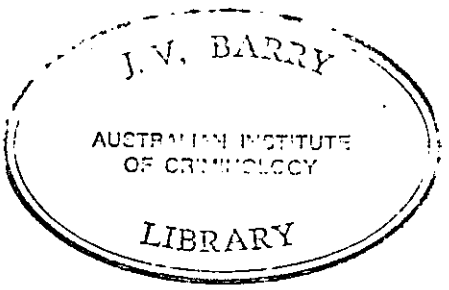
REFORMING THE PEOPLE'S COURT:

VICTORIAN MAGISTRATES' REACTIONS TO CHANGE



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We have learnt a great deal about the summary jurisdiction during the course of our work. For our part, this study demonstrates that there is much to be gained from more active co-operation between the hitherto distinct worlds of "town" and "gown". The potential benefits of such co-operation were not lost on our interviewees. As one remarked,

> I think outside people have got to say, 'look, they're doing these things or they seem to have a problem here, can we come up with some suggestions'. I've found, even though I've been on committees and on boards, etcetera, I really at the end of the day haven't got much time or much energy to do those things. I think somebody outside could have a look at it.

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CHAPTER I
The summary jurisdiction in transition

1. INTRODUCTION

There has been a quiet revolution to Victoria's summary jurisdiction over the past decade. Our busiest courts,[1] responsible for processing 95 per cent of all criminal cases and 90 per cent of all civil cases, have ceased to be courts of "petty sessions", devoted to the handling of minor cases involving straightforward legal issues. [2] Since 1980, there has been a concerted legislative and administrative effort to upgrade the jurisdiction and professionalise its operation. In addition to a number of minor legislative reforms, the 1980s have seen the passage of such major acts as the *Penalties and Sentences Act* of 1981 and 1985, the *Courts Amendment Act* 1986; the *Courts (Further Amendment) Act* 1986, and the *Magistrates' Court Act* 1989, and in 1991, a long-foreshadowed *Sentencing Act* was passed.

Following the *Courts Amendment Act* 1986 much of the civil workload previously assigned to the County Court has become the staple of the summary jurisdiction, and this jurisdiction was even further extended by the *Magistrates' Court Act* 1989. Lay justices have been deprived of their judicial functions (*Magistrates' Courts (Jurisdiction) Act* 1984), magistrates are no longer recruited from the ranks of the clerks of court[3] and their ties to the State Civil Service have been severed

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[1] There is, since the *Magistrates Court Act* 1989, a single Magistrates' Court of Victoria. However, we will sometimes make references the word "courts" in a more colloquial sense, that is to describe magistrates sitting in courtrooms exercising their judicial and quasi-judicial powers.

[2] Statistics of this nature are to be treated with a grain of salt. Different measures can yield somewhat different percentages. The percentage figure for crime would be lower if one were to omit "minor crime". The figures for civil cases would be different if one were to focus on contested civil cases actually heard by the courts. In some respects therefore, the figures are as meaningful as a statement that, say, 90% of the pieces of fruit in a fruit bowl are grapes. However, there is one sense in which the figures are important. The percentage of cases handled by the Magistrates' Court bears a strong relationship to the proportion of people whose cases are handled by the Magistrates' Court. Even if their cases are relatively trivial as compared with murders and billion dollar bankruptcies, they will often be important to the parties, and they will usually represent the parties' sole contact with the state's judicial system.

[3] This process has been partly legislative and partly through changes to practice.

(*Magistrates' Court (Appointment of Magistrates) Act* 1984). Many country courts have been closed and many of the "local" metropolitan Magistrates' Courts have given way to regionalised court "complexes" with new administrative systems designed to ensure greater efficiency and maximum use of resources. Courts which once rarely sat for more than three hours a day now regularly sit until and sometimes beyond four o'clock. The developments in Victoria have been a source of pride for the Attorney-General and provide a useful model for the reform of the summary jurisdiction in other States (Kennan, 1991).

This is a study of the summary jurisdiction in transition. Reform of the jurisdiction is seen from the perspective of those with a critical role to play in its transformation - magistrates themselves. What emerges most clearly is the relative success of this quiet revolution. Changes which would have rocked many organisations have been able to be absorbed by a jurisdiction whose most striking attribute prior to the initiation of those reforms had been its institutional stability.[4] To a limited extent we explain the jurisdiction's receptivity to change in terms of selective retention and recruitment: those who disliked the changes left; those attracted by them stayed or sought appointment to the bench. More crucial, however, is the existence of an organisational culture which has wedded the traditional values of service to the community with some strands of managerialism.

The Victorian Magistrates' Courts provide a useful case-study of the way in which an organisational culture can develop to accommodate what might, in the normal course of events, be overpowering structural change. Understanding this culture has important implications for reform of the legal system since the best of legislative intentions can be (and not infrequently are) thwarted by unsympathetic implementing agencies (Feeley, 1983).

2. THE STUDY

The Australian Criminology Research Council funded this study which was carried

[4] See e.g. La Trobe University (1980: ch 2) for a history of the courts. The remainder of that book provides an account of four suburban magistrates' courts immediately prior to the commencement of the reform process.

out with the co-operation and assistance of the Chief Magistrate and the thirty Victorian magistrates who took part in our study.

(i) Aims

There were three aims of the research -

(a) To record magistrates' responses to the organisational and substantive law reforms in the last decade.

(b) To understand the organisational culture of the Magistrates' Court during this period of transition, and

(c) To examine the implications of these findings for current and future reform of the jurisdiction.

(ii) Assumptions underlying the study

Previous studies of Australian summary jurisdictions have tended to focus on decisions and their determinants. The overwhelming concern of the literature has been with sentencing (e.g. Homel, 1983; Polk and Tait, 1989; Douglas, 1989a, and also the work of Lawrence[5]). Decisions on guilt and innocence have rarely been studied (but see La Trobe University, 1980: ch 7; Douglas, 1982). Civil litigation has yet to be the subject of published academic research[6], and descriptions of the trial and sentencing process are rare (but see La Trobe University, 1980: chs 7, 8, Appendix I; Douglas, 1986: chs. 7-8).

The dominant research method has involved observations or data-set analysis coupled with multivariate analyses (but cf Polk and Tait, 1988, and importantly, the work of Lawrence and Homel). The result of this research is that a considerable amount is known about magistrates' decisions and their correlates, but little is known about the

[5] This is extensive and includes Lawrence (1984); Lawrence and Homel (1987); and Lawrence (1988).

[6] However the Victorian Civil Justice Committee and the Attorney-General's Advisory Committee have conducted a limited amount of research into civil cases in the Magistrates' Courts (Victoria, 1986: esp. Appendix 4).

more subtle aspects of the decision-making process. Moreover, the studies are typically "static" studies which give little indication of the circumstances and respects in which reported patterns might change. This study proceeds on the basis that there are important issues which the existing literature has left open, and on the assumption that these are fruitfully explored by qualitative rather than quantitative analysis. In particular, we make the following assumptions:

(1) Court functioning depends upon a range of "unquantifiable" issues, including morale and organisational culture. The extent to which individual decision-makers see themselves as part of a larger whole has an effect on their behaviour and level of performance, as of course, does the nature of that broader whole.

(2) The attitudes and values of magistrates have a direct impact on their job performance. In particular, their responsiveness to change will be reflected in their decision-making style and application of the law in individual cases. Quantitative research may throw light on the variables taken into account in reaching their decisions.[7] It will rarely throw light on the attitudes which guide their decision-making activities. Yet this will determine whether decision-making is a formal ritual or a real attempt to go some way towards achieving the hopes that have underlain reforms to the jurisdiction.

(3) Concern with such traditional questions as the degree to which sentencing is characterised by sharp disparities may involve unreal assumptions about the importance of this to defendants' evaluation of their court experiences. In practice, individual defendants and litigants are likely to view their cases in isolation from others. In this sense, they are more likely to be pleased or aggrieved at a particular outcome according to more nebulous criteria, such as the decision-making style, including control of the court-room by the magistrate (see Douglas, 1989a; Tyler, 1990). While this suggests the need to interview defendants, it also suggests the need to recognise the importance of matters such as magistrates' style and morale.

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[7] There are some decisions which do seem to lend themselves to such modelling. Douglas (1989a) provides examples of a number of sentencing decisions which appear to be highly formulaic. Attempts to provide powerful models of verdict have proven far less successful, and even relatively powerful models of sentencing normally leave a considerable unexplained residue.

(4) Understanding the concerns and perceptions of key decision-makers is useful in developing law reform strategies for organisational change.

(5) It is possible to come to some understanding of these "unquantifiables" through questioning and discussion with intelligent and reflective participants in the system. The present study is predicated on a notion of taking the subjective reality of participants seriously. We assume that as participants in the system, they will be well-placed to provide informed views about the operation of the system. Moreover, even if there are some respects in which their beliefs are unwarranted, the fact that those beliefs are entertained is itself important.[8]

The findings of qualitative research of this sort are best when married with other more quantitative research approaches. Nevertheless, to date there has been an over-reliance on quantitative methods which have ignored the "humanness" of court organisation and judicial decision-making. This study attempts to redress this imbalance at a critical historical moment of reform of the jurisdiction.

(iii) Method

Thirty Victorian magistrates were interviewed. These magistrates were selected as follows. A sample consisting of two-thirds of all male magistrates was randomly drawn from those magistrates listed in the 1990 Law Department Calendar. Letters were sent to these and to all eleven female magistrates then sitting explaining the nature of our proposed research, and inviting their participation in the study. Half the magistrates approached to participate in this study agreed to do so. Of the thirty, eleven were former clerks of court, the balance being appointed after the changed recruitment criteria. Six of the interviewees were women. The sample therefore underrepresents ex-clerks (at the time of sampling for the study, half the sitting magistrates were ex-clerks); among ex-lawyers, an equal proportion of males and females are represented. The under-representation of ex-clerks is worrying, and raises the question of whether our results are likely to be biased in consequence. On a priori grounds, it is not clear how the under-representation of clerks might bias our

[8] Even if there are differences between what people think they do and what they actually do, the latter statements can be illuminating - as evidence of personal and institutional ideals and aspirations.

findings. It probably reflects attitudes to research and researchers; it may reflect differences in perceptions of the propriety of magistrates expressing opinions. It is therefore possible that the results might yield under-estimates of the conservatism of the magistracy. They might also reflect the views of magistrates with stronger opinions. There is no obvious reason for suspecting that the non-respondents are less sympathetic to the overall reform package than the respondents: one might expect that those hostile to the innovations would be particularly anxious to communicate their disaffection.

Nor does comparison between those ex-clerks and ex-lawyers who did agree to be interviewed indicate significant differences between ex-clerks and ex-lawyers. There are subtle linguistic differences, and a certain amount of recognition that magistrates from particular backgrounds tend to flock together, but the differences are not marked, and the findings reported below would not have been different had there been twice as many ex-clerks. We cannot know whether those ex-clerks who agreed to be interviewed differed from those who did not. We suspect not, and there is one suggestive piece of evidence: we found no obvious differences between those interviewees who readily agreed to be interviewed, and those whose interview was arranged only after a reminder letter. If those who did not agree to be interviewed differed from the interviewees in significant respects, we would have expected "eager" interviewees to differ from "less eager" interviewees.[9] Finally, it should be noted that the problem of bias is such that the under-represented magistrates are those who are less likely to be sitting in five to ten years time. Indeed, by March 1992, there were only 26 pre-1985 appointees still sitting as magistrates. For this reason the results of this study should provide a relatively reliable guide to the attitudes of those who will be responsible for the development of the Court over the next decade.

A semi-structured interview of approximately one to one and a half hours' duration was conducted.[10] All but three of the interviews involved both researchers. The

[9] There was one other respect in which our sample is unrepresentative. None of the magistrates in one of the metropolitan regions agreed to be interviewed. Since a high proportion of the magistrates in that region were ex-clerks, that helps explain the lower representation of clerks; however the high proportion of ex-clerks might explain why no-one from that region agreed to be interviewed.

[10] Ninety minutes was the length foreshadowed in our letter, and we endeavoured to keep to our promise, knowing that our interviewees were busy people. The interviews were structured in such a way as to give our interviewees considerable control over the length of

interviews were, with the permission of all bar three of the respondents, taped and transcribed. Where no tape was available, detailed notes were made during the course of the interview and written up immediately after.

The interview protocol (Appendix 2) was divided into three sections:

(1) **Profile of decision-makers**

The background, motives, and career plans of participants were probed. There were questions about any change in their approach or lifestyle since their appointment and about any surprises in the job. A particularly revealing question asked magistrates to identify the qualities of the ideal magistrate and selection criteria for the bench.

Differences between magistrates were most clearly articulated in their responses to general questions, such as their perception of the major challenges confronting the jurisdiction in the next ten years, consultation about reform, and relationship between the summary jurisdiction and the superior courts.

(2) **The nature and process of decision-making in the summary jurisdiction**

A variety of questions were designed to probe how magistrates went about the difficult job of decision-making. They were asked, for example -

- How they operationalised such legal concepts as reasonable doubt and balance of probabilities.

- The influence of lawyers on the conduct and outcome of proceedings.

- The relationship between the bench and other key participants in the court-room, such as police, interpreters and clerks.

- The impact and influence of appeal and review decisions.

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the interview so that if they wished the interview to be relatively short, this would have been possible. However a substantial minority of our interviews alasted for more than two hours, and few lasted for less than seventy-five minutes.

- Whether they had in their minds any **prima facie** sentencing formulae.

- The usefulness of training and continuing legal education.

- The facilities and resources available to the bench and their relative importance.

- What they regarded as the hardest decisions and most stressful aspects of the job.

- Their attitude to specialist jurisdictions, such as the Children's Court and Coroner's Court work.

(3) **Responses to reform of the substantive law and organisation of the jurisdiction**

Participants were given eight cards as an aide-memoire to assist them in discussing, what had emerged during the pilot, to be the major changes in the jurisdiction over the last decade, i.e.

- Changes to the civil jurisdiction which had given the courts a general civil jurisdiction in cases involving up to $25,000 and which had given the courts an equitable jurisdiction, including the possibility of injunctive relief (*Courts Amendment Act* 1986, *Magistrates' Court Act* 1989).

- Increases to the Magistrates' Court's criminal jurisdiction so that the category of indictable offences triable summarily came to include most property crime where the value of the property was up to $25,000, as well as unarmed robberies (*Magistrates' Court Act* 1989).

- The introduction of the Mention System, an organisational reform which introduced a listing procedure to allow guilty pleas to be heard immediately on the basis of a short police summary of the facts.

- Computerisation of the summary jurisdiction, so that decisions are recorded in court by the magistrate rather than in registers.

- The Family Court jurisdiction referred from the Federal Court and the *Crimes (Family Violence) Act* 1987 which allows parties to obtain "intervention orders" against other members of the family or household where there has been violence.

- Introduction of a system of "Arbitration" (a legislative scheme which allows civil disputes involving less than $5,000 to be processed using the kind of relatively informal procedure characteristically used by Tribunals).

- Expanded sentencing options, including community-based Orders and suspended gaol sentences.

- Changed recruitment procedures. This included such developments as the elimination of non-professional justices of the peace from judicial functions, the professionalisation of the bench through legislative requirements to have a full law degree and five years' experience in practice as a prerequisite to appointment, and the appointment of women to what had hitherto been an all male preserve.

The form of the interviews varied somewhat over time. Some questions evoked similar responses from all those we interviewed. In later interviews, we became somewhat less likely to ask supplementary, probing questions on these issues. Conversely, early interviews occasionally suggested issues which deserved further exploration, but which we had not taken into account in our initial protocol. Where this occurred, we incorporated the issue into subsequent interviews. While such cross-interview variations would pose problems were we to have wished to reduce our findings to numerical statements (x% of interviewees thought "y"), they pose few problems when our closest approximations to quantitative statements are relatively crude (using terms such as "most" "some" or "few").

As with any interview protocol the ordering and significance of the questions varied according to the interests and enthusiasms of particular interviewees. Some participants with longer experience in the various jurisdictions were happy to discuss all aspects of their work while others focused on their more immediate area of expertise. There were also clearly personality differences with some magistrates being more inclined to be expansive, volunteering their opinions, with others favouring a more directed interview question-answer format. Despite these

differences however all interviews provided a rich and textured source of data, participants willingly expressing their views, perceptions and opinions. The length of the interviews and the comprehensiveness of the answers suggests that our interviewees were happy to talk generally about the issues raised by this study.

There is of course the possibility that in the interview situation participants provided "socially desirable" responses. Our own perception of the interviews however was quite the reverse. The interviewees were a confident and self-assured lot, who were, if anything, assertive in their right to their own world of view. And, with most questions, it would be difficult to ascertain what a "socially desirable" view might be. (E.g. How do you find Children's Court work? How do you operationalise "reasonable doubt?") Our interviewing technique also provided minimal clues as to what the "politically correct" answer might be. For example, the potentially controversial question about appointment of women to the bench was located innocuously under the heading of "Changes to Recruitment", which bundled together a variety of changes, such as stripping JPs of their judicial power and the decision to make legal qualifications sufficient and subsequently necessary for appointment. The scope of the interview too meant that there were possibilities of cross-checking for consistency of responses. Thus, for example, the question about the "qualities of the ideal magistrate" could be compared with, say, attitudes of the subject to the professionalisation of the bench through lateral recruitment.

We found no "category saturation". Our magistrates did not give the same answers - there were no rote pat responses. In fact there were sometimes an ironic self-conscious recognition of what the standard answer might be, e.g. the conventional philosophy is that regionalisation has made the courts more efficient BUT our interviewees sometimes continued, it was not efficient for the customers, police, or witnesses.

Some of the obvious limitations of interview methodology clearly did not apply to our group of subjects. They were all articulate, used to both putting and answering questions "on their feet". Assured that any information obtained would not identify them individually the subjects were also pragmatic. They saw the research as an opportunity to express views and opinions which they wanted aired but owing to the constraints of the job, were usually prevented from doing so.

3. CONCLUSION

This study documents the views and attitudes of Victorian magistrates at a critical moment in the history of the summary jurisdiction. (Would that we had similar accounts of judges' responses to the 1873 *Judicature Act*!) Chapters III, IV and V of this report outline these views. The research has however more general application. The reform of the Victorian Magistrates' Courts is a useful case-study of the organisational culture which can sustain and absorb dramatic organisational change. These matters are addressed in Chapters II and VI.

What emerges most clearly from the interview data is that the bench is comprised of a group of thoughtful individuals who share a common organisational philosophy. All the interviewees had a strong sense of their responsibilities and accountability to the "public" and were conscious of their own role in projecting a positive image of the jurisdiction. Despite limited resources and quite specific concerns about aspects of recent reform to the substantive law and organisation of the courts, the general tenor of the interview data suggests there is high morale among the bench and a commitment to further reform of the jurisdiction to enhance its public image and performance.

CHAPTER II
The human face of the Magistrates' Court

1. INTRODUCTION

For understandable reasons the lay-out, ritual and ceremony of the court-room creates a distance between judicial officers and the public. The implication of course is that judicial officers, in their professional capacity are the servants of an impartial or "blind" justice system administered according to law. The corollary of this is that the "punishment" meted out on behalf of the state does not reflect the individual or even idiosyncratic approach of a "human" decision-maker but rather is a uniform commodity dispensed in similar fashion by any court of the jurisdiction.

The ideal of blind justice has obvious advantages for decision-makers. As anonymous ciphers, they are less likely to be treated as personally responsible for the misfortunes which befall unsuccessful litigants.[1] Moreover, such a myth can facilitate the decision-maker's task by restricting the range of matters which need to be taken into account by the decision-maker. A major reason why office-holders comply with the rules is that it is far easier to do so than to have to invent one's own. This in turn can also contribute to the quality of justice delivered by the courts. Insofar as the ideal is internalised by judicial officers, it will be reflected in relatively standardised behaviour on the part of those appointed to the bench. The public in turn can confidently respect the office and its authority rather than the individual incumbent. Finally, a justice system runs smoothly and efficiently when there is no necessity for the decision-maker to project their personality beyond the formal expectations of the role.

