(^{115}\)

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\(^{111}\) Schon, *Educating the Reflective Practitioner*, above n 110, xii.

\(^{112}\) Ibid, 3-4.

\(^{113}\) Ibid, 10.

\(^{114}\) Ibid, 11.

\(^{115}\) Ibid, 16-17.
There are obvious differences between the model proposed here and that pioneered by Schon. The model proposed arose out of my own research methodology; I realised with surprise that as I sat and observed other magistrate and subsequently listened to them as they described their day that each of us was growing in understanding. It was not a matter of colleagues being ‘taught’; but the process itself informed the magistrate. The process is a conduit between the legal knowledge that the magistrate must possess and the practical skills used every day. The latter, in this dissertation, are asserted to be skills in decision-making, communication and understanding the work environment.

**Other models proposed**

The concept of magistrates or other judicial officers observing a colleague in court is not novel. Malleson in *The New Judiciary* refers to precedents for the proposal that judicial officers should observe one another from time to time:

> In 1993, the Royal Commission on Criminal Justice drew attention to the absence of monitoring during training and the report proposed that an effective formal system of performance of appraisal should be instituted. As well as criticising the absence of monitoring during training, the Royal Commission also concluded that there were not satisfactory monitoring arrangements in place during the judges’ routine work to ensure that standards were maintained, and it expressed surprise that full-time judges seldom, if ever, observed trials conducted by their colleagues. The Commission proposed the presiding and resident Judges should attend trials to assess the performance of judges in their courts. In 1995, Lord Woolf in his report on the civil system, similarly recommended that there should be a general extension of monitoring. He argued that appraisal would allow judges to be given constructive comments on their work which would help to promote consistency between one judge and another in management decisions.²¹⁶

Malleson puts the proposal in the context of the ‘observer’ acting as a ‘monitor’ who would ‘assess the performance’ of a colleague. That is not part of this proposal. If any process of PD is to be implemented successfully it must engage the group at whom it is directed. Magistrates are legally qualified. They will usually have had considerable experience in the law prior to appointment. They are independent judicial officers. Whilst it is the case that magistrates have from time to time been appointed as Judges,

there is no established system of promotion from magistrate to judge. The proposal made here, so long as the emphasis remains that its focus is upon the observer and not the person under observation, is not as threatening as either ‘monitoring’ or ‘peer review’.

Handsley, writing in the *Journal of Judicial Administration*, suggested another model.

The type of system envisaged is one whereby judges, at regular intervals (say, annually), produce a document containing reflections on various aspects of their activities over the relevant period. The document would then be discussed with a nominated colleague — possibly, but not necessarily, the head of jurisdiction. Between them the two judges would consider ways of addressing difficulties the judge has faced and possibly set goals for the coming period. There need not be any sanctions attached, even to failure to complete the document. Rather, the idea is to provide a forum for focused reflection on and support for the judge’s performance. Performance appraisal would encourage judges to identify, and seek ways of addressing, difficulties they have encountered and areas in which they would like to improve. The very process of reflecting on performance in this way can have a powerful salutary effect. From the point of view of the court as an institution it would provide an opportunity to communicate, through the appraiser, any concerns it might have about the judge’s performance. As the precise details of the process would remain confidential to the judge and the appraiser, such communication could occur in such a way that the judge would not feel singled-out or persecuted, for he or she would expect that many if not all colleagues had some matters raised in such a context. In other words, a regular appraisal cycle would render such interactions a good deal less confronting, and therefore a good deal more constructive.  

In so far as Handsley advocates that there be ‘a forum for focused reflection’ her concept is not dissimilar to that advocated here. Where I differ from her is the use of the word ‘appraise’. This proposal does not advocate either ‘monitoring’ or ‘appraisal’ by magistrates of one another. It also avoids the difficult issue of reconciling those approaches to PD with notions of judicial independence.

**PD and Accountability**

Malleson argues that PD serves the end of enhancing accountability:

> By being seen to respond to concerns about the behaviour and attitudes of judges in court the judiciary can claim to be accountable to the public it serves. The effect of this form of

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117 Handsley above n 34, 186.
accountability should, in turn, enhance public confidence in the judiciary. Since public confidence is the bedrock of judicial independence, it can be seen that increasing training can serve directly to reinforce judicial independence.\textsuperscript{118}

The proposal put in this chapter requires the magistrate in attending at public sittings of the court and observing. It is an aspect of accountability and, as Malleson suggests, it will thereby enhance public confidence in the judiciary. Lawyers, police or witnesses may identify magistrates observing at the back of the court. The learning experience is what is important, but the fact that the legal profession and public become aware is an advantage as the can see magistrates engaging in a learning process. There is a security risk but it would not appear to be great given that the observer will be incognito and his or her attendance will not be broadcast. Although the risk is slight the protocols will require that those charged with security at the court be advised of the intention of the observer to attend.

Reports at the de-briefing session indicate lawyers noticed the presence of the observing magistrate:

FE: Talking of my observation as an observer I walked in there and Sam Smith, the local Agatha's Bay lawyer and Jan Pier saw me sitting there. Neither of them said anything. Jim Hardy turned around, saw me and said 'Do you need the services of a lawyer?' I said 'Yeah, a good one!!! There were about five lawyers and Jim Hardy asked my clerk what I was in court for!