There are however also some advantages to slightly "lifting the veil" on the decision-makers. For one thing, whatever the rhetoric might be, decision-makers do vary in their personal style and understanding of their role. They bring to their job individual talents, capacities and experiences. These in turn shape the public's image of justice. It is particularly important to know about individuals who comprise the bench at a time of rapid transition for the jurisdiction. It is, after all, individuals (albeit judicial officers), who bear the responsibility and full burden of implementing these reforms.

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[1] It is perhaps for this reason that the Family Court has come to adopt some of the formal trappings of blind justice.

It is therefore important to understand how magistrates see the world generally and their job in particular before assessing the impact of the changes in the jurisdiction.

The magistrates' responses to our questions about their background and perceptions of their role revealed two quite interesting findings. First, magistrates are highly individualistic and, in a positive sense, opinionated. Their experiences and perceptions may overlap but their idiom, style and decision-making processes can be sharply delineated.[2] Secondly, and somewhat paradoxically, there was a consistency in the organisational philosophy espoused by almost all of the participants. This philosophy seems to be a mixture of modern managerialist[3] principles (modified by a commitment to a sense of "community") with traditional respect for the law. Almost without exception there was high morale amongst the participants.

This chapter notes the strong individualist strands within the bench through a discussion of the decision-makers, their style and decision-making processes. The chapter continues with observations about the respondents' perception of the organisational culture of the summary jurisdiction, and concludes by trying to account for the success of the organisational culture in harnessing quite different individuals working in a stressful environment at a time of rapid change.

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[2] One of our respondents was sufficiently sensitive to this to ask that we not reproduce any direct quotations of our interview with him. Others were not so sensitive, but in deference to our guarantee of anonymity we have taken the following steps. First when quoting magistrates we have not identified the speaker by age, pre-appointment background, or even by numerical code. We have sometimes identified respondents as males, but have endeavoured to avoid identifying respondents as females except where this has been essential to the development of a particular argument. Second, we have endeavoured to ensure that our direct quotations have been drawn from as wide a cross-section as possible, save for the person who asked not to be quoted. Third, we have generally relied on short quotations or paraphrases rather than on longer direct quotations.

[3] The term "managerialism" has come to acquire a number of negative connotations (e.g. Pusey, 1990: 121-6), and writings on public law have tended to proceed on the basis that managerialism may be incompatible with peoples' rights to due process of law (e.g. Bayne, 1988). In using the term "managerial", we are not intending to use it to denote these negative connotations. Rather we merely seek to make the point that like modern managerialists, our respondents favoured an organisational philosophy which emphasises the desirability of decentralising decision-making within an organisation to the lowest possible level. They favoured efficiency, but not if this was to be achieved at the expense of law.

2. THE DECISION-MAKERS

(i) The ideal magistrate

We asked our participants what they regarded as the qualities of the ideal magistrate.

The most commonly favoured attribute was legal competence[4], however there was some disagreement as to the level of competence required. While one magistrate referred to the need for "legal expertise of the highest level", most considered that magistrates did not need the "juridical skills of a High Court judge", and providing that a magistrate was a competent lawyer, other attributes mattered more than exceptional legal virtuosity.

Of these, the most important was common-sense: magistrates should: be "practical and sensible". Broad experience was seen as a plus, a good magistrate being someone who: has "knocked around a bit"; has had some experience of people from the "factory floor"; is able to see beyond their own experience; and is able to "relate to others from whatever station of life and have contact with the less fortunate and empathy with those people". Related to this is the requirement that the ideal magistrate be: "compassionate"; a good listener; patient; courteous; and have a "pleasant manner in court". The ideal magistrate would recognise that even though "it's just another day at work for the magistrate, for the people who come to court it is the big event". You do not want someone who will "thump the bench or demean people in court, you can't rob people of their dignity". It is also important that the magistrate be a good communicator, "able to tell people what you're doing and why".

The pressures of the jurisdiction too demand certain personality traits. It's no use having people who will "go home, cogitate and worry". You need people who "like making decisions often very quickly", who "do not waver at making the hard ones". This requires an enormous amount of self-confidence. In the view of one of the interviewees:

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[4] A crude count of the number of times different attributes were listed could be misleading. There would almost certainly be attributes which some magistrates would see as so self-evidently desirable as not to warrant mention. Legal competence, fairness and a sense of justice would probably be included among these.

> Without this you are unable to make decisions. You need people who are generally emotionally mature, who don't have to be the centre of attention and who don't need to put themselves first. You need confidence to make unpopular decisions. You need a stable home life because you judge people who, in their personal life seem to be in the middle of a major upheaval. You need to be a good judge of character...A magistrate needs quickness of perception and proper instincts and the confidence to make decisions...You need a strong person who has authority.

It was valuable to have a "sense of justice appropriate to this court to get through millions of cases quickly". Experience in the jurisdiction was for many of the respondents a critical factor. Without such experience, "you have a torch at your belly". The rarefied atmosphere of the higher courts is not necessarily the best grounding. Judicial officers in the Magistrates' Courts need "to have a sense of fairness". In the words of one participant, the ideal magistrate:

> must create an atmosphere which is palpable which the public can feel and recognise that they have a judicial officer who is fair and unbiased...In this event, they may not like the decision but they leave court satisfied because they know they've had a full and proper airing of the dispute.

Unfortunately, it is hard to know in advance whether a prospective appointee will turn out to be one of these paragons. You cannot predict with any certainty whether a person from a particular walk of life is going to be good -"Power goes to some people's heads". However, by and large most respondents considered that the current composition of the bench is stronger than it has ever been. Some made favourable comparisons between the bench and the County Court; and some considered that the Victorian magistracy is probably the most talented in Australia.[5]

There was considerable disagreement over whether good magistrates are "born" or "made". The differences were most clearly articulated in participants' attitudes to training and continuing legal education. In the view of one participant for example -

[5] A cynic might say, "They would, wouldn't they?" However cynics with experience of academic departments might not be so dismissive. General respect for the competence of one's colleagues is not something one can take for granted, and even if treated with a grain of salt, it should be regarded as evidence of a high level of morale. We would add that our respondents' high regard for the competence of the Victorian magistracy appears to be justified.

> Some things can't be taught because you are dealing with people's value systems - sentencing is hard because of people's different scale of values about good and evil and methods and solutions.

By contrast, others recognised that you must have training because of our "different backgrounds and different approaches to the job". Precisely how this was best achieved however was also a matter of controversy. There were two clear schools of thought. According to one approach, all training must be "on the job", "you can't take magistrates away from court and send them to college. The jurisdiction is still a knock-about court, a people's court". In the view of another participant, "training opportunities can't be more sophisticated otherwise there's a sheltered workshop mentality and you are not choosing the right people for the job". Any extended training programme is, "almost a confession that you're not good enough and you shouldn't be doing the job". The other school of thought is that training is "terribly important, because being a magistrate is a continuing learning process and you are never equipped to know it properly. It is not right to say that you need to know the job from day one". It was recognised by others with a similar view however that in order to benefit from training -

> You first need to train magistrates to see the benefits of continuing legal education. You need attitude-softening programmes because magistrates are set in their ways.

The expectations that magistrates have of themselves are very high indeed. This is further complicated by a belief held by many magistrates that achieving this standard is a matter for the individual alone without relying on the assistance of formal vocational training. What has attracted this group of people such a demanding job?

(ii) <u>On becoming a magistrate</u>

We were surprised at just how many of the magistrates had had a burning passion for the job since their late teens. This tendency was, for obvious reasons, more marked in the magistrates who had joined the Law Department as clerks of court. Some of the respondents freely confessed that becoming a clerk was a "poor man's law degree", an alternative to an expensive university education which their families could not afford. The Public Service too offered a degree of security, status, and the opportunity to undertake interesting work which might not otherwise be open to them.

Similar considerations, albeit after the advantages of a full professional career in the law, also seem to have played a part in the motivations for joining the bench among the newer recruits. For many of the participants, a move to the bench was prompted by dissatisfaction with their career in the law. It was a hard decision. Some of the friends of the newer appointees couldn't understand why anyone would want to work as a magistrate. They saw the job as lacking status and as a dull dead-end job. For a small group the appointment meant taking a cut in income, although for most it meant a higher or more regular income.

The reasons for seeking appointment were various. Some felt that they had done as much as they possibly could do and had burnt out in practice. Practice as a solicitor or barrister held its own stresses - "you never had a spare moment" and much of the work was administrative, rather than legal. Often, the decision to join the bench was a question of choice about lifestyle. For many of the newly appointed magistrates family considerations were the catalyst for their change of career. The women magistrates would discuss such motives quite explicitly. However the newer male magistrates also tended to treat the prospect of having more time with their families as a significant factor in their decision to join the bench.

For some of the appointees elevation to the bench required some changes to their lifestyle. Several noted that they were now more cautious in expressing their views and more careful about who they were introduced to or seen with, particularly in a small community. Some socialised less, and three of our interviewees said they were reluctant to tell others in a social setting of their profession. For another interviewee appointment imposed a degree of self-censorship, "I haven't really been constrained but it makes life easier to be constrained". For others (the majority), appointment to the bench didn't change their lifestyle - "It should have but it didn't" beyond perhaps requiring them to buy more suits.

Despite some of these minor adjustments to their lifestyle most respondents are well-pleased with their decision to join the bench. They readily noted that being a magistrate was far less stressful than having the responsibility of clients riding on your shoulders.

> I've given up a life of acute harassment to a life of tranquillity. You are free at the end of the day which is remarkable and there is great relief that there is no tug of war from solicitors and clients. Practitioners accept the decisions you make instinctively and there is no need for endless justifications of outcome.

The job was very satisfying because you could control your work flow and, obviously, the outcome. One interviewee noted that "this is the first time in my life I've been a lawyer". The hours are not as onerous, there is less night work and their quality of life outside of working hours has improved enormously. For some, their biggest surprise was "that it worked out as well as it did".

The bench held very few surprises for former clerks of court "brought up in the courts". For those with experience in practice or the bar the lack of resources, such as library services and copies of legislation came as a shock. "I couldn't believe how casual it all was". For one of the former clerks however this was par for the course -

> When you come from the clerking system you know that you are minus 30 on the pecking order and you get used to pitiful conditions, so you don't know what you're missing. Some of the others come from outside notice the appalling facilities because they have something to compare it with.

For former barristers now on the other side of the bar table the work culture of the bench was surprising in that there was, just like the bar, a high level of camaraderie, with people helping each other. Former barristers reported finding few problems with the task of decision-making, seeing it as involving the same skills as those exercised in evaluating cases for the purposes of negotiation and giving opinions.

Most magistrates say that the only discernible change in their approach from their first days as a decision-maker is that they are now more confident. Whereas previously they might take the time to prepare ahead or look up the law the night before, they now go to the bench "without a worry in the world". After about six months or so there is very little which fazes many of the participants. You tend to think you've heard it before and it's easier to "fly by the seat of your pants" and "there is a heightened sense of bluff". Some confess to having developed a style with which they are more comfortable but, they maintained that "basically, I'm still the same person". Only one magistrate was of the view that the experience on the bench makes you more cautious because "the more knowledge you have and the more you know, the more you realise you don't know". The non-clerks all however felt that they had become more efficient and better able to manage the "initially horrific" workload.

Whilst almost all of the interviewees "loved" their work many could see that they could not sustain their enthusiasm for the job indefinitely. The nature of the work according to most of the respondents meant that there was a "burn-out" factor. The most commonly cited time-frame was ten to fifteen years after which the job may become too stressful or boring. As many of the magistrates recognised however, at present there seemed to be few options for career progression from the bench. Some noted that although thus far magistrates had not made it onto the bench of the higher courts, the calibre of some may make this a realistic option in the near future. For others, a career in decision-making in other jurisdictions was a possibility. Of course, moving out of the law altogether and "doing something else" was also on the cards. The problem of career advancement of course was more acutely felt by the newer recruits appointed to the bench relatively young with the prospects of some twenty-five or thirty years of work ahead of them.

As a number of magistrates pointed out however "burn-out" or boredom was a state of mind which was affected by working conditions. For example -

> The problems of occupations which involve intensive dealing with people: medicos, uni professors, judges, etc. can be cured by good terms and conditions - long service leave, financial security - so you don't have to look over your shoulder at what the Super Board is doing. If there is good faith by the government of the day which is not cynically trying to save a few pennies...some people will gladly go on until the end.

For the present, magistrates appear to be well-pleased with their work and the recognition of the growing importance of the jurisdiction through remuneration commensurate with their expanded responsibilities. There is however some hint of unrest centering around the decision not to provide a non-contributory superannuation package for magistrates, such as that enjoyed by judges. The superannuation issue of course is merely indicative of a much wider concern that the new professionalised bench should be treated by the government "as a fully integrated part of the judicial system". Another reflection of this was the suggestion by some of the bench that they would favour a change in title from magistrate to "judge", which has taken place in other jurisdictions.

(iii) The work of the bench

The summary jurisdiction is comprised of a number of quite distinct specialised jurisdictions, including the Children's Court, Coroner's Court, the family law work referred from the Federal jurisdiction and the ever-expanding civil jurisdiction as well as the "bread and butter" work of the criminal jurisdiction[6] Magistrates therefore, need to be "Jacks and Jills of all trades". For almost all participants however it was the very diversity of the work which they found most appealing. As one participant put it -

> I like the law, the court, it's just one big system. I think you ought to be involved in the whole big system. So often, especially in the country, in the Children's Court you'd have the son in court in the morning in the Children's Court and Dad or Mum in the afternoon, shall I say.

Nevertheless, magistrates have their own preferences and ways of thinking about each of the jurisdictions. Some, for example, don't like the family jurisdiction because it is "very messy" or, "a real pain" because of the emotions involved. The work is hard because the Magistrate's Court does not have the infrastructure of the Family Court nor the specialist training. Despite these concerns however most magistrates recognised that referral of this jurisdiction provided a cheap way of meeting community needs and provided people with access to a local court to resolve matters which affected their daily lives.

Children's Court work too was recognised as one of the hardest and most stressful jurisdictions. According to one magistrate -

> It is a much under-rated jurisdiction and the work is testing, hard and unrelenting. The rights of children are often stampeded. Making a child a ward is often a more difficult decision than sentencing an adult.

Separating kids from their families was frequently mentioned as one of the most stressful parts of the job.

The criminal division of the Children's Court attracted quite strong reactions. For many of the interviewees it was a "very frustrating jurisdiction", because "there's not much one can do except yell at them not to come back again" and there does not seem to be any disposition which "can affect the way a kid behaves" and, in any case,

[6] Details of these are provided in chapters III to V, below.

if they do commit an offence "all you can do is send them back because there are not enough resources to really assist them". By contrast, some of the other participants regarded this jurisdiction as "good fun", which gives you some degree of optimism because you can "help kids get out of trouble". Some magistrates "derive enormous satisfaction from it". It was generally recognised however that a Children's Court magistrate needed to have particular personal qualities and skills and that not all magistrates would be suited to this type of work.

The Coroner's Court jurisdiction elicited similar, quite contradictory responses ranging from a reluctance to undertake the work because it was "depressing", ghoulish, voyeuristic and stressful "because everyone in court is upset". Even some of the magistrates whose personal preference would not be to work in the jurisdiction nevertheless acknowledged that it was a fascinating and intellectually challenging endeavour because "you're required to get on top of medical issues and adjust to an 'inquisitorial mould'". There was an acknowledgment that the jurisdiction was "important" and could be used creatively to protect individuals' potential rights - "even dead ones and their families" or "prophylactically for the treatment of community problems".

Reactions also varied to the work of the civil jurisdiction. Some of our participants preferred this jurisdiction because of its increased legal complexity, and, because, in the view of one of the participants:

> the civil jurisdiction has more to deal with if you like the conduct of human affairs than anything else. By and large people have got to pay bills, they've got to sign contracts and everybody does that, 100 per cent of the community deals with some part of the civil law. In the criminal law 100 per cent of them are subject to it, it's just that they don't have any contact with it unless they do the wrong thing. That's the thing that I always liked about the civil jurisdiction and still do...

Interestingly, many of our interviewees preferred dealing with criminal defendants than civil litigants. They found that the civil court was full of "intransigent people" "who can't settle their own cases" and "are already a bit frustrated" and aggressive. As a result, some "found it harder to maintain your dignity with civil litigants because of their tunnel vision". One magistrate however had a different explanation -

> Well people say that because the civil litigants are not (well they are in some cases) in a total case of shock and fear and they are not in the state of mind

> where if they yell out anything they would be hauled off by the police. So they are much more questioning, much more demanding of reasons and of reasoned decision and they should be, but then the criminal defendant should also be but traditionally they're not. They're not questioning and demanding, they just want to know the answer. They often come from a lower socio-economic level and they are just used to having decisions about them made without them having any input or any possibility of input.

Whatever their personal preferences however most magistrates acknowledged the importance of all these jurisdictions and conceded that the "community" is well-served by having ready access to summary decision-making in all these areas. And, many of the respondents felt that one of the attractions of the job was "the mix of work and the very wide jurisdiction, because we have to be able to switch from one jurisdiction to another very quickly and that appeals to me a lot".

(iv) The work environment

Location

Not only do magistrates have to handle many areas of law; they are also required to work in quite different work environments. In the country, magistrates sit alone, often in a "historic" court-house with few, if any, support services or resources available. By contrast, the recent trend in Melbourne has been for the establishment of a number of regionalised purpose-built "court complexes" affording better resources and supports to a larger number of magistrates working there. The Melbourne Magistrate's Court is a cross between the two - well-serviced but the impressive building is woefully inadequate.[7] All the participants directly or indirectly noted the inadequacies in court facilities and the lamentable lack of resources. The surprising thing however was the stoic attitude of members of the bench to all of these inadequacies. Most had accustomed themselves to appalling conditions and it was a matter for grim humour rather than complaint. As researchers have long noted, workers in an organisation with high morale are less concerned with their physical working environment.

Here again however there were clear personality differences between magistrates with

[7] The Children's Court and the Coroner's Court as well as the new Civil Court complex all have their limitations but, at least provide such essentials as offices for individual magistrates, meeting areas, proper acoustics, and adequate heating and cooling systems.

some, for example, conceding the benefits of the regional complex but adding that they were "more comfortable" on their own because, in the words of another magistrate, you can be "more of an individual, and in the smaller courts you are your own boss".

Predictably there were clear preferences for country or city work. For one magistrate the provincialism of small country towns can be oppressive, although local court-houses are appealing because of their "eccentricities", colour and "there's a local theatre in the smaller courts that I wouldn't want to miss".

Even city areas though have their own quirks. The socio-economic characteristics of suburbs differ as does the nature of the work. For example at the seaside suburb of Williamstown there is much more marine, ports and harbours work and environmental protection authority prosecutions. There is also a sense that there is such a thing as a "Broady boy" or "Heidelberg boy".

Implicit in magistrates' discussion of their work environments was a sense that the courts afforded the opportunity for some degree of choice in preferred work environments, as well as the opportunity for change, so that the work remained fresh and interesting.

(v) Services and support

The observation by one of our magistrates that, "when you're up there on the bench with everyone looking up at you, you are all alone and no-one can help you", has a literal as well as figurative meaning. Without any real rancour almost all our interviewees noted that they frequently lacked even the most basic support services and resources. In country courts it was not at all unusual for a magistrate to "fly by the seat of his pants" without a copy of even the most crucial legislation. Of course, the law for some of the more exotic jurisdictions was never at hand. One magistrate confessed to travelling between regions with a "suitcase full of books" just to be on the safe side. A magistrate without legislation is "like being a workman with no tools". ("A magistrate should not have to beg for books".) Things are of course better in the city. Even then however a librarian has only relatively recently been appointed to the City Court.

There was "disappointment" that the computer programme was not equipped to be

able to provide magistrates with a ready reference system - the section of legislation being discussed, penalty ranges and perhaps, some magistrates mused, some indication of the sentencing grid for particular offences.

In the older courts magistrates do not have an office of their own. They are required to work sometimes in smoky common-rooms where it is hard to concentrate. "You can't get away to think about things because there's no-where to go". Sometimes the only office doubles as a holding cell for offenders when it is too hot to leave them in the divi van. These problems however were usually matters for wry amusement, rather than real disquiet - "facilities could be better".

One-third of our interviewees were concerned about the lack of adequate attention to security even in the newer court buildings. As a number of respondents noted, the jurisdiction deals with people who are "capable of great passion and violence". Some magistrates have had death threats made against them and, since the Russell Street bombing and the problems of courts overseas, there was a sense that security was a potential problem requiring attention.

Changes in recruitment to the bench too, in the view of many magistrates, has meant that the calibre of the clerks has declined. Clerks, historically overworked and underpaid, who work like slaves for a pittance "no longer have a carrot" to sustain them. "They don't have the same interest" so they "don't bother". "The brighter ones get degrees and go elsewhere". It is now, "difficult to impress upon some of the younger clerks the need to make something of the job".

There were two exceptions to this general trend. In the country, clerks are dedicated and work closely with magistrates and they seem to be more experienced. The female clerks too were often singled out as more mature, reliable and capable.

There are also fewer clerks and they spend less and less time sitting in court providing assistance to the magistrate. In the larger courts there is a constant turnover so that clerks have no opportunity to come to know how particular magistrates work and, by extension, to be trained properly for the job. For this reason, at least three of our interviewees suggested that eventually magistrates may need to have a personal support staff in the future. It goes without saying that secretarial assistance for magistrates is almost non-existent. Perhaps the qualities of

a good magistrate should include the ability to type.

The one constant source of support and assistance mentioned by almost all our interviewees, were their colleagues. There was great "collegiality and camaraderie among the bench". There seems to be an unwritten rule that they will always make themselves available for advice and assistance to their colleagues, even if this means temporarily adjourning their own court. Mostly however assistance and support comes from more informal contact. Magistrates lunch together in some regions and there is a high degree of socialising among the bench. And magistrates "bounce ideas off each other", which is very helpful. One magistrate preferred region-based work because:

> that comfortable feeling of knowing that if there's a hiccup, there's someone to take over. If you get caught in the middle of a case and there are twenty other cases waiting and you know that there are a couple of other magistrates around, there's less pressure on you and that's a very important thing. I think it comes back to what I was saying about it being a highly pressured court as it is. Any way of diminishing that pressure is important. I think also for your first few weeks as a magistrate if you haven't had an experience in court it might be useful too at least in the sense that you might feel that if something happens that I don't know about I've got someone to turn to and that must be a very comforting thing..... I very much profited by being around other magistrates in my first say six months, and I still do in that regard. Even if I don't have a specific problem in mind that I might go and seek help with, we are always having discussions of a general nature and we're often raising matters for discussion and consideration, not on a formal level, but nonetheless that's a very useful exchange of ideas and it keeps us in touch with each other and what we're all thinking and doing and produces in the end I think a more uniform attitude by the court as a whole.

For a few of the magistrates who have dealt with harrowing cases, discussing this with some of their colleagues who have been through similar such experiences was enormously "comforting". In the end however magistrates have to make their own decisions and this can be "a lonely job".

The degree of support and assistance varies from region to region. (It was noted that the magistrates in the city region were all very close.) In the view of one magistrate, the bench is "one big happy family", which is friendly, helpful and supportive.

3. MAKING DECISIONS

A magistrate is a career decision-maker - required to make important decisions on a range of issues very quickly. How do individual magistrates go about this complex business?

(i) Guilt and liability

Higher courts have occasionally attempted to define what is involved in proof beyond reasonable doubt; their attempts having created confusion rather than clarity, they have largely abandoned the task, leaving it up to juries to decide what the standard requires. Magistrates are unique among judicial officers in regularly having to apply the standard to cases before them.[8] Their definitions highlight the difficulty of defining the standard in non-tautological terms. Criteria for reasonable doubt were variously defined:

- If you have to keep thinking about it then there must be some doubt.
- When in doubt, chuck out.
- If in doubt, throw out.
- If there's a hypothesis consistent with innocence you can't be satisfied beyond reasonable doubt. But this is not a mechanical process. It is a state of mind.
- I look at it from the position of a jury - a cross between myself and my personal preferences and the reasonable man. I ask myself, 'What would somebody think of this'...I try to steer clear about certain prejudices and try not to be too cynical, e.g. if a person has tattoos, or is aggressive or unpleasant.
- I put myself in the position of a jury to work it out.
- I believe in what Richard Eggleston said in his book that it is a sliding scale and it does depend on the gravity of the offence. Someone who is charged with a parking offence you can be persuaded more readily to be satisfied beyond reasonable doubt. It's the seriousness of the offence I suppose.... do I have a doubt? It's just an assessment of the evidence. Are you satisfied on the evidence, are you satisfied that that

[8] The only other judges who have to apply the standard in criminal cases are County Court judges handling appeals *de novo*.

witness has told the truth?

- I've never been comfortable with it [reasonable doubt] but there are no other standards.... When someone's liberty is at stake if there's any doubt you would throw it out because you can't just say well I've got this gut feeling, he's probably guilty, but maybe he's not..... I tend to apply the standard at the higher, rather than the lower end of reasonable doubt. I don't think it's worth the risk of erring to the detriment of the defendant.... My reasonable doubt might be somewhat higher than what is required by the test that the higher courts have determined.

- Reasonable doubt is a gut feel - you hear all the facts and in coming to your conclusion that you have a doubt you ask yourself, 'Is it reasonable in the circumstances?' But you don't analyse it like that - it is really a gut reaction...The test doesn't vary with the seriousness of a crime because even in simple cases it affects people. These are often complex philosophical issues which are really a question of semantics.

- If you have to keep thinking about it then there must be some doubt. In our system of law we err on the side of the defendant and I have confidence in that system.

- It's a gut feel, I like to think myself sitting up the back of the court, 'How would I feel?' If I'm still uncomfortable then I throw it out.

- If then [after examining all the evidence] you've got a worry, yes, that's what the reasonable doubt is all about, because you have reasoned through the evidence and you have been left in some doubt and that's how I would try and verbalise what reasonable doubt is. I hasten to add that all the courts in this land that have tried and all the courts in England that have tried and I think even America have said that in the end it may not mean a great deal but they're really hard-pressed to find a better expression. I think it's a very difficult concept.

There is an encouraging core element to these definitions. In general, the interviewees equated "doubt" with "reasonable doubt". This suggests that they are treating the standard as particularly rigorous, and that they are highly sensitive to the importance of Rumpole's Golden Thread Which Runs Through British Law.

The answers also suggest a degree of difference over the legally unresolved question of whether the standard becomes more rigorous as the consequences of conviction

become greater, but that on the whole magistrates appear to proceed on the basis that the rigour of the standard is independent of the consequences of conviction. They also disclose a variety of ways of describing the decision-making task, with some preferring to describe the process in relatively cerebral terms, while others feel happier emphasising gut feelings.

In applying the balance of probabilities different magistrates articulated their thinking processes in the following terms -

- I ask whether it is more probable than not that something happened according to one party's version of events.
- I ask myself, 'What probably happened?'
- What is 'more likely or more persuasive?'
- What's probable. It doesn't take long to feel the test once there has been close examination.

These formulations leave tantalising questions unanswered: what must be the subjective likelihood of guilt before a magistrate considers that there is no longer any or reasonable doubt? Is balance of probabilities always interpreted to mean 50% +? How do images of these standards affect actual decisions? Answers to these questions must await further research.

Magistrates were evenly divided on what they regarded as the more difficult decision - applying the criminal standard of proof of guilt - "guilt beyond reasonable doubt" - and the civil standard - "on the balance of probabilities". For some, the balance of probabilities was a much easier test to apply because "it has a greater ring of truth than the criminal test" and is more likely to involve "pure legal issues". For others, balance of probabilities was harder because issues are sometimes so finely balanced that it is difficult to find totally for or against one party and "you can't achieve that degree of certainty that the standard requires". Some participants recognised that they found the criminal test was easier simply because they had had more experience in its application.

Assessments of the relative difficulty of applying the two standards appear in part to have been cognitive, but in part emotional: among those who found balance of probabilities an easy standard to apply were several magistrates who explained that

the standard provided a face-saving device for losing parties. The civil standard allowed the magistrate to explain to the disappointed party that the finding merely reflected which of two stories was more plausible and did not imply a finding that the other party was a liar.

(ii) Sentencing

Almost all the interviewees maintain that sentencing was a much more difficult exercise than the finding of guilt and liability.[9] You need to find a disposition which "fits the crime and with which the defence and the prosecution and everybody else and the defendant is reasonably happy with. "Sentencing affects people's lives and their liberty". "You have to make hard decisions that are sensible, effective, and within a range", and "often quickly and without resources". In the words of one of our magistrates -

> sentencing is a task which is very demanding, it requires a lot of thought and often in this court unfortunately because of the pressure of work sometimes there isn't a lot of time. So to do that job skilfully with less time than a Supreme Court judge may have, is in itself a further challenge. To an individual who has never been to goal and with whom you are seriously considering a sentence of gaol, the effect is the same whether it's handed down by a Supreme Court judge or a magistrate and the effect of sending someone to gaol in most cases is of such magnitude to their lives and also to the community that one has to be right and being right all the time is not so easy.

In coming to this decision magistrates are continually "weighing up competing principles" "and balancing punishment versus rehabilitation ends".

For almost all our interviewees the most stressful and difficult decision was whether or not to send someone to gaol, particularly for the first time. "Every day you would go to court with the hope that you don't have to send or you're not faced with the

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[9] One reason for this may be that in most cases, verdict poses no problems. In uncontested cases, guilt is virtually never at issue (although legally agile magistrates may occasionally note that the "facts" do not constitute ingredients of the offence to which the defendant has pleaded). Even in contested cases, many will be relatively straightforward, either because there is effectively no defence, or because there exist strong doubts as to the defendant's guilt. However even where the decision is not clearcut, there will be far more time for thinking about the issue than will be the case for a typical sentencing.

prospect of sending somebody to gaol...". However, "that's the job you're paid to do so you do it", and many magistrates pointed out that you simply don't gaol someone "unless you have super-good reasons". "You are usually certain when you imprison". Magistrates seem to have their own philosophy about sentencing. Almost all wholeheartedly believe that gaols serve no useful purpose, except perhaps incapacitation and that "no-one comes out better or rehabilitated".

There are also specific sentencing "formulae" which some magistrates have in mind for a given offence and then move up or down depending on the individual circumstances. For example, one magistrate explained that -

> You start with the premise that with violence or an unprovoked assault on a stranger the penalty is imprisonment and then you have to be persuaded not to do that. With burglaries your starting point is imprisonment and CBO and then it depends on the history and circumstances.

Having some *prima facie* sense of penalty is very important in a busy mention court. One magistrate argued that you have your own tariffs in mind. For example, "for a first-time shoplifter you give a bond. For a first-time theft, a fine or CBO and so on". Sometimes, the formulae can be quite mechanistic. For example, for speeding offences the "going rate" for one magistrate is $5 per kilometre over the limit depending on the resources of the individual.

Underlying the approach to sentencing is a general philosophy about the purposes of punishment. Some magistrates articulated this most eloquently -

> I was keen....to absolve people from their feelings of guilt. It's an extraordinary system whereby if no penalty is imposed people often (from my experience as a solicitor) felt that they had been patronised, that they felt that they'd done something that warranted a punishment or warranted a recognition that it was a serious thing and they paid the fine or completed the work and then that was gone, whereas it's always "no you poor unfortunate person I will let you go and be counselled for a year." I think people have an innate sense of justice and I hope that you retain that and people know when the right decision has been made. The most important thing I could do as a magistrate was to put into words those thought processes or processes through which you go to arrive at a decision and that's what I find challenging - to try and work out what it is, why you make your decision and what you base it on and if you can eliminate the processes that are unfair or purely subjective. But I think people make enormous decisions and enormous assessments of people by unspoken evaluation.

The "human" side of sentencing was most evident in the admission by many of our interviewees that they sometimes "take a chance" with a defendant based on "hunch". Sentencing was sometimes about "creative risk-taking". At least two of the magistrates confessed that where a defendant under such circumstances abuses this trust, they feel it personally, almost as though a relationship of trust had been breached. Such "human" responses are not usually able to be measured in standard research on sentencing. Nevertheless, they are evidence of the fact that, as one magistrate noted, "Sentencing is a complicated science or art".

(iii) Influences on decision-making

Pressures of the job

Magistrates now sit for considerably longer periods than previously. The average sitting time is now about 4.9 hours per day. Yet, if you sit too long you are "washed out and lose efficiency". It is "often hard to concentrate, especially in a work environment like the courts where people are coming in and out all the time". In the view of one magistrate, "If you sit too long you're history and talk gibberish".

The Magistrate's Court is a "volume jurisdiction". The essence of the task is to provide "quick" judgments on increasingly complex matters. As noted above frequently this is without adequate resources and few supports. One of the major influences on decision-making therefore is speed. "Speed is everything...This is not the High Court or Supreme Court. You cannot ponder and pontificate". Although in theory judgments can be reserved, in practice this is neither practical nor, according to almost all our interviewees, desirable.

Frequently, magistrates are required to make decisions on very scant information. In criminal matters police prosecutors are often over-worked and the summaries inadequate. Other times, deals are struck between prosecutors and defence counsel either by way of plea-bargaining or fact-bargaining. Magistrates feel themselves to be "mushrooms" deliberately left in the dark about why, for example, an attempted murder charge suddenly is withdrawn and replaced by "assault". "Two punches to the eye becomes an open hand to the face". In these circumstances a magistrate is made to "feel quite stupid because everyone else knows and you would like to feel that you do too".

Magistrates too have very little feedback about how well they're doing their job. If anything, it is usually derogatory or negative - when a barrister's jaw drops to the bar table or a prosecutor rolls his eyes at a particular decision. The difficulty of course is that "in every case there is always a loser and your decision displeases at least one party". There are problems however with such feedback:

> It would be nice to know what people thought and for what reasons but you have to be careful of judicial independence.

Or,

> Yes, I think feedback is a problem for any judicial officer. But like everything, you only want to hear that people say good things about yourself.

You can't ask friends because:

> your confidence is everything and you don't want it undermined. If you knew what people thought you might come unstuck, so it's a self-preservation not to ask.

Most magistrates however had a sense of where they thought they rated as a sentencer. Almost all saw themselves as "lenient" or "middle of the road". ("I'm not the hangman".) Only two admitted that they might generally be perceived as "tough" or at the higher spectrum of the sentencing scale. A number noted that they did not believe that there was much separating the mildest from the most punitive magistrates.[10]

Feedback from the higher courts was not found to be particularly helpful. For one thing, feedback has often been rather haphazard, with magistrates failing to learn of the fate of appeals from their decisions. (This, however, is changing). And, as a number of the interviewees noted, appeal decisions are not an accurate assessment about a magistrate's judgment. "What would judges do if they didn't know the outcome at first instance?" Or, in a County Court *de novo* hearing the witnesses may have changed their evidence or new evidence can have been added. In addition, some magistrates regarded County Court judges as no more competent than magistrates when it came to sentencing. Still, County Court decisions have "morbid

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[10] This would be consistent with the findings reported by Douglas (1989a) in his analysis of magistrates' sentencing in the late 1970s and early 1980s.

curiosity value". Being reviewed by the Supreme Court however is a more daunting prospect because your "intellectual processes are taken to task". Despite this, many magistrates found some solace in being at the bottom of the hierarchy of courts. "The appeal structure is an important safety valve and lets you sleep easier". "You go into this job knowing you're going to make mistakes. One comfort is that you can be appealed against".

Lawyers

The adversarial system is predicated on the notion that the contest between lawyers on behalf of their clients will have a critical impact on the outcome of a case. There were however marked differences in individual magistrates' response to the importance of lawyers to their decision-making. At one extreme, one of the major surprises for a former barrister was the importance of an advocate in proceedings. At the bar, this magistrate subscribed to a view that things happened "because they were destined and you had very little control over this". A number of the interviewees noted that a good advocate can make all the difference, "Probably you get swayed by the outstanding advocate.... You probably start off with some basic principles...You're looking at imprisonment if it's an unprovoked assault...but you can change your mind", sometimes quite dramatically. On the other hand, one magistrate commented that the criminal jurisdiction of the Magistrates' Courts and the Children's Court tended to be a training ground for young lawyers (and "repositories of lawyers who will never get properly trained"). The expanded civil jurisdiction however has meant that much more senior counsel is appearing there and cases are properly researched and prepared.

To test the impact of a lawyer on outcome we asked magistrates about their response to a "bad lawyer". Most denied that there was a bad lawyer effect, noting however that magistrates are only human and can be affected by personalities and sometimes a particular manner doesn't go down very well. Magistrates try however to recognise and overcome these prejudices but it is still one of the in-built limitations of *viva voce* evidence. Some of the interviewees however still preferred to have a bad lawyer to no lawyer at all, "because there's so much you can reasonably assume in a relationship between the bench and a practitioner". However, others maintained that some lawyers do their clients a disservice and the client in person would have been better off.

There were two distinct schools of thought about defendants and clients appearing in person. There was, what one magistrate termed "the elitist" perspective, which emphasised the inadequacy of untrained people trying to present their own case. According to this view people are "nervous and worried and it is hard to get them to comprehend". Some clients in person are inarticulate and a magistrate is left not knowing enough to impose a proper sentence. Or, in a civil dispute, the person is unable to identify the real issues in a dispute and distinguish between relevant and irrelevant evidence. Clients in the civil jurisdiction tend to go for each other hammer and tongs and, an unsuccessful party can become agitated and upset without a lawyer there to explain the result. Lawyers could defuse disputes. Of course, the degree of disadvantage depended upon the skills and intellect of particular defendants and litigants but, according to this line of thinking, for the most part "people need the protection of good representation to secure their rights". "People can be too easily railroaded without lawyers". Sometimes, "even if people are articulate and rational they cannot demonstrate these qualities in court when dealing with their own issues".

The other line of approach was that it was surprising how well people are able to speak for themselves; parties sometimes seemed to have a good grasp of the facts and "could summarise the issue in two sentences for you". Most people are "sensible and practical". And, in some kinds of cases, such as "crash and bash" there is really no need for a lawyer at all. There are however real dilemmas when one side is represented and the other party appears in person. Under these circumstances, there is always the risk of you being unfair to one or other side. It can add to the length of a hearing and therefore add to the costs of litigation, which discriminates against the party who has legal representation.

Both groups however recognised that lawyers make for a more efficient and expeditious determination of the case. You do not need to take time to explain rights and procedures. The lawyer often serves as a filter by explaining things to a client before court, the process of decision-making and the weight that things carry. The presence of a lawyer means that the decision-maker is free to sit back maintaining their dignity and authority without having to be interventionist. Representation helps to place distance between the bench, defendants and plaintiffs. Although the purpose of the lawyer according to another magistrate "is not to separate the bench from the client", their presence ensures that a magistrate does not, particularly in a criminal matter, prejudice the outcome by "entering the bun fight".

(iv) Personal style

The interviewees had their own style and ways of maintaining control during the interview. This is none too surprising since magistrates are used to pacing themselves and maintaining their authority. In many ways, the different ways of handling the interview were a reflection of the quite distinct personal styles of the magistrates which they themselves noted about their approach in the court-room.

Decorum is, "something you create in your court: a way of balancing the need to get through cases expeditiously while letting people feel that they have been listened to or, have had their day in court". On a busy mention court day, it is important not to let people feel that they have been through "a sausage machine". The conduct of a case requires "dignity and authority" but sticking rigidly to this means that "you can lose people". As one magistrate expressed it -

> There is a degree to which you control your action or inaction in court. You have a choice when to interrupt and when to engage and this depends on your mood on the day.