Not only was the magistrate noticed but the word also began to spread to the point where a practitioner was inquiring as to which magistrate Susan Gray SM would be observing:

SG: I had a lawyer ask whom was I going to observe because they'd obviously button-holed Barney outside the court and found that he was observing me.

\textsuperscript{118} Malleson, above n 116, 177.
Those who participate should do so voluntarily. That is accepted for both pragmatic reasons — if magistrates do not desire to participate, their input is not likely to be worthwhile — and for reasons of principle, that insistence on participation may offend judicial independence.

The value of the observation experience was enhanced by the debriefing session that followed. That enabled interchange between each of the magistrates who had participated. It allowed feedback. It gave the exercise an end point and a focus. That focus was heightened by the subsequent production of a transcript of the debriefing session.

The debriefing and discussion added a great deal to the process and should be part of the process and one of the protocols attaching to such exercises. The debriefing took place at my home. The atmosphere was semi-social. It was easier for participants to relax and talk freely. The work atmosphere of Chambers or one of the courts was avoided. The semi-social environment encouraged an informal, relaxed and open exchange. The comments and interchanges cited above as examples bear this out.

**Safeguards to protect the participants and the integrity of the process**

One protocol that should guide such an exercise is that the ‘observer’ discusses their observations with the person observed immediately on conclusion of the exercise. If the observing magistrate is critical of anything which has been observed it should be understood and agreed by the participants that that matter will not be raised in subsequent discussion without the agreement of the person observed. Unless this is acknowledged other magistrates may approach such exercises in a guarded manner.
Those who participated in the observation exercise suggested this as one an important protocol:

BJ: Yes, I think the idea you had that you discuss it with the Magistrate concerned and make absolutely clear that he knows what you're going to say elsewhere and agrees to that is the essential protocol.

Not all magistrates would have an objection to an open session as part of a debriefing.

But some would:

BB: Just a modicum of politeness. I've welcomed Frank's constructive comments but I wouldn't like to think, for example, he would discuss with other Magistrates my shortcomings on that occasion. I'm quite happy for it to happen here.

The debriefing meeting was tape-recorded. That fact did not inhibit discussion and indeed my impression is that knowledge of the fact that a record was being kept enhanced the exercise. The recording set the scene as one where the discussion was of importance. The transcript allows reflection at a later date and ensures that the value of the exercise lives beyond the immediate experience. For purposes of this research I have read and re-read the transcript. I find it to be revealing in many more ways than have been able to be cited in this chapter.

On the other hand, existence of a written record leaves open the possibility that others will gain access to it. Trust is fundamental to this process being successful. On this question my interest as a ‘researcher’ conflicts with my interest as a ‘participant/observer’. Whilst the option of maintaining a transcript could always be open to a group of magistrates my view is that it ought not to part of the recommended or ‘formal’ protocols. The value to magistrates is that gained upon the day of their observation and at the following discussion. The value to them of being able, at a later
date, to read a transcript is offset by the potential for that part of the process to undermine its credibility as a forum for reflection in an open and honest manner because of the risk that the transcript may actually be misused or by the fear or perception that it is able to be used at later date to embarrass a participant. The potential dangers of this aspect of the process have previously been identified and discussed above.\footnote{Text at 122-123 and comment by ‘FE’ – Frank Eastwood SM.}

**Steps to enhance the project**

Participants must feel at ease to discuss weaknesses or problems without fear of retribution or subsequent comment. It would be unrealistic to expect that those who participate will never talk of the experience. To protect those who do participate it should be a further agreed protocol that in any later reference to the observation by one magistrate of another that the magistrate referred to not be identified by name.

The proposal cannot be put into effect without the approval of Chief Magistrates or others responsible for listing arrangements in the various courts. It is desirable that the observations happen in a ‘block’ of consecutive days or, if the group contains say five or six magistrates, over not more than two weeks. The observation exercise stimulated the participants. If a de-briefing meeting is delayed for much longer than a week or so after the exercise the enthusiasm generated by the experience would wane and memories would fade. Making of these arrangements require a coordinator. The coordinator would plan the exercise and would also have the function of ensuring that the protocols governing the exercise are understood and accepted by all who participated. One of the difficulties of professional development at this level is that of knowing how to ‘engage’ magistrates in the process. They are most likely to respond if
the coordinator is a colleague known to them and trusted by them. There should be wide consultation amongst the magistracy as to who would be most suitable.

**Protocols summarised**

The process should be:

- Voluntary
- No magistrate should be ‘observed’ without the consent and agreement of the magistrate who is to be observed
- Acknowledged by the participants as having the primary objective of assisting the observer, not the person being observed
- The identity of the magistrate observed should not be revealed by the observing magistrate
- Any critical comment will be discussed with the magistrate observed on the day of the observation and not to be raised at any ‘review’ or debriefing session without the consent of that person
- The observer will focus upon asking questions about what the magistrate has done or said rather than express their own critique
- A debriefing meeting should follow — preferably held in a semi-social atmosphere conducive to open and friendly exchange and reflection
- Observations should be by groups and programmed so as to ensure that the ‘circle’ of observing and being observed takes place within a short time frame with the debriefing meeting held soon thereafter.
- A coordinator should be chosen who is trusted by other magistrates and only after wide consultation within the magistracy.
- Chief Magistrates should be asked to endorse the process actively
- Security staff should be alerted to the presence of an observing magistrate on the day of that magistrate’s attendance
Summary

The observation exercise has been carried out and has been shown to be successful in that it allowed those participating magistrates to reassess different aspects of their work. It emerged from the research whilst being part of the research. It allowed valuable insights for the participants but these emerged from their self-reflection and observation rather than from tuition or directed input.
CHAPTER 8: CONCLUSIONS

Magistrates make decisions. These decisions require a sound and up to date knowledge of the law and the capacity to make judgments often of a subjective nature. Each decision, including decisions of a procedural nature, may have profound consequences. Magistrates work largely in isolation from their peers. They communicate daily with a large variety of people, some of whom have limited understanding of the workings of the judicial system.