Some magistrates would "never speak directly to a defendant if there was a lawyer present". Others however were far more interventionist in their approach. One magistrate for example, justified addressing a defendant who had a bad lawyer on the grounds that even though the Supreme Court says you can't do this, the Supreme Court clearly weren't taking into account the duty lawyer scheme! Taking such liberties is justified because "it is better to do this than to allow a defendant to leave the court feeling that the magistrate hasn't heard his point of view".

Not unselfconsciously, some magistrates will gently rebuke a defendant for particular behaviour, while others argue that the Magistrate's Court should not be "sanctimonious and delivering sermons".

> Sometimes it's necessary and especially with young offenders, first-time offenders, to dress them down and explain to them what a bond is and what is going to happen to them if they don't keep it. And sometimes you are so upset about things that you find yourself saying something about it, but by and large despite the fact that the newspapers are always there hoping you will say something, it's nice to try and avoid it...

Magistrates noted that some of their colleagues believe it is necessary to make sure that a young offender leaves the court crying "or else they don't think they've done a job properly". The clearest examples of their differences in approach was in their attitude towards the conduct of less formal civil "arbitrations". One magistrate gave a direct contrast between attitudes and styles by recounting a conversation with a colleague who had complained -

> I don't know how you do those pre-hearings. I just had one and I said to the woman, 'You'll lose, there's no question you'll lose', and she wouldn't settle. I was really amused because I just have a totally different approach to them. Now in some, his approach might be excellent, but in a lot of cases everyone's going to lose face, feel alienated, and go away saying, 'I'll show the bastard and I'll fight it'.

Asserting the authority of the court to control its proceedings was relevant to the granting of adjournments, running the mention list and the refusal to allow police to swear themselves in in court. The objective of all the magistrates was to convey a sense of "fairness" to all those who appear before the court. The way in which this was done however varied significantly according to the individual temperament, personality and philosophy of the individual decision-makers who make up the bench.

4. THE ORGANISATIONAL PHILOSOPHY OF THE COURT

Despite the quite marked differences in individual preferences, attitudes and opinions, there seemed to be a commitment amongst all participants to a shared organisational philosophy for the summary jurisdiction. This was evident in the language they used and in their discussion of the main challenges confronting the jurisdiction in the next decade.

Some of the most commonly used words across all the interviews were, "public", "customer", "service" and "community". We had a strong sense that these were not hollow rhetorical turns of phrase. Rather, without specific questioning, magistrates would often justify their views on a particular issue whether it be regionalisation, the mention system, or the duty lawyer scheme according to a reasonably consistent philosophy about the summary jurisdiction. In the view of one magistrate -

> Magistrates have a responsibility to the customers. We are a service delivery institution answerable to a lot of people at a lot of different levels. The whole

> time you're on the bench you're on public display. You need to let the defendant and the parties know that they are getting appropriate fair treatment.

This view prevailed "even if people don't like what they hear, we are providing a service fairly". Repeatedly, cost-savings and efficiency were regarded as critical, so that "people could afford to come to court and enforce their rights". It was the job of the courts too to "demystify the law and make it relevant to people, to make people happy and comfortable in court". The courts need to be made more "accessible physically and economically". The gravest concerns were that further reform and increases of jurisdiction would remove the courts from the community. "You can't remove magistrates too far from the people because it's a people's court, to do so is a grave error".

Magistrates saw themselves engaged in a collective endeavour to raise the standard of service delivery and, "to communicate with the people of Victoria that we are an effective and fair system of justice for the State".

Above all, there was a need to preserve the confidence of the public and their respect for the law and the courts. The bench should strive to fulfill community expectations of the law. If the bench is perceived as not doing this people become disillusioned and the jurisdiction will be brought into disrepute.

There was great optimism about the potential of the courts to assist the community. In the view of one magistrate the courts should aim to have a "positive effect on the community whether by way of resolution of conflict, engendering happy families or by a reduction of the road toll". The job was satisfying for another magistrate because, "you can help people".

The many different concerns about the challenges for the next decade, for example finding solutions to the drug problem, finding better dispositional alternatives for mentally, emotionally and disabled people, revising the circumstances under which people will be imprisoned and providing more non-custodial options and extending the jurisdiction to make other alternative dispute resolution forums unnecessary were all, at their core, about preserving the effectiveness of the summary jurisdiction and making it "relevant". The danger for the summary jurisdiction was that too rapid or large an expansion would mean delays, so that the court was no longer able to provide a quick, efficient service. Lack of resources and facilities could ultimately

crush the jurisdiction, so that it will be unable to keep up with the social changes of the 20th century. There was a sense too that if social problems like unemployment continued and social unrest increased the role of the courts in dealing with "crime" would change radically.

For the moment however magistrates perceive the bench to be "a happy lot", which works well as a collegiate, doing a variety of work which is the envy of some superior court judges.

5. CONCLUSIONS: RECONCILING INDIVIDUAL DIFERENCES AND ORGANISATIONAL IMPERATIVES

The strongest impression of the Victorian bench is that it is comprised of a diverse range of individuals with strong personalities and quite distinct viewpoints. Some crude general categorisations of course are possible. The background and experience of former "clerks" is one possible explanation for some differences in viewpoint. The motivations for joining the bench were clearly different. One must be wary however of drawing too many conclusions from such artificial categorisations. The distinctions for example are just as easily accounted for by differences in age and length of experience in the jurisdiction - the slight tendency for "new" magistrates to be more enthusiastic may be a function of these two variables and explicitly related to the source of recruitment. Similarly, the effects of gender, age, and prior experience are difficult to disentangle. However, while there is anecdotal evidence that background and gender could both affect patterns of social interaction, there was little evidence to suggest that these variables (and their correlate, age) bore much relationship to attitudes to the job. Whatever the differences between groups there is no doubt that the magistrates share an overriding commitment to an organisational philosophy.

There are two possible explanations for this. It may be that the organisational culture of the magistracy is so overpowering that it has managed to envelop even the most ruggedly individualistic of its membership. That is, the position of magistrate constrains the incumbents. Socialisation, role constraints and the nature of the job in this way affects the way in which it is carried out regardless of the attributes of those appointed to the job. ("You are not a woman, you are a magistrate".)

An alternative explanation is that there is at present an organisational culture in the summary jurisdiction which is supportive of and consistent with the opportunity for

individuation. Thus, individual magistrates feel themselves committed to an organisational philosophy precisely because it is broad enough to accommodate their individual attitudes and the styles. Some key features which promote this appear to be,

- Respect for autonomy. Magistrates do not interfere or "judge" their colleagues. While they will freely provide support and advice, there is a strong sense that each court-room is an island.

- There is also a sense that the bench is able to work together as a group because of a creative social exclusion of the judiciary from the mainstream of the legal profession. Since it is not seemly to have too close contact or to rely on assistance from the "outside" magistrates have developed their own form of "in-group" solidarity.

  The lack of a promotional structure within the bench has also affected this. For example, there is, as one of our magistrates noted, no competition for managerial positions and therefore no office politics which makes for an unusually happy work environment.

  And, outside of the legal profession, being a magistrate has a degree of status in the community. This esteem need not be fought for nor asserted because it comes with the "title". One of the key elements of the doctrine of "judicial independence" is that it liberates judicial officers from a quest to be "popular" or "liked" or, in the present context, conformist.

- The definition of "community" is a convenient catch-all which can be used as a rallying point without the risk of disagreement which a detailed exposition of precisely what each magistrate means by this "population" is left vague.

- Working conditions. Although the physical facilities and support services provided to magistrates leave a great deal to be desired, this is in part compensated for by the attractions of the job itself and general working conditions. All the magistrates enjoy the diversity of the work which was far from "routine" and, in many cases, is far

preferable to alternatives in the law. They control their own work flow and environment and, overall, found challenges in the work to be done. The relatively high salary for magistrates also partly compensated for some of the deficiencies in the work surroundings.

There were industrial issues which required resolution, e.g. superannuation, however there was optimism about the prospects for achieving the integration of the magistracy into the general judicial structure.

For both former clerks and newly appointed members of the bench, recent reforms to the jurisdiction have been welcome. There is very high morale among the bench which suggests that organisational reforms, as well as substantive reforms to the legislative jurisdiction of the court will also be accepted with good grace, which of course does not preclude constructive criticism. These issues are discussed in the next three chapters.

CHAPTER III
Restructuring the courts: Organisational and administrative reforms

1. INTRODUCTION

The 1980s have been marked by concern with improving the "efficiency" of the public sector, both overseas and in Australia. The courts have not escaped this concern. "Throughput", "case-flow management", "reducing delays", "curbing costs" and other such terms have been major themes in recent dialogue about the courts. This concern is evidenced by the establishment of bodies such as the Australian Institute of Judicial Administration (AIJA), and by a series of reports prepared for the AIJA (e.g. Victorian Bar, 1985) and the Victorian government (e.g. Victoria, 1986; Hill, 1989).

In the summary jurisdiction the impact of managerialism however has been most directly felt in the move to regionalise the local court system, professionalisation of the magistracy and with the introduction of computer technology. These changes are discussed in this chapter. In addition, concern with efficiency has been reflected in the introduction of the mention system in criminal cases, and in attempts to introduce a streamlined procedure for handling minor civil cases. These latter reforms are discussed in chapters IV and V respectively. As a reform package, implemented over a very short period of time, these changes have transformed a jurisdiction which had been almost unchanged for more than a century. While there is concern at both the manner of implementation and the effect of these changes amongst the magistracy, there is also keen recognition of their inevitability and desirability.

2. REGIONALISATION

The notion of "local" courts dispensing justice throughout the State has (as noted in Chapter II), given way to a regionalised system of courts to maximise efficiency. In Melbourne, this has meant the closure of many suburban courts and their replacement by relatively large court complexes. Outside Melbourne, multi-magistrate courts are still confined to the provincial cities, but even in the country, there has been a vigorous program of closing down small courts. There is ready acknowledgment of the benefits which have come with the establishment of court complexes. As an administrative arrangement court complexes are seen as far superior. Within the

region all the resources are "at your fingertips" and it is, "a more efficient use of court personnel and time". Delays are kept to a minimum and "matters can be handed over to other magistrates if there is some difficulty with a particular magistrate hearing the case". The complexes have much better facilities and resources. Finally, as noted in Chapter II, many magistrates prefer the complexes because of the opportunities for informal contact and support from their colleagues.

At the same time however there is recognition of the problems which regionalisation had produced, particularly for people in the country. The closure of small courts had adversely affected many rural communities. For one thing, country people were now unable to rely on the clerk of court, who had sometimes served as a "poor man's solicitor" running a "*de facto* free legal advice service". Getting to regional courts was a serious problem in the country. With little or no public transport the trek to a court is now a major hurdle, particularly for the most vulnerable people in the community - such as young people and women with small children. And, while it is not unreasonable for city people to travel to regional courts, even this can pose problems for some people. Some magistrates noted that other members of the community had been disappointed with the demise of the local courts. They argued that police for example believed that local courts had some deterrent effect because of the reporting of cases in the local paper. Larger regional courts could also be "over-bearing if you are not familiar with the court set-up" and can feel like a "sausage factory", particularly on mention court days.

There was some suggestion that the regionalisation of courts had been a cynical move on the part of government undertaken with little or no consultation other than *ex post facto* discussions which came "too late". All in all, the closure of the courts was "regrettable" even if inevitable. Certainly, there was a clear sentiment that regionalisation had "gone as far as it could" and there was no justification for any further closures. Reaction among members of the Victorian bench to regionalisation is a good illustrations of the fine balancing of managerialist concern about efficiency with sensitivity to competing principles, such as "access" and "equity".

3. COMPUTERISATION

Computers came late to the Magistrates' Courts. Until the late 1980s, court records were kept on registers. In the early 1970s, cumbersome register books gave way to

looseleaf folders, and by the late 1980s, it was customary for details of charges to be typed (often electrically) onto the register. Magistrates would then fill in details of case outcome on the register pages,[1] using whatever rubber stamps might be appropriate to the task. Follow-up of defendants was dependent on paper records and on a filing systems. Computerisation has come late and abruptly to the jurisdiction. From terminals on the bench, magistrates are now provided with details of a defendant's charges, and using the terminal, enter details of outcome via, what can be, an elaborate set of "screens". The computer can generate documents such as good behaviour bonds, and store information both about sentences, and about the progress in attempts to execute sentence. The system also provides magistrates with access to information stored on the system so that if questions arise about the outcome of a case heard at another court, details can be called up. The system does not provide access to legal sources such as reported and unreported cases; nor does it provide access to statutes.

Magistrates waxed rhetorical and eloquent on the introduction of the computer to the jurisdiction. ("This is my favourite topic".) Quite clearly this had been the most hotly debated political and industrial issue in the recent reform package, and one which aroused strong emotion: "I hate the computer with a passion". Here again, there was willing recognition of the *potential* benefits of computerisation for the jurisdiction. They would be "wonderful if they worked properly". In theory, an efficient computer system would be "fantastic" because "clerks can't mess up your decisions and the possibilities for enforcement and follow-up are excellent". The paperwork for defendants is much clearer because "documents are prepared in a proper legible form". Computers also provide instant and accurate statistical data and have the potential to be an aid to decision-making by having sections of the Act, even penalty ranges and a grid system of the sentencing matrix, available to assist magistrates.

The reality of the current system however is that it is user-unfriendly, slow,[2]

[1] It was also customary to enter details of plea and of representation.

[2] In later interviews, our respondents reported that there had been steps taken to cure some of the worst features of the program so that the system moved faster, and so that fewer screens needed to be called up to impose relatively basic sentences. Over time, too, magistrates would have become more familiar with the system. However, despite (or because of) greater familiarity, even later interviewees expressed impatience with the speed of the

intrusive, cumbersome and, "was probably obsolete by the time it was introduced". The net effect of these problems is that the computer is "embarrassing" in court. It "raises your blood pressure" and "disturbs your equilibrium". ("It is not seemly for the magistrate to be seen cursing and swearing on the bench!") The implication of many of these concerns is that a good computer system would have been well-received. What had been provided is found to be sadly wanting.

There are clear inadequacies in the current programme. At the time of the interviews the sentencing provisions of the Commonwealth *Crimes Act* 1914 were not included, nor did it accommodate certain sections of the *Bail Act* 1977. It was near impossible to consolidate charges and difficult to record various combinations of concurrent sentence. The inadequacies of the programme meant many of our interviewees were prepared to concede that they or "others" are sometimes tempted to modify their sentencing decision to suit the computer.[3] Still, there was considerable unease that at the moment, the "computer directs you, rather than you directing the court".

There is however one remaining controversy over the applicability of this technology to the court-room: the divisive question, "Should the magistrate rather than some other court official be required to make the entries?". One line of thinking is that it would be more efficient for the magistrate to concentrate merely on making the decision. According to this view, it should be a matter of judicial prerogative to determine how decisions are recorded. After all, keying-in decisions (particularly long and complex ones which take "good" typing) is "like having the managing director making the coffee". ("Supreme court judges don't do their own entries".) There is serious concern, even among those magistrates who feel comfortable using the computer, with the impression it creates in court. "It doesn't look good" because defendants variously suspect that the magistrate is "looking up their priors" or even, "watching TV". It, "makes the plea material look irrelevant" and conveys the impression that "the magistrate is not interested in what is being said".

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system - especially where a large mention list needed to be processed.

[3] Machine-led sentencing however usually led to minimal injustice. Its effect was to affect the sentences imposed for particular offences, "rather than the aggregate prison term". However, several magistrates were worried that an appeal court might misinterpret a magistrate's failure to differentiate between the levels of blameworthiness for a number of different offences as evidence of failure to give adequate attention to the overall sentence.

The other school of thought is that such concerns are a kind of "snobbery". After all, making entries into the computer is "just another way of writing, isn't it?". In time, working with the computer will become the norm and children will be educated from an early age to be computer-literate and "accept the presence of computers in all social settings". The argument that it is demeaning for the magistrate to press buttons is an "emotional" one, because, according to a number of our interviewees, "decorum is something which is created by the magistrate in the court and it can be just as demeaning to be rustling register sheets".

One compromise suggested by several interviewees is to design the bench to better accommodate the technology and to purchase less obtrusive equipment, so that the screen does not create a barrier between "us and the customers".

Of all the changes to the jurisdiction magistrates felt most aggrieved about the lack of consultation about the introduction of computerisation. Magistrates were "locked in" to the decision to introduce computers into the jurisdiction with little or no say in how this was best done. As a result, the jurisdiction is now saddled with what was described as a programme "designed by clerks for clerks" and there is little hope that adequate resources will be made available to rectify or, ideally replace, the patently inadequate current network system. Even here however there were clear indications that magistrates had, to some extent, accepted the unpalatable inevitable. They were co-operating to try to minimise the problems, albeit with varying degrees of enthusiasm. Even from the staunchest opponents of computerisation of there was no suggestion of such "radical" action as refusal to use the computer or doing other than grumbling amongst themselves about their grievances. In a different organisational climate however this issue could have proved far more explosive and divisive.

4. PROFESSIONALISATION OF THE MAGISTRACY

Expanding the civil and criminal jurisdiction of the summary courts required an important initial organisational change -professionalisation of the bench to ensure that suitably qualified decision-makers were able to deal with the added complexity of cases. There were three aspects of this professionalisation - stripping justices of the peace of their judicial role, changing the criteria for appointment to the bench, to require legal qualifications and thirdly, indirectly, opening up the possibility of appointment of women to the bench as a result of this change.

(i) JPs

Until 1984, Magistrates (then known as Stipendiary Magistrates) had shared their criminal jurisdiction with lay Justices of the Peace.[4] Two or more justices could sit as a bench, and in some courts, JPs sat with the Stipendiary Magistrate. By the 1980s, the JPs had come to play only a limited role. They handled about 20% of the cases in the suburban courts studied by the La Trobe University researchers (La Trobe University, 1980: 123). In the rural courts studied by Douglas in 1983, their role was even more limited. Finally, in 1984, they were stripped of their criminal jurisdiction (*Magistrates' Courts (Jurisdiction) Act* 1984, s 4), and subsequently, they were stripped of their powers to hear bail applications and their power to issue warrants.

Magistrates shed few tears about the loss of JPs from their courts. For some they "didn't go soon enough", although some were "magnificent" or at least "well-meaning" people. They were too often, however, "a damn nuisance", and many were "bored, tired, old men". Magistrates who had appeared before JPs were particularly scathing - "very few knew what reasonable doubt meant", and "would sign anything for the police". The law had changed, it was now a "business" and the Magistrates' Courts were now a "totally different ball game". "JPs had served their purpose but were not for the 21st century".

(ii) Changed appointment criteria

More controversial than the demise of the JPs was the shift from the traditional model of promotion of clerks of court to magistrates. Until the 1980s the customary path to the magistracy was via the ranks of the clerks of courts. Until 1979, the pre-requisite for appointment was to have passed a number of Law department examinations, and nine or ten specified subjects from the Melbourne or Monash LL B course. This pattern was upset in two ways. First, by the *Magistrates' Courts (Stipendiary Magistrates) Act* 1978, s 2(a), the qualifications were changed so that Magistrates were required either to hold a law degree or to be eligible for admission as a barrister and solicitor. A saving clause exempted those who at the time of

[4] JPs had been stripped of their civil jurisdiction in 1979 (*Magistrates' Courts (Civil Jurisdiction) Act* 1979, s 11).

proclamation of the Act, possessed all the then existing qualifications other than age. Under the *Magistrates' Court (Appointment of Magistrates) Act* 1984, s 4, the qualifications were changed to make admission or eligibility for admission as a barrister or solicitor a mandatory condition for appointment. Second, the government abandoned the practice of recruiting only from the ranks of the clerks, and began appointing lawyers with no public service experience to the bench. The only concession now made to the clerks is that a person with a law degree and ten years experience as a clerk or Registrar is eligible for appointment, notwithstanding that the person is not a legal practitioner of five years standing (*Magistrates' Court Act* 1989, s 7(3)). However such people must compete on their merits with qualified lawyers. At the time of these changes, there was "much bitterness about the loss of the traditional career path". Understandably many old clerks resigned "amid some ill-feeling and disillusionment".

The effect of the "revolution" was the recruitment of magistrates from the ranks of people in active legal practice. Some of the "old guard" did not take easily to this new composition of the bench. By the time we conducted our interviews, however, there was very little evidence of the earlier rancour among former clerks of court. There was both an acceptance that professionalisation of the bench was "inevitable" and a recognition that overall, the change had been good for the jurisdiction. It "seemed to satisfy a section of the community who had regarded the bench as a 'closed shop'" with the former clerks, (possibly unjustifiably) regarded as "too close to the police". The added diversity and wider recruitment pool opened up by the change "has probably benefited the 'customers' of the court". For their part, the newcomers have, "forced us to question our values and rethink our approach" and have "brought new ideas to the bench". The only qualification to the general acceptance of this reform was the fear that practitioners would not necessarily have the depth of experience of the jurisdiction of former clerks. Sometimes this was diplomatically phrased -

> the fact that they haven't got a background of course certainly must make it more difficult for a start...they're not just thrown in the deep end, I think they're given a fair bit of assistance. But of course it's still up to them once they're on the bench.

Or, "it takes the 'new ones longer to settle in'."

Sometimes, the concern was made explicit. A number of interviewees feared that

the major challenge for the jurisdiction in the next decade was likely to be the loss of a "core of magistrates" who knew how the courts worked and "could do their job efficiently and quickly". This concern was expressed by both some of the former clerks and the newer appointees.

Among the newer appointees there was recognition of the talents and skills of former clerks.

> By the time they reached the bench they have had a great deal of experience (although they may not have the same degree of legal knowledge). They are more experienced with dealing with people in the community than newcomers. As clerks they have seen people in a different way from lawyers. Most former clerks are very sound from whom you can learn a lot and I have a high regard for the old school.

The "oldtimers" are also more likely to be aware of hidden agendas, such as police not opposing bail for a person because they were an informer. The jurisdiction relies on the "nous" and experience of the ex-clerks. Recognising this, some of the newer magistrates have reported the folly of regarding themselves as "clever young things". There was a strong feeling that some of the old clerks were the "ideal magistrates". The "5 per cent of ex-clerks who make 'terrible magistrates' is probably no higher than the unfortunate appointment of some solicitors and barristers to the bench". For their part, the "oldtimers" have been found to be helpful, friendly and, by and large, accepting of the newcomers and many have forged close relationships with their new colleagues.

Overall, there is only a mild, ironic sense of "them and us" and, while some magistrates are seen as more approachable than others ("you might give a few a wide berth") there is a strong camaraderie between magistrates. "People support each other here, like the bar, people help each other. Life's not dull and colleagues are very attuned. There's a terrific feel about the place". In the words of one of the more expansive of our interviewees, the magistrate's court is now "one big happy family", much to the surprise of many of the older and newer appointees!

(iii) Women magistrates

Perhaps the most visible consequence of the changed recruitment procedures has been the appointment of women to the bench. Until the 1980s, Magistrates' Courts had

been an almost totally male preserve. While women sometimes sat as JPs, the first female clerk of courts was not appointed until 1979. Given the traditional appointment criteria, no woman would therefore have been eligible for appointment to the bench until at least 1989. There was some initial shock as the first women were appointed to the bench. According to one of the older magistrates, the immediate reaction was that it won't last and, ironically, they noted, it didn't because the first appointee was quickly promoted out of the jurisdiction! Some magistrates felt that it took a while for the system to adjust to the presence of women on the bench. The jurisdiction had been

> traditionally male and those males who had always had wives who fulfilled the home-maker role.... found it difficult to come to grips with working with women who saw themselves in a career mode.... even just the simple things of just sitting around in the common-room and telling bawdy jokes, they had to take a back seat and found it uncomfortable and just found it difficult to talk to women generally. They're used to only talking to women about domestic issues at home.

Nevertheless, there seems to be general acknowledgment that the shift has been a positive one and women are welcome in the jurisdiction and, indeed, some of the most successful appointees. Many of our interviewees took the opportunity to single out the new female Chief, Sally Brown, as evidence of this. Most interviewees agreed that women magistrates were "down to earth, can tackle anything and don't put up with a lot of bullshit", albeit sometimes in rather less colourful language. The women, in the words of another interviewee, are "rip-snorters". For some of the newer appointees however, thinking about their colleagues on the basis of gender was "sexist". "Well it's hardly an issue really, is it and as far as I'm concerned they're just magistrates, they're not female".

There was concern among both male and female magistrates about the possibility that women have been appointed to the bench "because they are women". Indeed, such limited criticism as did exist of female members of the bench was, by at least one of our interviewees, ascribed to an indirect effect of affirmative action - compared with their male colleagues - women were appointed relatively young with a corresponding lack of legal experience.

One of the most important theoretical questions underlying the advent of women to the professions has been whether they "differ" in their decision-making from their

male counterparts. Initially, part of the resistance to the appointment of women was the fear that they might prove "a bit soft" or "timid" as sentencers. The interviewees conceded that these fears were unjustified. In fact, one interviewee argued, the women, "had firm ideas and some of their decisions were perhaps firmer than we "men" had given. And that wasn't in areas where females were involved". Or, in the words of one female interviewee, "It is well-known that some of the women can be real animals".

However some of the interviewees maintained that there was a special quality of decision-making which women brought to the jurisdiction. According to one, women "were more sensitive, they're more compassionate and they are more understanding". Of his own statement he immediately added, "It's a very sexist comment, isn't it?" For another male interviewee -

> Certainly I always think women sometimes have the ability to sense something perhaps quicker than a male. It's a point of view that perhaps males haven't looked at from and they can provide it.

For most interviewees however, the effect of gender was far more subtle. A woman on the bench is sometimes greeted differently by defendants -

> I can't help feeling that often you get the sense that a woman in the witness box is terribly glad there's a woman on the bench. Now that's just a fact of life I think, the gender identification...and the opposite would be true too that sometimes men in the witness box would be rather disappointed to find a woman on the bench.

Sometimes police officers are noticeably embarrassed by having to repeat indecent language in court in front of a female magistrate and occasionally senior barristers try "to laud it over a young looking female magistrate", with, she added, little success.

Two of the female interviewees maintained that the court ritual and traditional authority of the magistracy militated against any sense of gender -

> I have not found anybody treating (any prosecutor or defendant or any barrister) appearing before the court, who seems to be conscious that you're a man or a woman. They all call you 'Sir' generally, because they are just in that mould. You're just 'the magistrate'.

Although gender may not be an issue in court, a number of our interviewees were aware that it was a matter of comment outside the court-room. If parties are unhappy with a decision they might grumble about the decision of a male magistrate but are more likely to make some sexist or derogatory comment about a female.

The real effect of the appointment of women to the bench, according to almost all our interviewees, has been in improving the quality of the work environment and the relationships between the bench. Women are "good fun" and tend, "to liven things up", because they are, "a bit more social" and, "more talkative and more socially adept at initiating discussion and topics of conversation". For the younger magistrates who had gone to university and practised with women, this was not remarkable. For the men long-used to an all-male jurisdiction, the changed work environment "gave them a new lease of life". For some of the women, close relationships have been formed with the older, more experienced magistrates who have shared their knowledge and been particularly supportive.

Beyond subtle differences in language, style, and approach to the interview[5], we could discern no substantial difference between the responses of male and female magistrates to reform of the summary jurisdiction. In many ways, the appointment of women to the bench and their relatively successful integration into the magistracy is symbolic of the change to the organisational culture of the bench. The "new" and "strange" has been absorbed, even welcomed as a positive improvement. To some extent, it is possible to see many of the changes as evidence of "feminisation" of the summary jurisdiction - a process which the appointment of women has reflected and further facilitates (Laster and Douglas 1991).

According to one of our interviewees, there had really only been four major innovations to the summary jurisdiction -"the electric light, the ball-point pen,

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[5] For example, women magistrates were less likely initially to agree to participate in the study. We therefore used a "snow-balling" technique to ask women magistrates to encourage others of their number to agree to participate. When women magistrates did agree to the interview they expressed some reservations about the usefulness of their comments. They were more likely to qualify their observations on the grounds that they had not been working in the jurisdiction for long enough or had no recent experience in particular parts of the jurisdiction and to suggest that other magistrates were more likely to be knowledgable about particular reforms. In fact, the responses of the women magistrates demonstrated a very sophisticated knowledge of the jurisdiction and their answers were frequently far more detailed than those of their male counterparts.

computerisation and women magistrates". It is perhaps fortunate that the wrath directed at the computer has served to deflect the attention which might otherwise have greeted the last "innovation".

CHAPTER IV
Substantive reforms: criminal

1. INTRODUCTION

The recent expansion of the criminal jurisdiction of the Magistrates' Courts has put a lie to their previous incarnation as courts of "petty sessions". Magistrates are now routinely dealing with offences which would have been heard by the County Court. Expansion of the jurisdiction to allow magistrates to hear property offences up to $25,000 (*Magistrates' Court Act* 1989, s 53(1) and Schedule 4), has effectively shifted much of the criminal workload from the higher courts to the summary jurisdiction.

As with almost all of the reforms to the jurisdiction over the last decade, magistrates regarded the expanded jurisdiction as "necessary" and "sensible". They argued that the legal and forensic problems posed by a theft case are independent of whether the value of the property involved is $20 or $20,000. Magistrates are "just as skilled as judges" in handling such cases and, it is "in the interests of justice and the community to have defendants dealt with expeditiously". The expanded jurisdiction has also rectified some of the anomalies. Previously a magistrate couldn't hear cases of 17 year-olds who forced school-mates to surrender their lunches but could determine summarily a case against a man who defrauded insurance companies of $8,000-9,000 on a number of separate occasions. It also prevents charges being artificially split so as to come within the jurisdiction.

While there was support for expansion of the jurisdiction there was also a keen sense of the consequences of this pragmatic decision. Many of our interviewees noted that the government is slowly eroding the jury system of trial for defendants. Related to this is the added pressure on defendants to plead guilty. In effect, it now places "the onus on defendants to take it upon themselves to challenge the State and stand upon their rights".

There was also concern from the other direction - that it will take some time for the Magistrates' Courts to become accustomed to imposing penalties at the top end of the scale. ("Will the community be let down by timid souls who are only used to fining people $100?). It was recognised that the framework for sentencing of serious offenders will need to be laid down by the superior courts to help magistrates

determine the sentencing range and whether or not to exercise summary jurisdiction in particular cases.

For the moment, magistrates have a discretion to waive jurisdiction in the case of serious offenders if they believe their sentencing powers are inadequate to deal appropriately with an offender (*Magistrates' Court Act* 1989 s 53(1)(a)). In practice, this requires that the magistrate make some enquiries about the "priors" of a defendant. This in turn requires that police prosecutors "be on the ball", which is not always assured. Waiver of jurisdiction also creates a logistic difficulty in that once a magistrate has heard the priors, the case may have to be referred to another magistrate to be heard. In the country, this poses a significant problem.

To some extent the criminal jurisdiction has also contracted. Minor traffic matters, which previously occupied so much of the time of a magistrate are now normally dealt with by Traffic Infringement Notices. None of the magistrates were prepared to "take out a protest flag" over the loss of some of the traffic matters, although there was some recognition that such cases have an edge which ought not to be "rubber-stamped".

Changes in the criminal jurisdiction were recognised as an outcome of hard-nosed pragmatism on the part of government. The magistrates willingly accepted some of the consequences of this as a price to be paid "in rationalising the criminal jurisdiction". The same realism underscored their reactions to two other important changes to the criminal jurisdiction - the introduction of the mention system and the expanded range of sentencing options available to the court.

2. THE MENTION SYSTEM

Not too long ago bringing a matter, however trivial, to court was a major undertaking. Police, witnesses and the defendant would wait around, sometimes for hours, in the hope that their case would be heard on a particular day. Needless to say, such a system (or non-system) did nothing to promote efficiency nor to enhance the public image of the summary jurisdiction. The introduction of the "mention system" changed all this. Guilty pleas can now be heard in the absence of the police

informant and witnesses on a scheduled day. Contested cases and lengthy pleas in mitigation are adjourned for hearing at a later fixed date.

According to our interviewees, the mention system is, "the greatest thing that ever happened to the courts", the "greatest innovation since sliced bread or canned beer". It sorts out the "wheat from the chaff", "lets police get on with the job that they're paid to do"[1] and saves "the government and the community time and money". The mention system has also allowed the courts to take back control of their work from police and lawyers who had previously run the system to suit themselves.

The main "losers" in the mention system however are the victims of crime.[2] Magistrates are required to make sentencing decisions on the basis of a very limited, and often inaccurate, summary of the facts by the police prosecutor. "You sense there is more to a story than the two-minute summary". Magistrates willingly concede that summaries are manipulated. They hear a sanitised version of events, "two punches to the eye becomes an open hand to the face" or an "attempted murder suddenly becomes an aggravated assault" because of plea-bargaining and the pressure on prosecutors from the volume of cases. There are huge variations in the quality of the prosecutors and the preparation of their briefs. The summaries get "doctored by barristers". Some magistrates will adjourn cases, in order to have better details about the injuries sustained by victims. However all the interviewees were aware of the pressures to get through a mention list as efficiently as possible.

Mention days can sometimes look and feel like "conveyor-belt justice", with defendants feeling as though they've been through a "sausage machine". It takes certain skills and a "particular type of personality to run the mention court well". You need to "psychologically set your mind to running the court in a certain way". It was recognised that some magistrates "loved the colour while others hate the pressure of the mention list". Both groups however can sometimes feel "burn-out at the end of a busy mention day". It is "tough to find something different to say every

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[1] Some of our magistrates suggested that one consequence of "liberating" police from the responsibility of routinely giving evidence in the summary jurisdiction is that they are less experienced as witnesses when they are called upon to do so.

[2] At least two of the magistrates also noted that the summaries also hide possible defences which might be open to a defendant and the mention court system in general contributes to the pressure on a defendant to plead guilty.

five or ten minutes".

Like many of the recent reforms to the jurisdiction, magistrates recognise that, "the mention system is about pragmatism. There's room for this in a society where resources are scarce". The mention court is a "good system but not a fair one".

The success of the mention court system is really dependent upon the skill of the magistrate in making a quick and appropriate decision about sentencing.

3. SENTENCING

There have been four major reforms to sentencing law in Victoria over the past decade. The first, the *Penalties and Sentences Act*, 1981, sought to consolidate the general law of sentencing in a single Act, and also created a number of new sentencing options, namely the Community Service Order. This Act was amended in 1984 (*Penalties and Sentences (Amendment) Act*). The amended Act introduced more flexible provisions for the handling of fine defaulters, provided that imprisonment was to be treated as a sentence of last resort, and introduced legislative authority for discounts for guilty pleas. The *Penalties and Sentences Act* 1985 repealed the earlier legislation and introduced a comprehensive sentencing code, replacing the old Probation order and the Community Service Order with a far more flexible disposition, the Community Based Order. The Act also made provision for suspended sentences. Following the Starke Committee's extensive report on sentencing (Victorian Sentencing Committee, 1988), the government sought to implement a number of its recommendations. The result (which departed from the Committee's recommendations in a number of important respects) was the *Sentencing Act* 1991. This latter Act received assent only after our interviewing was complete. Interviewees' responses to the reforms of the 1980s therefore relate only to the earlier Act (most of whose innovations are reproduced in the later Act).

Magistrates were divided in their reactions to the expanded sentencing options introduced over the 1985 Act. For one group there was a cynical response to a question about expanded sentencing options - "What new options?". For this group, not much has changed - community-based orders have simply replaced probation. Others argued that "the new options are only as good as the resources put into them",

and some noted that in any case, some of the options were unavailable in the country.[3]

The newer magistrates seem to be more enthusiastic. It was "wonderful" to have the new options and the "more the better". In the view of some magistrates you can "never have too many options".

> It is marvellous to have the most flexible sentencing procedures available because every case is different but you need more information to know whether they are working out as well as they should.

There were clear differences in the assessment of the relative effectiveness of the various new options.

There were a number of further options which magistrates were keen to have provided, e.g., places for mentally ill people, special provisions for the mentally retarded, extension of the maximum period of suspended sentence to three years and, for one magistrate, an option which allowed for a "short, sharp shock other than gaol". There was support for including in Victorian legislation some of the options available in the current Commonwealth *Crimes Act* and in the higher Victorian Courts. Several Magistrates would have liked the option of being able to impose bonds with conviction, and bonds of greater than twelve months.

(i) Gaol and suspended sentences

There was a consistent view across all the interviewees that gaol was absolutely the last resort and that it achieved very little. There was a recognition by some of the long-serving magistrates that their attitude to gaol had changed since their appointment. For one magistrate -

> I think I'm a lot more comfortable and I think I've mellowed as far as attitudes and penalties are concerned. I think it's just becoming more aware of the options and that particularly imprisonment is really the last resort and no-one comes out of gaol a better or rehabilitated person so I think I'm more

[3] Notably the Youth Attendance Order for juveniles in the Children's Court.

> inclined now to use that absolutely as a last resort. I've seen more and I think being on the bench means I'm more aware of the publicity about prisons, so if I see any articles now I'm more inclined to open them and read them.

The major alternative to prison however, the suspended sentence, received a mixed response. Some of our interviewees regarded them as a "Clayton's sentence" which is being misused in the jurisdiction and in the County Court. In the view of one magistrate -

> It's based on a notion, a rationale, that someone about to commit an offence is going to think twice before he does it, think of the suspended sentence hanging over his or her head. The number of cases in which this is a realistic option are pretty limited. There are a lot of offences committed from people under the influence of drugs or alcohol. The last thing in their mind is a suspended sentence. The criminal element love it. It's the greatest advance in sentencing of all times with the criminal element. Now I sometimes use it. It's best used sparingly I reckon, and preferably with a portion of the sentence suspended, but my concern is that it is too often used as a cop-out and I've probably done it, myself, I'm prepared to concede that..... I think it's been used a little too much, I think it will bring the whole option into disrepute. Too many of the timid variety suspend suspended sentences.

The suspended sentence is recognised by some magistrates as a "strategic tool". They do not seem to do the person any good but they satisfy the sentencing criteria. Almost all magistrates maintained that the twelve-month period for the sentence "is not long enough". The suspended sentence "doesn't seem to impinge much on the life of a defendant or exert control over him".

The compromise has been to combine the suspended sentence option as a "cocktail or shandy", so that people do not think, "that they have gotten away scot-free or beaten the system". Magistrates prefer to do this even when the Supreme Court has specifically cautioned against its use in this way.

(ii) Community-based Orders

There were differences in attitude to the community-based order. It was recognised by some magistrates that it was a positive move because "it allows for tailor-made sentencing" and it is "a relief to know that the community-based order is available as an alternative to gaol". It means that drug offenders for example, can "get specialist help" and it, "gives people a go before you punish them".

There were however some clear reservations about the way in which community-based orders worked in practice. For example, imposing the community-based order requires the defendant's consent and "defendants sometimes quite unreasonably refuse their consent". Some forms of community work are a "joke" or work is not available, especially in the country where it is difficult to find supervisors. Mostly however, magistrates seemed not to be made aware of what opportunities would be made available to a defendant on a community-based order and there was a feeling that some feedback, or at least information about the schemes currently in operation would be useful.

There is also little feedback on the effect of a particular disposition on a defendant. There were marked differences in whether or not magistrates would welcome such feedback. For some "it would be nice to know" but "perhaps impractical and imprudent since you should really only act on the evidence". Some magistrates however, especially in the country where this is possible, go out of their way to find out a little more about how a particular sentence has worked out for a defendant. At least one magistrate talked about the European model of the judicial officer who "manages a case" as perhaps a preferable system.