This dissertation is based on interviews with 14 magistrates from South Australia and five from other States. Responses to a questionnaire, and recorded/transcribed group discussion between magistrates after observing colleagues at work in court, add to the data. What magistrates say they do has been assessed in the light of the quantitative material and data reflecting what they do in fact.

In the course of my discussions and interactions with them, magistrates were both descriptive (looking outwards) but also reflective (talking about the frustrating and difficult aspects of their job and how they manage their work). Some magistrates spoke ‘off the cuff’ and without requiring much in the way of prompting. Other magistrates waited for questions, responded and paused allowing myself as interviewer to decide whether to ask a follow up question.
An advantage of being a ‘participant/researcher’ may be that it is easier to gain access to and the confidence of magistrates when the researcher is identified as a colleague. In this dissertation I have set out to gain understanding of what magistrates do — through the best means available to me — made special and unique because my research uses and relies upon my background as an experienced magistrate.

Magistrates, given the opportunity, spoke coherently, fluently and fervently. They are vitally concerned about and involved in their work. Analysis of the interview material led to some 404 ‘key words’ or phrases being identified which in turn were sub-categorised into 26 categories. These 26 categories were examined and grouped into three main streams: decision-making, communication and work environment. A theme running through and co-coordinating this thesis is that these three concepts are themselves interlinked.

The evidence, particularly the key words and phrases shown in Appendix 1, and the breadth of ideas, issues and concepts identified, is consistent with an intellectually active and concerned group of judicial officers. Further and stronger support for this conclusion is to be seen from the verbatim and other quotations set out and discussed in the course of the three core chapters of this dissertation namely those dealing with decision-making, work environment and communication.

120 One magistrate commented upon the fact that he found it easier to speak to me than to an academic who had interviewed him as part of the Freckleton inquiry into expert evidence – Ian Freckleton, Prasuna Reddy and Hugh Selby, *Australian Magistrates’ Perspectives on Expert Evidence: A Comparative Study* (2001).
A striking aspect about the material is the divergence of views between magistrates on some subjects. Some of them do not mind long lists at all. They ‘get rolling’ and the length of the lists appears to be of no real concern. Others remarked upon the tiredness they feel at the end of a long list. These differences in style and personality are not a cause for concern. In an independent judiciary one accepts and expects such differences to emerge. They are complementary to a healthy and intellectually vibrant judiciary. They are also pointers to some important issues. One is the need for sensitive listing practices — the need for those listing cases to bear in mind differences between the rates at which different magistrates work. The other is to be aware that constant decision-making may take a toll unbeknown to the magistrate concerned. The magistrate hearing his or her ‘nine hundred and ninety ninth' plea to drink driving may forget that to the offender appearing it may well be the first experience of a law court with its unfamiliar structures; the attendance at court may well be marked by trepidation, embarrassment and fear that loss of social and family respect and, worse, loss of employment may result — as indeed may well prove to be the case.

Magistrates have contrasting views about communication. At one end of the spectrum one magistrate believes that offenders are only interested in the sentence whereas others consider their words are meaningful and effective. The interview material demonstrates that just about every aspect of a magistrate’s work has clear and direct or fairly direct communication aspects associated with it.

Data gathered from interview material are grouped under 26 categories. Although some are obviously connected with communication issues, close examination indicates that
the majority of issues arising from the interviews are directly or indirectly concerned with communication.

Interviews form the basis of this research and in them magistrates identify ‘co-operation between magistrates’ in a number of different ways. Appendix 1 shows that they spoke of ‘talking to each other’ (eight times), ‘helping a colleague’ (six times) and ‘working together as a group’ (nine times). This is an important aspect of communication.

Magistrates work in an environment marked by intellectual and physical isolation. It is not an environment conducive to the development of communication skills. Examples have been cited of the teaching of the principles of communication as part of the law syllabus. Formal tuition of this sort has not been developed as part of PD for the judiciary. The experience of ‘mutual observation, reflection and discussion’ of the sort described in Chapter 7 may assist. However ‘communication’ emerges as such an important aspect of the work of magistrates that I suggest that formal tuition of the sort developed within Universities might become part of PD for the judiciary.

The community is affected by the decisions magistrates make. The frequency and importance of each decision is highlighted by the examples, discussion and statistics provided in the thesis. Magistrates make vast numbers of decisions. They have multiple choices to make each day and the decisions have consequences that are far reaching. The quantitative material examined in Chapter 3 demonstrates the intensity and immensity of their task. The qualitative material highlights sentencing, dealing
with children and dealing with unfamiliar areas of law as the issues a number of magistrates find very difficult.