Again, some magistrates would have preferred to have a longer period than twelve months or the power to impose certain conditions which "might be of benefit to the defendant" and they favoured an extension of the provision under the *Children's Court Act* which allows a community-based order to be imposed in default of a fine. Perhaps too, it was argued by some of the magistrates, there ought to be provision to assign individual defendants to particular local projects, rather than have them go through the limited options provided by the regional Office of corrections.

(iii) Fines

Fines have always been an important part of the sentencing armamentarium. However the utility of the fine has decreased as an increasing number of those fined have come to lack the resources to pay their fines. Section 65 of the *Penalties and Sentences Act* 1985 required that an offender's capacity to pay now be taken into account in the imposition of fines.[4] Magistrates identified a number of problems which can arise from this requirement. It was recognised that there was a paradox

[4] The corresponding section of the 1991 Act is s 50.

in allowing a penalty to somehow indicate a person's position in society. There is also a sense in which it works against the "rich" because they do have the capacity to pay. One indirect effect of the legislative provision is that the fine as a criteria of the severity of a previous offence of a defendant is lost.

The legislation also provides for work to be undertaken in cases of default and the non-payment of a fine. This replaced the unsatisfactory situation where people could be gaoled for relatively minor offences simply because they were poor. The philosophy was accepted by the magistrates as admirable, however in practice there were many abuses and inconsistencies which needed to be resolved. The calculation of the "day rate" of work required to discharge a fine was extremely generous to defendants. Respondents referred to the way in which the system could be abused so that a person who had accumulated a large number of small fines could work them all off by doing the work required, given the maximum of the individual fines. Respondents also referred to the fact that the hourly rate for commutation of fines was *significantly higher than the hourly post-tax income of a magistrate.*[5] *In many* cases the limited community work was unsupervised and the type of work was often "a joke". This was "bringing the system into disrepute" and it "acted as a disincentive to pay the fine". For this reason, some magistrates expressed their reluctance to give defaulting defendants the option of working off their fines, and claimed that threats of imprisonment instead "worked wonders on defaulters' capacity to pay".

One magistrate pointed to a further paradox. The effect of taking financial resources into account when determining quantum of fine was that the default penalty imposed on people who had committed a given offence would also vary according to their financial circumstances. The default sentence for a relatively impecunious defendant would be far less than that for a less impecunious defendant.

The net effect of these perceptions about the practical difficulties involved in the imposition of fines may well result in inconsistent sentencing practices which in

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[5] The commutation rates were provided in s 71(2) of the Penalties and Sentences Act 1985. For a fine of up to $400, the maximum number of hours of work was fixed at ten; for a fine of between $401 and $2,000, the number of hours was limited to forty. What makes these conversion rates all the more bizarre is the corresponding maximum prison periods: seven days, and one month. The 1991 Act goes some way towards the elimination of these anomalies. The conversion rates are $20 per hour, or $100 per day of imprisonment (s 63). But one may still ask whether five hours community work is as unpleasant as a day in prison.

various ways try to second-guess the effect of a particular fine on an individual defendant. One magistrate admitted to not taking financial circumstances into account on the grounds that those who deserved a low fine would not be able to pay it, and would therefore have to be dealt with under the default procedures. Another magistrate uses a rule of thumb sentencing formula for when fining, single, unemployed males - make the penalty as realistic as possible knowing it can be converted to community work. Magistrates were apparently unaware of the obvious solution to some of the paradoxes created by the attempt to reconcile formal and substantive equality: something like the Swedish and German day fine systems.[6]

4. THE *CRIMES (FAMILY VIOLENCE) ACT* 1987

The *Crimes (Family Violence) Act* 1987 conferred on the Magistrates' Courts a quasi-criminal procedure designed to assist people, mainly women, who have been the victims of domestic violence. The Act provided a procedure whereby members of a family or a police officer could seek an "Intervention order" restraining a member of a family from attending at places such as the home or work place of another family member, or from engaging in criminal behaviour against other family members. Proof of entitlement to an order was to be on the balance of probabilities, and interim relief could be granted, *ex parte*. This new jurisdiction is the product of a long political campaign to change the attitude of law enforcement agencies, the courts and the public to violence in the home. To some extent, the new legislation formalises and streamlines procedures which were available under common law but were seldom used.

More than with any other of the recent reforms members of the bench expressed their support for its political objective -

> Not before time. It's ludicrous in a civilised society that the position where

[6] For a discussion, see Australia (1987: para 25). The Australian Law Reform Commission recommended against the adoption of such a system for Commonwealth offenders (Australia, 1988: para 114) but its reasons are not altogether convincing. If a person's income can be established for the purposes of determining eligibility for social welfare (as is the case for most criminal defendants), it can presumably be established for the purposes of determining monetary quantum of fine. Anomalies will result, but the question is not whether there will be anomalies, but whether they will be less acute than under alternative monetary penalty systems.

> the powerless partner has to wait until something dreadful happens before you can do anything.... But this gives people an opportunity to get in and try and put the lid on something before it's too late. It's certainly an added jurisdiction that I welcome. ... The only difficult question is, simply as a matter of evidence, occasionally you'll get someone say "I didn't hit her" and she'll say he did. Well that's like every other conflict of evidence - it has to be resolved. And then the other issue is is he likely to do it again? Well I think you've got to take a pretty robust view of that, if you've done it once, wouldn't you do it again? I think you've got to look at the objects of the legislation and not be too pedantic. So it's the sort of jurisdiction where you can grab by the scruff of the neck and give it a good go.
>
> Some of the people who are involved behind the scenes who push this I don't think are helpful in the overall picture. Some of the women's groups. They're too biased, they only see one view and unless you hang, draw and quarter everyone who's summonsed you're not doing it right.... You don't have to go that far. It's a jurisdiction where you need a little patience in it, sometimes it takes a little while to get the message through to some of those blokes.

There was general acknowledgment that such a legislative revision was long overdue and, as a simplified form of injunctive relief, it has encouraged the police to take domestic violence more seriously. The fact that subsequent violence was disobedience of a court order seemed to make police more willing to take it seriously. Several magistrates recognised the paradox posed by the fact that the strict logic of the orders was simply to threaten criminal sanctions for that which was criminal anyway, but nonetheless felt that the orders were more effective than the old system of relying solely on retrospective sanctioning.

The "political" objectives however have also created some problems -

> The legislation is in its infancy and requires legal input. If the courts are going to do it it needs to be done properly or the risk is that it ultimately demeans the stature of the court.

Some of the problems identified by the magistrates include -

- Lawyers have been excluded from this area with responsibility being vested in the clerks who sometimes do not have a clear idea of the difference between statements of fact and conclusions ("he was abusive to me").

- The document alone does not guarantee effectiveness of enforcement. One magistrate with experience in the Coroner's Court noted that many homicides had a long history of clearly unsuccessful intervention orders.

- Unrealistic expectations are being made of the legislation and many groups bring their personal prejudices with them and expect the magistrate to reflect their preferred view. People tend to think that an *ex parte* order is theirs "as a matter of right".

- There is a sense in which *ex parte* orders are a "growth industry". The order is used as a tactical ploy in the Family Court or to obtain priority in public housing.

Respondents varied in their attitudes to these considerations. Some saw the existence of abuses as grounds for being extremely critical of the legislation. Others saw a degree of abuse as inevitable, but considered that its incidence was so limited as not to outweigh the advantages of the legislation.

One of the main difficulties noted by our interviewees, was that it is applied differently by different magistrates. Some magistrates have had a "tendency to settle anything approach, which flows through to the family domestic violence area to the detriment of the people where the settlement mentality is appealing but not always appropriate". Some magistrates are also inclined to give out intervention orders, especially *ex parte* orders too quickly, underestimating the impact of this quasi-criminal matter on the lives of respondents. (i.e. breach of an order "can mean gaol and you can be forced to leave your house and your children".) Trying to resolve some of these inconsistencies in approach has "probably absorbed a disproportionate amount of time in the training of magistrates yet the difficulties still remain". One of the major problems is that it is "hard to know what the statistics about the use of orders really mean - Does a high return rate mean that the orders are 'effective' or that they are not working?"

At the end of the day, magistrates recognise that this jurisdiction is useful and has "stopped a lot of pain" and "it is probably doing more for the community than we realise" but, its main benefit is symbolic, as a "public statement that the courts won't tolerate" violence.

There is among many magistrates recognition that many social problems can't be "resolved" or "cured" by the criminal justice system. Perhaps more than any other reform, magistrates' attitudes to domestic violence demonstrate the diversity of individual approaches in the application of the law to difficult social problems. Again however their approach also highlights the consensus across the bench about the important role of the courts in attempting to assist the "community" in dealing with these.

5. CONCLUSION

Applying the criminal law poses particular difficulties. Crime arouses public emotions and expectations to a far greater extent than breaches of any other branch of law, and legal responses to crime are apt to be evaluated accordingly. The demand which is made of the courts is not only that they engage in law-bound decision-making, but that they also contribute to such social goals as the deterrence, reduction, and punishment of crime. The expectation that criminal law decisions be both legally and instrumentally justifiable is one which is generally shared by the magistracy, and goes a long way towards accounting for the difficulty of the sentencing decision - for the magistrates tacitly assume that a sentence must be both intra-legal and defensible on non-legal grounds.

The task is complicated still further by ignorance. The major cost of the mention system is that sentencing must often be embarked upon in ignorance of what "actually happened". Magistrates also admit that they often have no idea of how a particular sentence will be implemented, much less of what effect it will have on the offender and the society. Perfectionists cannot be sentencers, and one way in which magistrates adapt to the strains of the sentencing task is by attempting to impose sentences which will do more good than harm. They have concluded (as have most criminologists) that there is little evidence to suggest that draconian sanctions do any good, and they share the hopes of the legislators that more imaginative sentencing will sometimes work. They hope that the intervention orders will work, suspect that they probably do, but recognise that their operation involves that perennial issue: the question of who should bear the costs of the mistakes made by the criminal justice system. Faced with decision-making in a state of ignorance, one might forgive magistrates for seeking a sentencing system which could remove some of the ambiguity surrounding the process. Instead, we find that there is hostility to measures which strip the courts of their discretion. Criminal law decision-making is

seen to involve legal and moral questions, and our respondents accept it as their melancholy duty to do their best to deal with both and, to their credit, welcome government initiatives which increase the likelihood of their being able to reach decisions which will survive not only the County Court, but moral scrutiny too.

CHAPTER V
Substantive reforms: civil

1. INTRODUCTION

There have been two major reforms to the civil jurisdiction: its expansion, and the attempt to introduce a less formal "arbitration" system, for the handling of minor cases. The expansion of the jurisdiction has met with considerably more support than the second innovation.

2. EXPANDING THE JURISDICTION

Until recently, the civil jurisdiction of the Magistrates' Courts was confined to the trivial. As one magistrate put it:

> the civil jurisdiction used to be really the second-class citizen. You would go up to the Melbourne Magistrates' Court and there would be 80 civil cases listed in one court and you'd get other courts during the day if and when they became available.

The civil jurisdiction conferred on the Magistrates' Courts was regulated by ss 50 and 51 of the *Magistrates' Courts Act*, 1971 (inserted by the *Magistrates' Courts (Jurisdiction) Act*, 1973, s 9). The Act listed the causes of action in which the Courts had jurisdiction. If a claim did not fall within one of the enumerated causes, and if the amount at stake exceeded the limit prescribed by the Act, the Courts lacked jurisdiction. The monetary limits were sparing: between $200 (in assault and debt cases) and $1,000 (in tort cases arising out of use of a motor car). There was no equitable jurisdiction. After the massive inflation of the 1970s, upper limits were increased to $3,000 (by the *Magistrates' Courts (Civil Jurisdiction) Act*, 1979. In 1984, the jurisdictional limits were increased to $5,000 and to $10,000 where the damage arose out of a motor car accident (*Magistrates' Courts (Jurisdiction) Act*, 1984, s 5). As part of the reform package of the 1980s, the civil jurisdiction of the courts was extensively increased by the *Courts Amendment Act*, 1986. This replaced the system of enumerated causes of action with a formula whose basic effect was to confer jurisdiction except where specifically excluded. Cases normally fell within the Courts' jurisdiction if they involved claims for less than $5,000 in personal injury cases, and $20,000 otherwise. The only other exclusions concerned cases involving the title to property whose value exceeded the jurisdictional limit, and cases where

the applicant was seeking a prerogative writ. The 1989 *Magistrates' Court Act* increased the jurisdictional limit still further (from $20,000 to $25,000) (s 3)[1] and made the court's equitable jurisdiction explicit (s 100 (1) (b)). It confirmed the court's lack of jurisdiction in administrative law cases (s 100 (2)).[2] Both the 1986 and the 1989 Act conferred jurisdiction in cases involving more than the jurisdictional limit where the parties agreed in writing to have their cases heard by a Magistrate. However the lack of an express grant of the equitable jurisdiction in the 1986 Act seems to have created uncertainty as to the scope of the new jurisdiction, and the courts were not expressly granted the powers needed to enforce equitable orders.[3] Practitioners rarely used the new jurisdiction. The 1989 Act included provisions for the enforcement of equitable orders (s 135).

While most interviewees considered that the increased jurisdiction had added to the Court's workload, they either welcomed this or saw it as a just quid pro quo for changes to the status and remuneration of the magistracy. The general feeling was that the expanded jurisdiction made life on the bench more interesting.

> I find [civil work].... different, in a sense more relaxed, in a sense more demanding, and in a sense not as emotionally demanding. In that sense it's more relaxed. It's demanding of one's concentration both on the evidence and the law and I enjoy having to research the civil law and I enjoy having good barristers before me hearing their submissions. The fact that it's expanded I'm all in favour of.

Indeed one magistrate referred to the expanded jurisdiction as among the matters which had encouraged him to apply for appointment. However, another found complex issues of civil law "exhausting". Attitudes to civil work were partly a

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[1] Like several abortive predecessors, the 1989 *Magistrates' Court Bill* had envisaged the raising of the limit to $40,000.

[2] While the 1986 Act explicitly excluded jurisdiction in cases were prerogative relief was sought, it was silent on the question of whether declaratory or injunctive relief could be sought against an administrative authority. The fact that the jurisdiction was civil would probably have been enough to resolve the question, but if so, one wonders why it was thought necessary to make specific references to applicants for forms of administrative relief. There are no reported higher court cases on the issue - which probably did not arise, given litigants' reluctance to use the courts' new equitable jurisdiction.

[3] Nash (1990: 1.11-1.12) cites English authority to the effect that the grant of an equitable jurisdiction might be taken as implying the grant of the powers necessary to enforce equitable orders.

function of prior experience. Magistrates with experience primarily in the criminal law found civil work harder (legally and emotionally). Those with civil law experience often relished it.

Expansions to the jurisdiction were also welcomed as a means of ensuring the availability of faster and cheaper justice than litigants could expect from the County Court. The calibre of the magistracy meant that the Court could now handle the broader jurisdiction.

There were, however, some reservations expressed. Two country magistrates referred to the time-tabling problems which could arise if a 4-5 day civil case were to arise in their jurisdiction. There was also considerable anxiety expressed about whether the Court could continue to handle its case load expeditiously, especially if the jurisdiction were to be increased still further.[4]

> If you expand it too high you clog up our works because they're the sort of cases that do take time.... A piddly dispute that really, because it's bigger money, goes for weeks.

While high stakes cases would be relatively infrequent, they would tend to be relatively time-consuming. There was also some concern expressed lest there be expansion of jurisdiction from another source: the shifting of the Small Claim Tribunal's jurisdiction to the Court, as had been the case with the jurisdiction of the Crimes Compensation Tribunal.

(i) Reactions to the new jurisdictional limits

Magistrates' reactions to the increased civil jurisdiction were almost universally enthusiastic, sometimes suggesting surprise that anyone would think otherwise. Several respondents made the point that after taking account of inflation, the expansion of the monetary limits amounted to little more than the maintenance of the status quo.[5] Most treated the expanded monetary limits as real. Most considered

[4] Kent (1990: 2.3) reported that the profession did not consider that delay in the Magistrates' Courts was a problem.

[5] This was more or less the case if one compared the 1989 and 1986 limits. It is certainly not the case if one compares either with the pre-1986 limits.

that at least in theory the legal issues were the same in the higher stakes cases, and a couple considered that the facts were no more complex. However most considered that in practice, high stakes cases tended to be more complex. Parties are more likely to brief more senior counsel and a greater range of legal evidentiary issues are argued.[6] Cases now take longer. Parties expect decisions to be justified and are more likely to appeal. Magistrates therefore needed to be more analytical and articulate in the reasons they gave. [7] Several magistrates reported that they would sometimes like to reserve their decisions, but there was only limited time for doing this, and in any case, parties want quick decisions.

(ii) Equitable relief

Most magistrates welcomed the added equitable jurisdiction but reported little or no experience with this new set of powers.[8] One explanation for this was that there were simply not a great many cases where equitable remedies were appropriate. A second, (given by a magistrate with civil complex experience) suggested that the reason lay in professional conservatism: lawyers have only just realised, "that it's a very cheap nifty way to run in and get an injunction".[9]

3. ARBITRATION

(i) The arbitration system

In 1986, the Attorney-General's Advisory committee recommended the establishment of a system of arbitration in minor cases (Victoria, 1986: paras 6.33-6.51). Its recommendations were almost immediately implemented by the *Courts (Further*

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[6] Moreover some took issue with the argument that higher value cases were no more complex than low value cases, pointing out that one of the factors that could make a case a high value case was the existence of a large number of minor issues which produced a large aggregate claim. Building disputes, for example, often involved numerous low value issues.

[7] Magistrates reported giving written judgments of more than 80 pages.

[8] The exceptions were those who had had experience in the civil complex, but even they found that equity cases were rare.

[9] Another felt that reluctance by solicitors to use the equitable jurisdiction reflected the same conservatism that had prompted them to resist the expansion of the monetary limits to the jurisdiction.

Amendment) Act, 1986 which amended the *Magistrates' Courts Act*, 1971 so that disputes involving less than $3,000, or in which no monetary relief was sought, were to be normally to be handled by arbitration. The 1986 report had recommended that the operation of the system be reviewed after a two year period. The review concluded that the system had not fulfilled the hopes of its initiators, and that a major reason for this was that parties were entitled to legal representation and to legal costs, if successful (Hill, 1989). The review therefore recommended that parties to arbitration proceedings should not normally be entitled to legal representation. It also recommended that the monetary limit for arbitrations be increased to $5,000. The *Magistrates' Court Bill*, 1989 reflected the conclusions of the review. It increased the monetary limit for Arbitration to $5,000 (while eliminating the arbitration requirement in cases where non-monetary relief was sought). It also provided for the exclusion of lawyers from arbitral proceedings except in special circumstances. This latter provision fell foul of the Opposition majority in the Legislative Council, and was dropped from the Act.

Arbitration was to differ from the traditional judicial processing of civil cases in a number of respects. The magistrate was permitted to dispense with the requirements of formality (1989 Act, s 103 (2)(c))[10] and was not to be bound by the rules of evidence (1989 Act, s 103 (2) (a)).[11] There was, however, an express requirement that the proceedings be conducted according to the rules of natural justice (s 103 (2)(c)).[12]

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[10] On what this involves, in administrative tribunals, see Pearce (1986: paras 245-6) and the material cited therein.

[11] The effect of provisions of this nature is not to permit tribunals to act in an arbitrary manner. Rather, questions of admissibility are transformed into questions of weight. Since evidence is normally inadmissible on the grounds that it is of a type which is normally of little relevance, outcomes will usually be similar whether evidence is excluded or admitted, but given the minimal weight it deserves. However, relaxed rules of evidence may nonetheless be important. They make it much easier for unrepresented parties to give evidence. (It can be extraordinarily difficult for litigants to tell their stories when they have to cope not only with the unfamiliar environment, but also with a person who keeps on interrupting on the grounds that they have said something they should not have said). They also facilitate the presentation of certain forms of evidence, notably "credible hearsay". On informal evidence, see e.g Campbell, 1982; Pearce, 1986: paras 248-251.