When individual magistrates were asked to look back on their decisions over the week or so prior to interview and to nominate their most difficult decision the responses varied. For two magistrates, the decisions in minor civil actions were what they had found most difficult. The source of difficulty seems to have been the unfamiliar law combined no doubt with the lack of representation inherent in the conduct of minor civil actions. For one magistrate the issue was essentially a philosophical or intellectual one: how to balance the rights of a person who had a regularly obtained judgment against those of a defaulting party who might nevertheless have a good defence. Several magistrates identified sentencing as the most difficult issue. For some it is the sheer weight of numbers that causes the greatest difficulty.

The data collected establish that magistrates hear many cases, in little time, sometimes in unfamiliar areas of law, security issues, isolation and pressure. The interview and questionnaire data indicate that magistrates are conscious of their role in the community and in the lives of the people who appear before them. In addition they constantly weigh up their options and most feel the pressure of their work.

\[\text{[References]}\]

\[\text{121} \] Colin Saunders SM example in text 64; Janine Johnstone SM example in text 60.

\[\text{122} \] Henry Walters SM example in text 70.

\[\text{123} \] Barney Bryant SM example in text 59; Daniel Walters M example in text 58; Peter West SM example in text 82; Matthew Perkins example in text 67.

\[\text{124} \] Joseph Domino SM example in text 68; Bob Jones SM example in text 73.
From where magistrates sit on the Bench they have, of necessity, a narrow view. The weight of numbers and length of lists is such that they must be active and sometimes pro-active participants in the processes of the court. The data show how often they must make decisions. These decisions are non-delegable. They may have profound consequences. Yet, most of the time, the magistrates are looking down a gun barrel firing quick decisions at rapidly moving targets.

In this dissertation the view from the Bench is portrayed. The spotlight shines out from the Bench rather than being directed at the Bench. This result has been achieved through the co-operation of my colleagues.

This research demonstrates the complexity and difficulty of the task of a magistrate. The literature speaks in general terms of the significance of the role of magistrates. Senior judicial officers have commented in papers at conferences on the importance of that role. The data show that magistrates handle the overwhelming majority of the cases heard in courts. It is obviously very important to the community as well as to the magistrates that they understand their work and are provided with as many options as are available to improve that understanding.

I have sought to discover what it is that magistrates themselves perceive as central to their role. Interviews were in the context of the decisions the magistrate had made on the day of the interview or within the preceding week. The interviews record contemporaneous or at least very recent experiences. The data collected are qualitative but it is the recollection and description by magistrates of what they had in fact done or
been doing at the time of interview. The examples are rooted in reality, as the magistrates’ perceive reality to be.

**Findings**

My analysis of the interview material identifies three core concepts: decision-making, communication and work environment. Extensive use is made of quotations from the magistrates’ interview material and these illustrate and highlight my finding that, from the magistrates’ perspective, these three concepts underlie their work. These concepts are themselves interlinked.

The process by which this information was gathered required reflection by myself as interviewer and magistrate and reflection by colleagues of what it was that they had been doing. Each of us gained insight as the process took place. The interview material was consistent with the quantitative and other data collected: the theme that magistrates work in an environment that calls for constant decision and communication at a variety of levels whilst working in an environment that militated against personal interaction.

This then has led to the question: how can magistrates gain a better understanding of their work? The ‘observation exercise’ — the process of magistrates periodically moving from their own courtroom to visit that of other magistrates — has emerged as one solution to the problem. The key to this process is that it is conducted in a manner to encourage self-reflection. I have found this process to be an alternate and previously untried means whereby magistrates can engage in a learning process that is not judgmental of them and will give them a better understanding of their work.
This finding adds to existing proposals for professional development. However, even had this proposal not emerged, the insights gained and exemplified in this research as to the understanding magistrates have of their work is important and a contribution to existing knowledge about those described by Willis as ‘the undervalued workhorses of the judicial system’ — the magistrates of Australia.
## APPENDIX 1. INTERVIEW MATERIAL ISSUES CATEGORISED

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### INFORMATION AND RESOURCES

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**COMMUNICATION**

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**DECISION MAKING**

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<td>What the magistrate takes into account</td>
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**POSITIVE ASPECTS OF MAGISTRATES WORK**

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<td>Something more satisfying</td>
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<td>Found that pretty interesting</td>
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<td>Enormous cooperation</td>
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<td>Feeling good — what helps the magistrate</td>
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<td>Most satisfying aspect of being a magistrate</td>
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<td>250</td>
<td>I love that feeling of release and pleasure of finding out</td>
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<td>251</td>
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**THE MAGISTRATE AND THE COMMUNITY**

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<td>Good magistrate needs to be in touch with community</td>
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<td>Magistrate attending community meetings</td>
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<td>Seeking contacts with the wider community</td>
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**CONTINUING LEGAL EDUCATION**

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<td>278</td>
<td>I do not know what other magistrates do</td>
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<td>CLE</td>
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<td>Keeping up to date with law</td>
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**PRE TRIAL CONFERENCES**

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**DEVOLUTION OF JURISDICTION**

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<td>Elimination of voir dire makes job easier</td>
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<td>Ways job is easier/the same/harder</td>
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<td>Things placed under a finer microscope today</td>
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<td>Don’t necessarily agree that work harder</td>
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### SENTENCING

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**CHANGE WHICH HAS OCCURRED**

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<td>Biggest change is the new agencies to advise</td>
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<td>Biggest change has been…</td>
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<tr>
<td>380</td>
<td>One person court thing of the past</td>
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</table>