[12] Even in the absence of such a provision, the courts would have implied such a provision in the absence of a clear legislative intention to deprived litigants of this prima facie right.

Both the *Courts (Further Amendment) Act*, 1986 and the *Magistrates' Court Act*, 1989 included a provision that where magistrates made an award of less than $500, costs should not be awarded except in special circumstances.

Even in their modified form the arbitration provisions have been the subject of considerable criticism.[13] Among magistrates, the arbitration system evoked a variety of responses. One was puzzlement at what was seen as a misuse of terminology.[14] A more usual response was that the arbitration system had made little difference to the way in which the courts operated. The normal method of conducting arbitrations was usually "simply a short-cut system to what was the old system".

> what you're really doing is you say to the practitioners, stand up, summarise the case, you put your witness in the box and let them be cross-examined. It might shorten it a little bit but as I say, in the case of motor car accidents, really arbitration has no implication I don't think other than to shorten the procedure a little bit.

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[13] At a seminar on the 1989 Act at the Leo Cussen Institute, there was criticism by speakers and members of the audience of the vagueness surrounding the arbitration procedures (Dunne, 1989: 4.10-4.12). The residual "costs cap" continued to arouse criticism (White, 1990: 5.2-5.3).

[14] Several former practitioners noted that the term "arbitration" is typically used to describe procedures for handling highly specialised disputes where the matter was referred to a person who was a specialist in the relevant area. The authors of the 1986 report had defined arbitrations thus:

> An arbitration is conducted by a person to whom the parties to a dispute agree to refer their dispute for resolution ("an arbitrator"). Unlike the mediator or the conciliator, the arbitrator is empowered to fashion his or her own solution to the conflict. usually arbitrators apply pre-existing substantive law in reaching their decisions but they may also employ norms agreed by the parties..... Often the arbitrator is chosen for his or her expertise in the subject matter of the dispute..... Sometimes parties are required by law to submit to arbitration. (Victoria, 1986: para 3.6).

It is apparent that the arbitration system which the Committee recommended departed in several respects from traditional arbitration systems. In particular, parties were given no choice as to whether to submit to arbitration, nor over the choice of an arbitrator. It might also be noted, however, that one difference between arbitrations and civil adjudications is that parties may agree that the arbitration be based other than on legal norms. We did not (unfortunately) ask our interviewees whether any parties had sought such an arbitration. However, in discussing arbitrations, one of our interviewees adverted to the possibility that parties might ask that the arbitration be based on a non-legal normative system.

This was the procedure typically adopted. One magistrate said -

> There are no guidelines as far as I understand, it's each to his own. Without ever having sat in on any other magistrate's conduct of an arbitration, from my understanding of it, some magistrates run them as an ordinary hearing and therefore there's no difference. Others go to the other extreme and virtually get a summary from the counsel on both sides. I might put the defendant in the box and say, 'What have you got to say about that?' I suppose I'm a bit in the middle.

Our other replies suggest that this magistrate has overestimated the degree of diversity in this respect, and may be a bit more relatively informal than the statement suggests.

There could be some time-saving where the summaries indicated that certain facts were not in dispute, or where relaxed rules of evidence meant the lack of a need for formal proof of certain matters. However, most considered that the time saving was minimal. A few considered that substantial time-savings would be possible only at the cost of "depriving people of their day in court" or of their right to test evidence adequately. Most considered that arbitrations were little different to ordinary trials, but that there were sometimes advantages in being able to depart from the strict rules of evidence, and in being able to use a slightly abbreviated procedure. Arbitration had its uses but these were very limited.

Several magistrates felt that arbitrations could be used more creatively. Two magistrates felt that a magistrate who was good at talking to people could get the parties to the point where they could start moving towards a compromise: "They'd feel better about it, and there'd be a fairer result too". However this endorsement of the ideals of the Alternative Dispute Resolution movement is outstanding for its atypicality.[15]

Magistrates reported several major obstacles to attempts to introduce a highly informal set of procedures. First, they considered that the legal culture encouraged practitioners to proceed adversarially, and that, in the absence of a change in *modus operandi* on the part of lawyers, informal arbitrations were unlikely to be feasible.

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[15] The only other magistrates to envisage such a procedure envisaged it in the context of pre-trial hearings and, notwithstanding their enthusiasm for such hearings, assumed that an arbitration would conform to the standard model.

Secondly, most magistrates felt that it was extremely difficult to use arbitrations in cases where parties were unrepresented. Thirdly, there were profound reservations about any suggestion that arbitration might involve by-passing the normal methods of testing evidence.

> in the end the reasons why [the parties] are here is because they can't agree and often even in a civil area one of the fundamental points of disagreeing is what the facts are and particularly in a case of factual disputes. If arbitration means anything less than a full testing, it's hard to see how it can really produce quality of result. You only need to think about it to realise that barristers who go to court each day are going to sound and appear much more persuasive than the average member in the community and certainly the sterilised version you get from them you can't possibly gauge fine issues of credibility or demeanour of the witness for instance.

There was also a sense that the more informal the arbitrations, the greater the likelihood that this would be at the cost of requiring one of the parties to surrender their legal rights. However some magistrates argued that the example of the Small Claims Tribunal indicated that it was possible to have a system where small disputes were resolved effectively and informally, and considered that there was no reason why a similar result could not be achieved in Magistrates' Courts.[16]

The costs cap met with little enthusiasm.[17] Those who felt that lawyers made a useful contribution to the handling of civil disputes could obviously be expected to oppose a measure which would reduce the use of lawyers. However even those who were less enthusiastic about the use of lawyers tended to consider that the costs cap was an unsatisfactory compromise. The cap was seen as encouraging people to persist with hopeless cases. It was also felt that if lawyers were to be permitted, it was only fair that those who retained legal assistance should be compensated in the event of their being successful. There was a sense that the costs cap rule was a compromise which provided the worst of both worlds.

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[16] On the other hand it was argued that Small Claims cases are processed no faster than cases with barristers involved, and that insofar as the Small Claims Tribunal processed cases expeditiously this was to be explained not so much in terms of the superiority of informal procedures, as in terms of the issues involved: simple issues such as whether a thing worked, and whether there had been a representation, what it had been, and whether it had been complied with.

[17] Only one magistrate argued that the cost cap was fair.

> Because I think political considerations came in from the Opposition and probably lawyers within the Labor party. We got a system which is no system. The cost cap with the arbitration system in my view hasn't worked. It does mean that for a disadvantaged person as a defendant he or she pays less cost to the other side but if he or she (the disadvantaged person) is the winner, they get less from the other side, because people seem to think that the cost cap means that is all a party has to pay.

(ii) Pre-hearing conferences

Following the 1986 recommendations of the Attorney-General's Advisory Committee (Victoria, 1986: paras 6.52-6.57), the 1986 and 1989 Acts provided that complaints might be referred by the Court to a magistrate or a clerk (1986) or Registrar (1989) for a pre-hearing conference[18] (for details of how these might operate, see McMahon, 1990).

Magistrates were more favourably disposed towards the pre-trial hearing procedures which had been adopted in several regions. These were regarded as promising developments with the potential to produce settlement. These aroused far more enthusiasm than arbitration.

> If they introduce a real mediation system with pre-trials, now that's a whole different issue and that could be really good.... It saves an enormous amount of time and it saves an enormous amount of dignity and saves an enormous amount in terms of cost.

However the same magistrate also reported that different magistrates understood quite different things by pre-trial hearings.

> I'm not surprised that you say some people confuse arbitrations and pre-hearings because in [one] region they were using it as an opportunity to quote on cases and I don't see it like that at all. I see it as a way to facilitate negotiation and settlement and to that as shrewdly as possible but I don't see it as a chance for me to be heavy-handed saying "okay, you're both here, you'll get 20 you'll get nothing".

As with arbitration, magistrates' attitudes to the process reflects both their perceptions of how the system operates or could operate, and their personal values.

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[18] There were minor differences between the Committee's recommendations and those embodied in the legislation.

(iii) Alternative dispute resolution

The reforms of the 1980s did not make any specific provision for magistrates to be involved in forms of alternative dispute resolution. However, as noted above, several magistrates spoke of the arbitration procedure as if it were intended as a form of Alternative Dispute Resolution, and a number of magistrates felt that ADR would represent an appropriate way of handling pre-hearing conferences. Attitudes to magisterial involvement in ADR varied. While some magistrates emphasised the importance of litigants becoming actively involved in the handling of their own disputes, others argued that people who had got to the point of litigating wanted nothing of the sort. They wanted to be told authoritatively who was right and who was wrong. For instance, discussing the possibility that some of the court's jurisdiction would be hived off to informal bodies, one magistrate remarked:

> The easier parts they are important to people and I don't for the life of me believe that they want to go to the local alternate dispute resolution centre and have a couple of social workers.

Moreover, it was felt, they were right to want this: outcomes to disputes should depend on law rather than on who was better at bargaining in a mediation.

The enthusiasts for ADR seemed to be outnumbered by those with reservations. Magistrates were generally far happier acting as independent arbiters than as participants in a negotiation process. One reason for this seems to have been the question of expertise. A number of magistrates reported feeling unable to conduct informal conflict resolution procedures and considered that they might benefit by training. (This was one of the few areas where training was felt to be potentially useful). Others felt that it was difficult to shift from being a traditional judge to being an active participant in a resolution process.[19] Finally, several magistrates warned that kadi justice[20] can involve its own in-built injustices: one magistrate pointed to the dangers where only one party approached negotiation in good faith; others mentioned the danger that one party would be overborne by the other; several expressed fears that non-English-speaking parties could be at a disadvantage.

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[19] One solution, mentioned by one magistrate would be to have arbitrators serving for a block of time, so that they could become habituated to the process.

[20] The term is Weber's (Rheinstein, 1954: 213), not theirs.

4. CONCLUSION

There was in short general support for the expansion of the jurisdiction, coupled with concern lest further expansions to the jurisdiction create a backlog inconsistent with the Court's traditional capacity to deliver justice effectively and expeditiously. There was a degree of sympathy for the arbitration system, coupled with considerable confusion as to precisely what arbitration was intended to involve. Non-adjudicatorial dispute-resolution appears to represent one of the few areas where many of our interviewees felt somewhat at sea. There is also considerable disagreement about the proper role of alternative dispute resolution techniques in the civil justice process. There is, arguably, considerable potential support for innovations in the civil justice area, but there is also a degree of wariness borne both of the ambiguities surrounding some of the reforms, and of disagreement about the role of role of law in the curial processing of civil disputes.

CHAPTER VI
Axioms of reform and change

1. EVALUATING THE IMPACT OF REFORM

According to one of our interviewees, the summary jurisdiction had long barely functioned as a 19th century institution; it was therefore scarcely equipped to meet the demands of the 20th century. In the last decade things have changed. The personnel, practices, and law governing the jurisdiction has been reformed. As with all reform endeavours the question is, "How successful/effective have they been?"

This question is not easy to answer: it obviously depends both on the normative question: what are one's criteria for success?, and the empirical question: given these criteria, how well do the reforms measure up? Our research cannot answer the former question, but it can go some way towards providing an answer to the second.

One guide to what constitute appropriate criteria for evaluating the success of the reforms is to be found in the justifications given for those reforms.[1] Parliamentary Debates and government reports suggest three major aims. One objective seems to have been to increase the degree to which the decisions in the Magistrates' Court would be determined by law. It was this consideration which was cited as a justification for the elimination of the judicial functions of the JPs, and for the decision to make the Courts independent of the civil service. A second objective seems to have been to increase access to justice (Victoria, 1986: paras 5.20-5.38, 6.4; Hill, 1989: 12). A third and less frequently cited objective seems to have been to reduce the costs to the state, of delivering high quality justice (Victoria, 1986: para 5.23).

Researchers have tried to evaluate the success of reforms in a variety of ways. One

[1] The justifications given for reforms are not always a guide to the intentions of those responsible for reforms, and there is a long academic tradition of proudly uncovering "hidden agendas" in reform packages. However there are grounds for taking justifications seriously. Regardless of the sincerity of those who articulate them, they reflect reformers' perceptions of what are regarded as constituting "good justifications", and they carry with them an implicit warranty to the effect that if the reforms fail to deliver what is promised, they may fairly be criticised on that basis.

approach involves the use of quantitative measures of effectiveness. Thus for example one might assess whether sitting times have become longer, delays have been reduced, the imprisonment rate has been lowered and inconsistency in sentencing reduced. However, one of the major problems with quantitative indicators is that they are apt to be infuriatingly inconclusive. Longer sitting days may mean increased efficiency but they might also mean that a higher proportion of cases are handled by mentally exhausted judges. Delays may mean that a court is unable to get through its case-load and that justice is being denied; but lack of delays may mean that litigants simply don't want to have their cases heard in a particular court, or that adjournments are being unreasonably refused. A reduction in the level of imprisonment may mean that courts are being more humane but it could also be seen as indicative of reprehensible indifference to a statutory intention that offenders be punished. Consistency may mean that unjustified disparities are being reduced, but it may also mean that sentencers are failing to exercise their discretion. Quantitative research has its uses, but its evaluation is often dependent on the existence of research which can throw light on the meaning of the indicators in question.

The research we have conducted has its limits too, but it is nevertheless illuminating. It provides data from people who are in a particularly good position to be able to assess the impact of many of the reforms. It throws light on issues of meaning. Moreover, it enables us to explore some of the reasons why the reform process seems in this State to have worked.

Our answers indicate a high level of satisfaction with almost all aspects of the reforms of the 1980s. The government seems to have succeeded in creating a court capable of rapidly and effectively processing a large number of cases. There is a sense that there now exists a court staffed by people with the legal talent necessary for an extremely diverse jurisdiction; there is pride in the fact that "the customers" are now able to have their cases heard at considerably less expense than if they had had to pay counsel on the County Court scale. There is also a sense that facilities are efficiently used - both in the sense of the cost per case being low, and in the sense of there being minimal compromises required to achieve this. There are fears: in particular that the mention system may be producing efficient case-processing at the cost of adequate, sentence-relevant information; also that attempts to abbreviate civil procedures may involve brevity at the price of law.

Perhaps these views are unduly optimistic. Perhaps they are self-serving. We doubt it. First, it is possible to imagine alternative answers to those which we received. There might have been endless grizzles at physical obstacles to doing one's job well. There might have been complaints that the jurisdiction had become unmanageable, there might have been statements to the effect that at the salaries offered, it was unrealistic for the government to hope to attract talented lawyers to the bench. Reforms could have been described as half-baked and ill-thought-through. Occasionally, magistrates did indeed make such comments, but their rarity suggests a general perception that the reforms had been successful.

Second, even if the answers indicated an unduly Pollyanna-ish attitude on the part of the bench, this attitude itself is significant. The effectiveness of reforms will often depend on the degree to which they are embraced (perhaps romantically) by those charged with their implementation.[2] Enthusiasm will reduce the likelihood of attempts to subvert, and can stimulate the effort required of the reforms. It is significant that the universal response to the increased working hours required of the reforms was not disgruntled comparisons with the "good old days" when the courts rose for lunch (and morning tea on a good day), but pride that such slackness was a thing of the past, and pleasure in the stimulation which came from the new jurisdictions. If the reforms are working, a major reason lies in the morale of the magistracy.

Given that the reform process appears to have been successful, we may ask: "why?" This is not as cynical a question as might first appear. The history of criminal justice reform has more often than not been marred by spectacular failures, rather than

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[2] See, e.g. the Report on the Future role of Magistrates' Courts:

> The Committee recognizes that such changes will require those groups which regularly operate within the Court to accommodate and, to some extent, embrace, such changes. It is firmly of the belief that the commitment to necessary change and increased access will be wholeheartedly demonstrated by all those groups currently operating within the system. (Victoria, 1986: para 6.4)

No reasons are given for the optimism displayed in the last sentence, and while most of our magistrates proved to be supportive of most of the reforms, there was certainly not the whole-hearted support that the Committee seems to have naively (or judiciously?) taken for granted.

success.[3] The best of intentions frequently produce unfortunate outcomes (Hudson, 1987) and, even apparent successes have "unintended" negative consequences (Merton, 1982). Change in one part of the system all too frequently triggers a compensatory backlash in another part (Austin and Krisberg, 1981: 166). Sometimes such effects are coincidental or accidental, other times there is flagrant sabotage. The success of reforms cannot be taken for granted; indeed, if anything, it is so unusual as to call for comment.

Part of the explanation for the apparent success of the reforms lies in the receptivity of the current members of the bench to the changes. To some extent, this in turn can be accounted for by a process of "self-selection". Those magistrates who disliked or felt uncomfortable with the changes left the jurisdiction,[4] whereas those to whom the changes appealed stayed or were attracted to the job.

However, as our interview data amply testify, the members of the bench are far from "clones" of each other, self-selection notwithstanding. Their attitudes and values are marked more by their distinctiveness than by adherence to some core philosophy or ideology.[5] We need therefore to extend the analysis to try to account for the way in which a diverse group of individuals can be marshalled to serve a common objective. For our magistrates the "new" reformist objectives of "efficiency" and "accountability" are easily absorbed because they are understood within the "old" traditional value system of the courts - fairness, respect for the law and service to the community. There is no mis-match between legislative objectives and magisterial priorities - the organisational culture of the summary jurisdiction has proved itself to

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[3] See, e.g. the literature reviewed in Douglas (1989b). This article concluded, however, that a minor statutory reform (the increase in fine levels for traffic and public order offences) was successful in producing a limited change in sentencing behaviour on the part of Victorian Stipendiary Magistrates.

[4] "Ex-clerk" magistrates were entitled to generous superannuation packages on reaching the age of 55, their pensions reflecting the length of their careers as civil servants. Few of the magistrates we spoke to adverted to this question, but several mentioned computers as the last straw for some who had left, and some mentioned other changes to the jurisdiction which had probably prompted some of the older magistrates to resign early.

[5] Both authors found that on numerous occasions, just as magistrates were beginning to slip into nice neat ideological pigeon-holes, they would make comments completely at variance with those we would have expected of incumbents of the appropriate box.

be flexible and accommodating. What is the secret of its success?

2. BALANCING STABILITY WITH CHANGE

Paradoxically many of the reforms to the jurisdiction have had the effect of revitalising ancient legal precepts and philosophies. The contradictions of "legality" have in part been resolved by striking a delicate balance between "traditional" values and "modern" aspirations.

(i) Critical positivism

Part of the answer lies in what we will call a form of "critical positivism". Weber, that most turgid and stimulating of socio-legal theorists, is helpful here. Always sensitive to paradox, Weber sought to explain the flexibility of bureaucratic rule, and saw it as lying in the bureaucrat's commitment to the rule of law. This commitment, he considered, meant that the bureaucrat could serve differing regimes, executing law because it was law. The Anglo-Australian tradition is to make heroes of our judges rather than our bureaucrats, but the structural and perhaps even the psychodynamic, basis for commitment to law is likely to be similar, whether one is considering Weberian bureaucrats or Diceyan judges. So are its effects. New laws will be implemented because they are new laws.

There was a profound "love of the law" expressed by many of our magistrates. Respect for "the law", the importance of legal reasoning and juridical skill characterised the thinking of our interviewees. They were worthy descendants of the legal positivist tradition. At the same time, most were also "critical". The system could not solve all human problems, such as family violence or drug abuse. Nor could the system be made "perfect". There was no guarantee of "right" decisions. For at least two of our interviewees this acceptance of imperfection was one of the strengths of the system itself - you have to err on the side of the defendant when you're in doubt, even if it means the guilty escape punishment. By extension, the legislative reforms were clearly not going to be "perfect". They can and are often abused. For example, mention lists are still manipulated by lawyers to their own advantage and sometimes the law needs to be "bent" a little - to help women who are the victims of violence or in refusing to punish when this would do no-one any good. Our magistrates were sensitive to the limitations of the legal world while recognising that they had to do their job regardless. Positivism meant a commitment to

implementing law, but positivism by itself is no longer enough. The austere Weberian bureaucrat loyally obeying orders is no longer quite the figure of reverence he might once have been; the orders must derive legitimacy from more than their mere law-ness. However the other extreme: the demand that law be treated as worthy of obedience only insofar as it achieves perfection is a recipe for paralysis (to say nothing of discipline).