**SPECIALIST COURTS**

<p>| | |</p>
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<tbody>
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<td>Domestic violence court</td>
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<td>Specialisation</td>
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<td>383</td>
<td>Drug court</td>
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<td>Specialist jurisdiction and youth court</td>
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<td>Is nunga court giving them a “special” deal</td>
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<td>Description</td>
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<td>Unrepresented litigants — how SM deals with them</td>
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<td>Complaints procedure</td>
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<td>402</td>
<td>Circuit work — fairly intense</td>
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<td>403</td>
<td>Circuits</td>
</tr>
<tr>
<td>404</td>
<td>Circuits</td>
</tr>
</tbody>
</table>
APPENDIX 2. CLEM MEETING 30 JUNE 2000 DATA

The following ‘needs’ were identified:

- Efficient support staff.
- Good registry staff relationship.
- Protection from ‘political’ interference in complaint mechanisms and court practices.
- Lack of control over lists and input into lists.
- Sense of humour, patience, optimism and a sense of proportion.
- Healthy and safe physical environment.
- Effective cooperation between Magistrates e.g. on circuits and in dealings within the workplace as to distribution of workloads.
- Collegiate respect.
- CLEM (Continuing Legal Education of Magistrates).
- Strategies to cope with changes such as come with being in the job for a number of years, technological change, removal of updated texts such as Magistrates Court Practice in some locations.
- Support in unfamiliar areas of law/jurisdiction.
- Control over workplace.
- Research support and availability of resource material
- Antidote to cynicism.
- Programmed time out of court.
- Individual docket control.
- Information regarding the broader picture of change. That is, information regarding directions the management group and the Chief Magistrate are heading

The issues of difficulty were categorised as being matters of:

- Intellectual difficulty
• Emotional difficulty
• Physical difficulty.

The following aspects of being a Magistrate were suggested within the group as being difficult:

• Working in a ‘hostile’ environment (referring to the physical and safety aspects of the environment).
• Fact-finding and issues of credit.
• Dealing with unrepresented litigants especially in stressful circumstances such as in circumstances where domestic violence was alleged.
• Gaoling people.
• Taking evidence from young children and determining the admissibility of that evidence and deciding what weight one should attach to it.
• Making decisions in unfamiliar areas of law.
• Having to deal with too many matters at the same time and having to make decisions too quickly — no time for reflection
APPENDIX 3. ANNUAL CONFERENCE (SA) 2000 CHALLENGING MATTERS

A blank form was distributed with room for comment at the foot. Magistrates were asked to circle one of the numbers on their blank form:

Please circle ONE of the following numbers for each process, assuming that 1 represents a routine or straightforward matter and 5 represents a very challenging matter:

<table>
<thead>
<tr>
<th>Process</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imposition of a custodial sentence</td>
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<tr>
<td>Whether or not to suspend a sentence</td>
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<tr>
<td>Contested bail applications</td>
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<tr>
<td>Deciding factual issues in criminal case</td>
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<tr>
<td>Deciding factual issues in civil cases</td>
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<td>Decisions involving children’s care</td>
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<td>Decisions involving children’s punishment</td>
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<tr>
<td>Taking evidence from children</td>
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<tr>
<td>Dealing with unrepresented people in trials</td>
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<td>Sentencing unrepresented people</td>
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<tr>
<td>Rulings as to admissibility of evidence</td>
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<tr>
<td>Interlocutory applications (civil)</td>
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<tr>
<td>Minor civil actions</td>
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<tr>
<td>Sentencing in Commonwealth matters</td>
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<td>Drug offences</td>
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<td>Domestic violence matters</td>
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<tr>
<td>Pre-trial conferences (Criminal)</td>
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<tr>
<td>Telephone applications</td>
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<tr>
<td>Managing a general list</td>
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<tr>
<td>Writing a reserved judgment</td>
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<tr>
<td>Cases involving unfamiliar areas of law</td>
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</tbody>
</table>

The results were tabulated with the number being the number of magistrates who have circled a particular issue.
Tabulation of survey results:

| Tabulation of survey results:                                                                 |
|---------------------------------------------|----------------|----------------|----------------|----------------|----------------|
| Imposition of a custodial sentence          | 4              | 1              | 4              | 6              | 10             |
| Whether or not to suspend a sentence        | 2              | 2              | 2              | 7              | 12             |
| Contested bail applications                 | 3              | 7              | 7              | 6              | 2              |
| Deciding factual issues in criminal case    | 3              | 7              | 9              | 2              | 4              |
| Deciding factual issues in civil cases      | 1              | 6              | 8              | 8              | 2              |
| Decisions involving children’s care         | 2              | 1              | 5              | 4              | 10             |
| Decisions involving children’s punishment   | 3              | 2              | 8              | 4              | 7              |
| Taking evidence from children               | 2              | 4              | 3              | 8              | 8              |
| Dealing with unrepresented people in trials| 4              | 1              | 8              | 7              | 3              |
| Sentencing unrepresented people             | 4              | 4              | 3              | 4              | 5              |
| Rulings as to admissibility of evidence     | 5              | 5              | 11             | 3              | 1              |
| Interlocutory applications (civil)          | 7              | 9              | 5              | 0              | 2              |
| Minor civil action                          | 5              | 6              | 6              | 6              | 2              |
| Sentencing in Commonwealth matters          | 4              | 6              | 7              | 7              | 1              |
| Drug offences                               | 4              | 7              | 10             | 1              | 2              |
| Domestic violence matters                   | 3              | 6              | 7              | 8              | 0              |
| Pre-trial conferences (Criminal)            | 6              | 6              | 10             | 1              | 1              |
| Telephone applications                      | 7              | 5              | 6              | 7              | 0              |
| Managing a general list                     | 6              | 6              | 7              | 5              | 1              |
| Writing a reserved judgment                 | 4              | 4              | 7              | 6              | 4              |
| Cases involving unfamiliar areas of law     | 0              | 1              | 7              | 9              | 7              |

At the foot of the form above — where magistrates had circled on a scale of one to five how each magistrate rated a particular type of decision in terms of difficulty — magistrates were invited to identify the work issues they found most challenging and to explain why. Fifteen of the magistrates present answered that question responding:

- Decision making — too many.
- Sentencing — trying to get it right.
- I find every day most challenging because I know there will be a fresh challenge every day.
- The relentlessness of making decisions — wears you down.
• The fact that it is unrelenting. Recognized non decision-making periods are needed.

• Writing the occasional reserve judgment — finding time.

• Dealing with my colleagues due to the varied and interesting aspects of their personalities.

• Making findings of fact in complex cases.

• The most challenging aspect of my work is ‘the whole lot’ because it’s a complex personally demanding job.

• Listening to legal argument especially areas involving new legislation or no precedents — stimulates mind.

• The inability of prisoners to be brought before the Court at Christies Beach — facility problem.

• Management!

• Remaining patient listening to appalling inadequate submissions and lies and incompetent counsel and prosecutors.

• Sentencing in complex matters: resolving legal issues in long trials, unrepresented defendants in trials. First and second require careful consideration are stimulating. Unrepresented defendants raise the stress level

• Trial work with young inexperienced prosecutors: it involves teaching presentation, research, getting a case together, advising on evidence and how to approach the role of being an advocate

• Areas where the law is not familiar, and custodial decisions relating to bail and requirements for detailed legal decisions with inconsistent Superior Court authority have to implement for custodial and sentencing decisions. Very little time is available for time out to provide volume work at reasonable cost without decreasing general public respect for the summary jurisdiction.

Those present were then asked to form groups and asked to nominate issue that were of concern to that group rating their significance of the issue on a scale of one to five. The written responses were collated revealing the following:
Subject: Legal education/keeping fresh:

On a scale of 1–5, in terms of significance, the group rated this as a number four.

Issues raised were:

- Computer literacy, pre allocated time required for training; say six days per year
- One to one training preferred to ‘classes’
- Magistrates chat pages to be established via e groups
- Summaries of relevant new legislation and recent judgments would be desirable
- Access to library as well as computer literacy was needed
- Audio tapes on education subjects suggested — some may like this, others not
- Civil law material in particular was sought
- Better control of what legislation was passed to magistrates — liaise with library
- We need constant refreshing.

**Governance of Youth Court:**

Issues raised were:

- Who controls the magistrates in the Youth Court — the Chief Magistrate or the Senior Judge of that Court
- SMs who feel specially suited to that jurisdiction should be able to apply to serve there
- Also some feeling that youth court work should not be confined to that Court as a specialist court.

**National Training College:**

Issues raised were:

- Scope of programs it should offer
- Governance need for magistracy to participate in management of the College.
Suggested programs:

• Induction courses
• Technology issues
• Courses in specialist jurisdictions
• Need for program to be tailored for each level of the judiciary
• Not to be Judge dominated
• Voluntary participation as compulsion would defeat the purpose
• Incentives for attendance.

Governance of the Magistracy

Issues raised were:

• Concern expressed that there was a lack of collegiate management.
• Courts Administrative Authority and registries set the agenda too much.
• A view that there should be a rotation of managers/supervisors — query annual rotation.
• Role of that rotating person to liaise with Registrar.

This dissertation does not deal with the question of internal governance within the magistracy. The subject is very important and requires a separate study. The importance of the issue is evident from comment and discussion that has occurred in recent years within a number of magistrates courts throughout Australia. In South Australia, at the time of writing, there is a proposal to establish a ‘College of Magistrates’ with responsibility for management of the magistracy sought to be vested in such a body as distinct from management being carried out through a system of ‘managerial appointments’ of ‘regional managers’ as is the current structure. There has in recent years been obvious disquiet and division within the Queensland and Victorian magistracies at different times especially arising from the relationship between the Chief magistrate and magistrates generally. I comment on this briefly when dealing with ‘communication’ in Chapter 6.
### APPENDIX 4. NSW MAGISTRATES: ISSUES OF DIFFICULTY DATA

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>TIMES IDENTIFIED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finely balanced factual determination</td>
<td>13</td>
</tr>
<tr>
<td>Decisions involving children’s care or punishment</td>
<td>13</td>
</tr>
<tr>
<td>Sentencing to prison</td>
<td>9</td>
</tr>
<tr>
<td>Civil claims cases</td>
<td>5</td>
</tr>
<tr>
<td>Unfamiliar fact or law</td>
<td>5</td>
</tr>
<tr>
<td>Determining appropriate sentence</td>
<td>4</td>
</tr>
<tr>
<td>Poor legal representation</td>
<td>3</td>
</tr>
<tr>
<td>Evidence</td>
<td>2</td>
</tr>
<tr>
<td>Facts not equaling truth</td>
<td>2</td>
</tr>
<tr>
<td>Consequences to parties</td>
<td>2</td>
</tr>
<tr>
<td>Meaning of ‘reasonable doubt’</td>
<td>2</td>
</tr>
<tr>
<td>Limited information</td>
<td>2</td>
</tr>
<tr>
<td>Impact of delay upon decision</td>
<td>2</td>
</tr>
<tr>
<td>Pressure from parties</td>
<td>1</td>
</tr>
<tr>
<td>Quantifying maintenance</td>
<td>1</td>
</tr>
<tr>
<td>Obstructive lawyers</td>
<td>1</td>
</tr>
<tr>
<td>Victims seeking to withdraw cases</td>
<td>1</td>
</tr>
<tr>
<td>Unfair result of enforcement of the law</td>
<td>1</td>
</tr>
</tbody>
</table>