The critical positivism which characterises magistrates' reactions to their environment combines the traditional bureaucratic/judicial commitment of functionaries to the rule of law, with the moral resources which that commitment now needs as supplement if functionaries are to be able to sleep well at night. Critical positivism contributes to support for the reforms of the 1980s in three ways. Positivism lays the basis for willingness to implement reforms insofar as this is what the law requires. The critical element means that willingness to implement the reforms is heightened to the extent to which the reforms can be legitimated by supra-legal ideals. The fact that critical positivism is characterised by tolerance of imperfection also means that reforms can be treated as valuable and therefore worthy of implementation notwithstanding that they may well make things only a little better than what went before.

The importance of critical positivism as a determinant of the success of the reform process is also indicated by examining the least successful of the reforms. The arbitration system for example, which requires magistrates to step out of the traditional legal mould and, to some extent, abandon adversarial principles sits unhappily with even critical positivism. Its basic objective - making justice more accessible - commands general support, and magistrates are prepared to acknowledge that this was a legitimate justification for exploring the possibility of streamlined civil procedures. However, insofar as arbitration is seen as requiring that magistrates go beyond the law, it arouses unease. Rather than intervening actively in the arbitration process (as its proponents intended) they prefer to stand aloof, apprehensive lest intervention be mistaken for partisanship.[6] Alternative Dispute Resolution fits even less well with Critical Positivism, given its open-ended nature, and, with some

[6] This may reflect culture rather than positivism. In inquisitorial systems, it is part of the judicial role to intervene actively in the information-gathering process. However, legal cultural differences are also reflected in legal differences, and a judge who plays an active inquisitorial role in our adversarial system runs the risk of falling foul of the rules of natural justice - rules which the *Magistrates' Court Act* 1989 specifically requires the magistrate to follow in the conduct of an arbitration.

notable exceptions, magistrates prefer not to get involved with such procedures, and express anxiety about suggestions that they should. The same point could be made about the implementation of the *Crimes (Family Violence) Act* 1987. There is considerable unease at the leap of faith required by the legislation to abandon the traditional "natural justice" safeguards of a party in a quasi-criminal matter. Magistrates however varied in their response to these reforms depending on whether they were closer to the "critical" or "positivist" ends of the spectrum. Advocates of alternative dispute resolution might well be critical of what could be perceived as lack of magisterial imagination, but a more appropriate target for criticism might be a government whose policies are communicating two quite different messages: the desirability of professionalisation as evidenced by the requirement that decision-makers be chosen on the grounds of a particular type of expertise, and the desirability of a form of conflict resolution which requires a quite different set of skills, and which might best be achieved by the appointment of magistrates outside of the legal sub-culture.

(ii) Principled pragmatism

"Fairness" and "justice" underscored many of the values and opinions expressed by our interviewees. To some extent though they recognised that the summary jurisdiction was about pragmatism - "this is a volume jurisdiction" - which meant that "efficiency" was vital. The conflict between these ends was real and ever present in the court-room. Each magistrate however found their own way of reconciling the contradiction. For some, it meant "slowing down" or adjourning a case to ensure that all relevant facts were before the court. For others, it was achieved by direct intervention in court proceedings. Always, there was the ever present fear that one day the jurisdiction might be "swamped", so that the ideals of efficiency, fairness, or both were no longer able to be met.

Principled pragmatism sits uneasily with a passionate commitment to truth, but it sits rather more easily with a positivism which avoids looking too far behind "the facts". It fits well with our legal tradition which recognises that the open-ended search for truth must be contained by procedures, deadlines, and restrictive rules of evidence. It also sits easily with a qualified criticality which acknowledges the desirability of finding out what happened, along with the reality that the ideal can prove extremely elusive. The pragmatic dimension must almost invariably characterise adjudication in the lower courts. A magistrate who cannot compromise will simply not be able

to survive.

Principled pragmatism cannot, however, be taken for granted. It is maintained partly by professional socialisation, and partly through social pressures, and concern with how one is regarded by important others. Principled pragmatism can easily give way to pragmatism, especially if resource constraints were to become extremely tight, or morale to break down for any of a host of intangible reasons. Currently, pragmatism still appears to be principled, and contributes towards the legitimation of reforms which are both principled, and inspired by the need to use scarce resources efficiently in the pursuit of justice.

(iii) Collegial autonomy

The time-honoured principle of judicial independence was sometimes explicitly but often implicitly invoked by our interviewees.

> People don't realise the importance of having independence in human affairs, to have a buffer between the individual and the government of the day. It just goes to the very core of democracy. It's a buffer between the powerlessness of the individual and the power of the government.

The corollary of this though is a respect for the separation of powers doctrine - government is entitled to do what it will to the law and the courts. Of course, it should probably consult with magistrates on the technical details, including for example how best to implement computerisation, but it is neither expedient nor desirable to extensively seek the views of individual magistrates about matters of law reform.

For many of our magistrates there was a clear division of labour too between "chief" and "indians". It was the Chief Magistrate who represented the interests of the bench and, where necessary, engaged in dialogue with government on their behalf. To some extent this echoed the traditional authoritarian structure of the courts[7] and the magistrates' acceptance of this. In the courts however the "manager" is constrained

[7] The traditional workings of the courts were only occasionally hinted at. However, interviewees indicated that speaking out on certain issues might involve such sanctions as being posted to an undesirable court, or being called to the Chief Stipendiary Magistrate's office to explain one's alleged misbehaviour.

and must act consistently with the dictates of judicial autonomy. Each magistrate runs their courtroom free of intervention or rebuke.[8] In any case, the current Chief Magistrate of Victoria enjoys the respect and high esteem of her colleagues based on her proven capacity as a good judicial officer.

Among themselves, magistrates do not vie for favour or attention. There is no apparent competition because there are few rewards to be competed for.[9] Appointment is for (working) life and, as it currently stands, nothing is to be gained through politics. There is no need to compromise nor perform in a particular way.[10] There are several ways in which the flatness of the court hierarchy contributes to high levels of morale. Its most important effect is likely to be to encourage co-operation and openness. The lack of opportunities for promotion within the organisation eliminates the frustrations that can come from disappointed aspirations. Opportunities for promotion create hopes of promotion, and when thwarted, hopes of promotion can give rise to bitterness, and resentment both of the system and of those who are often seen as having been unfairly promoted. In the absence of such opportunities, disappointments are likely to be minimised. Moreover, in the absence of competition for advancement, there is nothing to be lost (and, indeed, something to be gained) by assisting one's peers. Peers can be treated as people who share one's position, rather than threats to the likelihood of one's attaining a better position. Flat hierarchies can be excellent for morale and are arguably among the reasons for the high morale of the Victorian magistracy.[11]

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[8] There is provision for discipline under the Magistrates' Court Act 1989, s 11. Chief Magistrates continue to have the power to require that magistrates perform such duties as they may assign; what matters is how this power is used and this will depend both on convention and on the constraints imposed by the fact that misuse of the power would face resistance from magistrates who would probably prove less compliant than the ex-clerks.

[9] Even such potential rewards as being appointed Chief, or Deputy Chief Magistrate are questionable rewards. The salary differential is not great, and the added duties such that many magistrates would be reluctant to assume the duties of the higher offices.

[10] Judicial autonomy and independence however come at a price. A number of our interviewees talked about the "loneliness" of the career decision-maker. Isolated from mainstream legal practice and, in some cases, the "normal" lifestyle enjoyed by lawyers, they depend on other members of the bench for support and assistance. As a number of our interviewees noted, the collegiality follows the old established traditions of that other isolated group of professionals - barristers.

[11] On the issues raised in this paragraph, see Runciman (1972: ch 1).

Autonomy is closely related to a second feature of the job: esteem. Magistrates have now been given relatively high salaries as an acknowledgment of their added responsibilities and importance in the justice system. Thinking of themselves as professional judicial officers militates against grumbling unduly about the problems on the "shop floor". The newly professionalised bench implicitly regards itself in the mould of "judges", who enjoy high status and esteem within the community. Reform of the summary jurisdiction therefore has had the effect of more closely integrating the lower courts with the upper echelons of the court hierarchy. There is a little unease at this turn of events. The court is a "people's court" and this important difference, according to some of our interviewees, should not be blurred. The effects of status and esteem are twofold. First, insofar as the reforms have contributed to this, they could be expected to be correspondingly acceptable. Indeed, one of the reasons why the increased workload has been so readily accepted seems to lie in the fact that it makes magistrates more like judges. Moreover, since magistrates compare themselves with other judges, aspects of their workload are more bearable. While facilities are, in many ways, deplorable, working hours are less gruelling, and while the Court deals with slightly less "glamorous" cases than the higher courts, magistrates also noted that in many ways their jurisdiction was a more stimulating one, by virtue both of its diversity and its human interest.

3. LEARNING FROM THE VICTORIAN EXPERIENCE OF REFORM

The main lesson of the reform of the Magistrates' Courts in Victoria is that "radical" sweeping reform of the justice system is possible. There are however a number of necessary pre-conditions for its success. The optimistic message is that many of these are within the control of the initiators of reform endeavours. The more pessimistic reading of the experience is that regrettably a reform package is made or broken on the strength of some factors which are unreplicable. In both cases however there is much to be gained from analysis of the impact of reform strategies in one jurisdiction.

The first important point to note about reform of the summary jurisdiction in Victoria is that it was not "piece-meal". The government of the day did not set about to "tinker" with "bits of the system" in the hope that this would somehow lead to dramatic improvement in the operation of the court. Over the last decade therefore organisational change, structural reform and legislative initiatives have combined to change the face of the summary jurisdiction.

The key to such reform is in recognising that it was the court system itself which was inadequate. The package of reforms did not spring from feeble attempts to "blame" individuals or "other" factors. The temptation to find fault with "lawyers", "increasing crime rates", "falling standards of education and sense of social responsibility", etc. were avoided. Justice was made responsible for its own workings.

Related to this was a concern with has been what Malcolm Feeley has called a "consumer perspective on the courts" (Feeley, 1983: 120). The Victorian reforms have been based upon a realistic assessment of the impact of court functioning on individuals and the community. Delays, prohibitive legal costs and inappropriate sentencing practices have been seen to have an effect on the individual. The impetus for reform has not been to make court practice consistent with abstract "ideology" but rather identifies "problems as perceived and actually experienced by those who daily use and work in the courts" (Feeley, 1983: 210). To some extent the reforms owe a great deal to the positive aspects of "managerialism". It is this philosophy which has in one sense depoliticised court reform by insisting that the courts, like any other service, must be accountable for the way in which it goes about its work.

Such a hard-nosed approach however must be tempered by some concession to the traditional precepts of justice and the importance of law and the courts to the community. The quest for "efficiency" and "accountability" cannot be allowed to overshadow time-honoured practices and procedures. The almost accidental solution to achieving this compromise was to ensure that the courts were left in the hands of individuals committed to the "old" standards but who were also not immune to the necessity for "reform". Through a process of natural attrition and active recruitment the Victorian bench is comprised of a group of quite diverse individuals who nevertheless share a core philosophy about the importance of balancing "the rule of law", with all that it implies, with "necessary reform". There is profound respect for the law among the bench but this is not so great as to blind them to its inevitable "imperfections". There is also significant enthusiasm and confidence in the possibility that the system can be "improved". It is this curious combination of values which we have come to describe as "critical positivism".

There is high morale amongst the bench. There is no "Foucaultian pessimism" about the impossibility of "progress" among the current bench. They are not yet cynical. There is a clear sense of their own personal power to shape court practice and have

an impact on the image of the courts in the community. To some extent this is a direct product of the professionalisation of the bench. Freeing the Magistrates' Courts from the ties to the Public Service has rekindled the spirit of "judicial independence". This has meant that there is much goodwill amongst the bench toward reform endeavours. The corollary of this is that the bench is prepared to put up with some inadequate working conditions and shortcomings in the reform package thusfar. There is confidence that things will "get better" and that the positive start will turn around the ailing performance and public image of the summary jurisdiction.

The dark cloud on the horizon of course is the question about how long this high morale can be sustained. There has been a massive increase in attention and resources being devoted to the jurisdiction. Will this continue? More importantly, will the momentum for reform of the justice system continue beyond achieving some fairly basic managerialist objectives of government? The challenge for the summary jurisdiction would now appear to be, as many of our magistrates recognised, sustaining the current gains without being swamped by managerialist imperatives: If the workload increases too much for example, delays will creep back. If the jurisdiction is further expanded it will no longer remain "a people's court" and will become isolated from the community it once sought to serve. There is a keen sense among magistrates of the precarious nature of the gains made to date. The concerns of magistrates should be heeded by government. Successful reform after all, as this study has demonstrated, relies on much more subtle and complex interactions than mere legislative mandate.

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APPENDIX 1

Changes to the Magistrates' Courts Act 1971.

Amend't	Major provisions
8942	Minor
8998	Minor
9008	Minor
9152	Increased civil jurisdiction.
9226	Increased qualifications for magistrates. LL B or professional qualification mandatory for all future magistrates except those who "on the appointed day" were (or would, but for their age, have been) qualified for elevation under the old regulations.
9349	Increased civil jurisdiction.
9410	Increased criminal jurisdiction by allowing longer sentences and by increased upper property values in property cases. Corrected typos in 9349.
9427	Minor
9509	Minor
9549	Minor
9554	Minor changes arising from Penalties and Sentences Act 1981.
9576	Minor terminological changes.
9633	Specified interest to be paid on judgement debts.
9639	Restricted publication of fact of action having been taken against debtors.
9694	Gave courts jurisdiction in indictable offences against whales.
9848	Minor
9902	Minor
9967	Minor
10077	Deprived JPs of criminal jurisdiction (except on bail applications). Increased civil jurisdiction).
10084	Minor
10101	Altered appointment procedures and removed magistrates from control under Public Service Act 1974.
10146	Conferred jurisdiction to hear offences under the Constitution Amendment Act 1958
10167	Minor
10233	Expanded courts' jurisdiction.
10249	Minor changes incidental to enforcement of Infringement Notices.
10250	Minor
10257	Minor changes arising out of Coroners Act 1985.
10260	Minor changes arising our of Penalties and Sentences Act 1985.
10262	Minor
16/1986	Changes to qualifications for magistrates; increased civil jurisdiction.
107/1986	Arbitration in civil disputes where stakes <$3000.
110/1986	Minor, arising out of Supreme Court Act 1986.
124/1986	Minor, arising out of Prostitution Regulations Act 1986.
127/1986	Minor, arising out of Road Safety Act 1986.

20/1988 Conferred jurisdiction in aggravated pollution cases.
52/1988 Conferred jurisdiction in indictable offences under Marine Act 1988.
25/1989 Amendments consequential on abolition of common Law offences of forgery and uttering.
48/1989 Conferred jurisdiction under Dangerous Goods Act 1985.
51/1989 Magistrates' Court Act 1989, replaced 1971 Act.
54/1989 Minor
89/1989 Minor

Penalties and Sentence Act 1981 increased range of penalties which Magistrates' Courts could impose. Successive amendments and the Penalties and Sentences Act 1985 altered the procedure for enforcement of fines (providing for enquiries into defendants' means and for further hearings re appropriate response in the event of default). Community Based Orders introduced to replace earlier orders such as Probation, Attendance Centre etc.

APPENDIX 2

Interview Protocol

The Victorian Magistracy in a decade of change.

Preamble

Thank you very much for agreeing to this interview. We are interested in exploring a number of issues, but our main concern is with how the magistracy perceives and has been affected by the reforms to the jurisdiction over the past ten years. We will be asking questions about a number of these changes and welcome your views about both changes to the substantive law and about organisational changes. We would also welcome your views about the job of being a magistrate. Your answers will of course be treated as strictly confidential.

1. Appointment issues

When were you appointed to the bench?

What kind of work did you do prior to being appointed?

What prompted/attracted you to being a magistrate?

How did the appointment affect your lifestyle?

> *What was the reaction of family and friends to your appointment?*
>
> *Are there things which you used to do which you no longer do, or new things which you do now since your appointment?*

Is there anything that surprised you about the job after you had started which you hadn't anticipated?

Comparing yourself in your early days as a magistrate to now, how do you think your approach has changed?

What would you regard as the ideal qualities of a magistrate? If you were the Attorney-

General, what would you be looking for in selecting people for the bench?
Are there any respects in which you consider that you would be helped by the provision of post-appointment training?

2. Magistrates' work

What types of postings have you had since your appointment?

City/suburban/rural? Coroner's, Children's Court?

What do you regard as the most stressful part of the job? What do you like least about the job?

How do you find sentencing as compared with fact-finding?
Which do you find easier to apply: the criminal or the civil standard of proof?

What do you understand to be required by the two standards?

If you had a choice, which type of assignment would you prefer: sitting in a number of small courts? Sitting regularly as a sole magistrate attached to a moderately busy court, or sitting at a multi-magistrate court? Are there particular specialist positions within the magistracy that you would like to perform?

What do you regard as the major attraction of [your choice]? Do you see any disadvantages of your choice?

Consider such matters as:

Opportunities to consult colleagues

Facilities

Handling of backlogs

Skills needed for different kinds of work

What effects do you think the closure of smaller courts has had on the administration of

justice?

Elimination of knowledge of distinctive features of particular suburbs and towns?

3. Workload and efficiency

Before we begin this set of questions, a card-sorting exercise. Here are eight cards listing the major reforms of the past decade. We would like you to look at these and tell us what you think of these changes.

Changed recruitment procedures

Elimination of JPs; professionalisation; appointment of women. Effect of these changes. How they have been received by other magistrates.

Computerisation

Mention system

Efficiency? Quality of summaries? Effect on police?

Expanded criminal jurisdiction

Harder cases? Sentencing in serious cases? Waiver of jurisdiction.

Sentencing reforms

Fine default, CBOs, Suspended sentences. Uses of these? Alternatives? Feedback on effectiveness of sentences.

Crimes (Family Violence) Act

Expanded civil jurisdiction

Attitudes to jurisdictional limit, equitable jurisdiction. Has it made decision-making harder, more stimulating? Effect on court workload.

Arbitration system

How it works? Litigants appearing in person. Costs cap.

4. Other court participants

What do you see lawyers playing in the process? How do they affect outcomes? Is there a "bad lawyer discount"? Has the greater complexity of Magistrates' Court work meant that lawyers have a potentially greater contribution to make to the trial process than might once have been the case? (Note this issue often covered in context of arbitration).

Quality and role of clerks? Possible career structures in view of ending of old career structure. (Note: issue often covered in context of discussion of recruitment).

Developments in use of interpreters over the decade. Feel happier with the quality of interpreting than hitherto? In what respects has quality of interpreting improved?

Interaction with other magistrates. Have you found that you interact more with other magistrates than was the case with more decentralised courts? Do you welcome this? (Note: this issue often tapped in context of preferred court environment).

5. Participation, feedback and accountability

What feedback do you get about your decision-making?

To what extent do you feel your views have been taken into account by those responsible for affecting the extent, nature and organisation of the courts' workload? How far do you think magistrates should be consulted about reforms to the jurisdiction?

6. Conclusion

What do you think are the three major challenges to the jurisdiction in the next ten years?

Where do you expect to be in ten years time?

Thank you for your co-operation. We will send you copies of our report. We will also be

happy to discuss the results of our research with you personally once it has been completed. We hope that some of the information we are able to obtain through this research will be of assistance both to you and to the jurisdiction.