The tabulation above arises from information collected by Neil Milson M at a Conference of NSW magistrates held in 1997. Magistrates were asked to respond to questions asking:

- What decisions do you find hardest to make?
- Can you identify what it is about those decisions that make them hard for you?
- How long have you been magistrate?
Of one hundred forms distributed forty-seven responded and their replies identified eighteen decision types that were difficult, with three issues predominating namely:

- Finely balanced factual determinations.
- Decisions involving children’s care or punishment.
- Sentencing to prison.
APPENDIX 5. REFLECTION DAILY DIARY


The main case for the day was an unusual one — a property damage claim involving a collision at the intersection of Greenhill Road and Glen Osmond Road. Usually cases such as this are resolved between the insurers. This one didn’t. One never knows for sure whether the parties are or are not insured — and indeed it cannot be a factor which affects their driving or hence their negligence. Arguably it might affect their credit. A person covered by insurance has no direct financial motive to lie save for their excess. When I heard the defendant was a psychologist and I heard him speak clearly I felt a twinge of surprise. I actually subconsciously had assumed from his surname ‘Uzelac’ that he was not an educated person and that I might have trouble understanding him. Is there just below the surface an element of prejudice that I bear towards litigants based upon their race? Do I presume a well-educated person to be a better witness than one who is not well educated?

The plaintiff was a young married woman. From the police report I know her to have been born on 6 August 1973. She was 25 years of age. One counsel in his address to me referred to her as the “girl” driving the plaintiff’s motor vehicle. Perhaps not only judicial officers are not gender aware — so too are lawyers. At least I am gender aware to that extent.

At 12.40 pm we were about to start the D’s case. It was a simple, crash/bash. It was not a case where events unfolded and a sequence was of great importance. I knew there
were two independent witnesses waiting. The usual order would be to call the
defendant and then to follow with his witnesses. I invited Counsel to find out whether
any of the witnesses had commitments that would make it hard for them to come back
after lunch. One had and he was called. Was I right to put the convenience of witnesses
above the usual principles governing the calling of witnesses. I believed then and now
that I was correct. But it is a fine point. Pragmatism or principle? The answer is not
obvious. It depends upon the importance of the principle in the particular case and the
importance of the pragmatic alternative.

And then at 3.10 pm I came to the last of the Ds witnesses. He gave his occupation as
chartered accountant and he worked for one of the very big accounting practices. I
found out later that his charge out rate is $185 per hour. What kind of a system is this?
We are both to blame — Court and lawyers. The Court needs to be more answerable to
the community than it used to be. Why don’t we allow and indeed encourage
timetabling of witnesses. Why would not the lawyers have said to the witness: the other
side go first. We won’t need you at the start. Be available from say 12 noon and we
will ring you at your office and give you 15 minutes before you are needed. Why not?
Probably the lawyer had not thought it through. But perhaps also they fear criticism
from the bench if they ‘run out of witnesses’.

The more I think of it the more it is that I reckon that lawyers need to brush up their act
in terms of estimations of time. In this matter for example they said at call over (so I
was told) that the case would be over by lunchtime. The estimate was certainly one
made in good faith. But it was wrong. As things stand my rule of thumb as to how long
a case will take is to accept the estimate and double it. That is probably unfair but I would say that most estimates are underestimates by 50% or more. It might be worth trying to get data.

For example I could look at all files that lead to a judgment and compare the time taken with the time allowed at the listing. We would have to make sure that times are noted.

Finally this was a case that is a good illustration of the difficulty of knowing which version to accept. We had three totally independent witnesses. They were in three different cars and not involved in the accident at all. Their evidence as to the movement of the P and D vehicles varied greatly. Yet they had no reason to lie.

Finally there is in this matter a technical hitch. The P was an owner and the claim in her name was for the damage to her vehicle. Her daughter who was neither her servant nor agent was driving the vehicle. The daughter was joined as a co plaintiff so that a claim could be made for the driver for costs of hiring a replacement motor vehicle whilst the vehicle she was driving at the time (her mother’s) was off the road. The defendant counterclaimed for his damages when only the P was a party. He counter claimed against the owner but should have counterclaimed against the driver. In so far as the owner’s claim was concerned she (the owner) was not guilty of any contributory negligence. So in theory what should have happened was that the owner should have sued the driver of the other vehicle for her loss. That defendant would have joined the driver of the plaintiff’s vehicle as a third party seeking indemnity from the driver and also claiming from that driver the costs lost. As it is I decided in a reserved judgment to
deal with the matter allowing amendment after trial to allow the Court to arrive at a just result. That can be criticised. On principle the approach is wrong. But it is open although it should be done only in limited arrays of cases. Anyway, I did it.

Nothing for an experienced civil magistrate is more familiar as a piece of litigation than a property damage bash/crash. Most of us grew up cutting our teeth on these sorts of cases. Young lawyers have limited chances to do that today. The costs to the client are too great and most will settle rather than incur the expense of representation in bash/crash cases. But the points which arose today bring home to me the need to be very alive even to a routine case of this nature because in an apparently simple case the risk of injustice arises: injustice potentially because the pleadings are wrong, injustice potentially because the SM either has or has not waived principle or the traditional way, we need to guard against gender characterisations, we need to deal with cases upon the basis of what they say in justice to the witness who has nil to do with the outcome and spends a full half day waiting rather than their ethnic background.
APPENDIX 6. REFLECTION AFTER COURT OBSERVATION

(Note that no aliases used in this document. Observations made at Port Adelaide special interest court on 7 March 2000).

Upon arrival at the court I saw a handwritten notice on the front door saying that the 'Nunga' Court was in Court 9 and pointing an arrow. It made the finding of the court that much simpler. Within the courtroom itself the Magistrate sat not on the bench but at the desk where the clerk normally sits. On his left-hand side was his usual Magistrate's Clerk (Lee Vincent) and on his right-hand side sat an aboriginal person. Ordinarily that is Tony Lindsay, who on this occasion was not there, and an Aboriginal Justice Officer (AJO) sat instead. The person in charge of security and responsible for taking people out for bails etc, was an aboriginal person. He has a brother who is a heroin addict and another brother who appeared in court on this day. The obvious thing was that to the aboriginal persons who attended, the security officer was recognisably a person of aboriginal descent.

The defendants sat at the bar table next to their counsel. Both prosecutor and counsel addressed the bench while sitting down. They did not, as is traditional, stand up. Several of the defendants were asked by the Magistrate whether they had anything they wanted to say, and they did so. On one occasion a young woman from the back of the court with a young child came up to the bar table and addressed the Magistrate directly. She was not asked to come up but she was at the back of the court and simply came forward.

The remarks made upon disposal of the matters were minimal.
Use was made of the Griffith’s Remand whereby a plea was taken and the defendant was remanded to sentencing in six month's time or thereabouts. There is no legislative backing for this procedure, but it is one that the Magistrate has adopted.

An ALRM lawyer represented most of the defendants who appeared. He was quietly spoken and pleas were short. I was impressed by his knowledge of family generally.

A different solicitor appeared on behalf of another defendant in the list, being the defendant who had not attended. The solicitor explained to the court that he did not know where his client was and had not been able to contact him. The ALRM lawyer stood and said that he had seen the client the day before in another court.

It was apparent that the matters before the court had been the subject of considerable prior discussion between the prosecutor and counsel for the defendant. In a number of matters it was intimated that a factual dispute had been resolved. In others it was intimated that there were factual disputes that were still in the process of being discussed.

Ordinarily one perceives the court to 'impose' sentences. While sentences were imposed and penalties fixed, the impression conveyed was of a Magistrate who was fitting the sentence to the facts and circumstances in a particular way.

It was good to note that most of the defendants came accompanied by one or more family members.
I noted that in one matter the Magistrate effectively intimated a penalty that led to a plea and the matter being disposed of upon that day. It was a relatively old matter. Counsel for the defendant said that her client had no recollection of the events that had occurred because she was drunk at the time. It was the Magistrate's intervention, intimation and suggestion to the defendant and solicitor that they go outside and discuss the matter further that led to the ultimate plea.

In dealing with one break and enter matter the Magistrate asked the defendant whether he had ever been broken into and commented upon the effect the breaking may have had upon the 'two white women' whose homes had been entered. It occurred to me that white victims could find the attendance at the Special Interest Court to be more difficult than it would in another court. I have not sought to test that hypothesis.

The files ran from numbers 56 to 121 on the list, a total of 65 matters. In addition, three matters were brought in which were not on the list, meaning that a total of 68 files were processed.

With respect to those files, the number of defendants was 25. In other words, on average there were two to three files per person.

Looking at the nature of the offences, I note that 13 of the files included or consisted solely of allegations of failure to comply with bail agreement or breach bail or estreatment.
There were 17 counts of drive unregistered or uninsured, and associated with most of those were charges of drive under disqualification. There were nine charges of drive under disqualification. There were 11 appearances in person. On a number of the matters where the defendant did not appear, the lawyer had in fact been instructed and knew what was going on, and in some cases it had been agreed it was not necessary to attend. Those matters were simply adjourned or remanded.

There were probably two or three matters where the Magistrate directed that a warrant issue and two or three where he directed a warrant to issue but to lie on the file. In those latter instances the lawyer was able to indicate that he believed the defendant to be able to be contacted, and he undertook to trace the defendant and endeavour to get him to attend court on the next occasion.

The acoustics in the courtroom were very bad, although not helped by the 'intimacy' of the physical situation of prosecutor, defence counsel and the Magistrate. Essentially, they spoke to one another in an ordinary conversational style and their voices did not carry. There were only three rows of chairs. In the third row or back row I could hear hardly anything. I moved to the centre row and I could then hear reasonably well for most of the time, but sometimes I missed things that were being said. One of the strongest impressions was that the Magistrate knew his patch well. It seemed obvious to me that he placed great emphasis upon keeping people out of gaol. If charges were old or at the bottom end of the scale he was inclined to dismiss them, even without conviction.
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