



Recommendations Response
By The Australian Capital Territory Bar Association
to the ACT Auditor-General's Performance Audit Report
Courts Administration - September 2005

The ACT Auditor-General's office Performance Audit Report entitled Courts Administration contains recommendations falling into two broad categories – one dealing with issues of governance and accountability and the other with systems of case management. The heads of both jurisdictions have responded to many of the recommendations in a positive way. Their views are extracted in the Report. The Bar Association supports the views put by the Chief Justice and the Chief Magistrate .

However, the Bar Association would urge Government to act with care and with the greatest level of consultation with all relevant stakeholders before acting to legislate any of the recommendations of the Report. The Report of the Auditor-General will provide a useful starting point for informing a process of on going reform and performance improvement in ACT Courts. However, the Report should not be accepted without qualification. In some respects it is simply incorrect. In others it does not acknowledge that the problems are not those of the Court but of other stakeholders in the system.

Nor should Government lose sight of the fact that the efficient running of the Courts is inextricably linked to the capacity of stakeholder in the system to perform their role adequately. The Report for example does not systematically address the issues and challenges associated with the increasing number of self represented litigants appearing. The adequacy of the funding of the ACT Legal Aid Office is not addressed. There is no acknowledgment that the DPP appears to be significantly under resourced. The capacity of the AFP to deliver briefs of evidence of a high standard and in a timely fashion is not considered in the report. These issues have to be addressed as part of a complete response. For example whilst the suggestion of over listing in the criminal jurisdiction may appear attractive, the implementation of such a strategy would place considerable burdens on defendants, witnesses, victims of crime, the legal profession, the ACT Legal Aid office, the DPP and the AFP. The interest that other stakeholders including the legal

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profession have in making the Courts work efficiently must be recognized when decisions about how the ACT Courts operate are made..

Recommendation 1

JACS should work with the judiciary with a view to:

- a) establishing a more collaborative relationship between the judiciary and the Department;
- b) putting in place regular forums for communication between the judiciary, the Department and the executive arm of the Government; and
- c) establishing a governance model for the courts that provides greater administrative independence and hence better alignment of courts' responsibility with public accountability.

Australian Capital Territory Bar Association - Response to Recommendations 1& 2

The Bar Association strongly supports the implementation of the South Australian model of an independent courts administration body. Such a body should operate under its own legislation and be responsible for its own budget. The enactment creating such a body would impose a requirement for the delivery of annual reports either to the Legislative Assembly or the Attorney-General. In the meantime the problem of accountability and the tensions between administrative efficiency and judicial independence should be addressed by adopting a model closer to that used in Commonwealth courts (see paragraph 2.18 of the Audit Report).

Recommendation 2

JACS should invite the heads of jurisdictions to contribute comprehensive annual reports for incorporation in the overall JACS Annual Report. Alternatively, heads of jurisdictions should provide their annual report directly to the Attorney-General or the ACT Legislative Assembly.

Australian Capital Territory Bar Association - Response to Recommendations 1& 2

The Bar Association repeats the response to recommendation 1

Recommendation 3

The LC&T Unit should develop a risk management plan to assist in identification and amelioration of significant risks.

Australian Capital Territory Bar Association - Response to Recommendation 3

Time and effort should be focused upon practical problems and practical outcomes. The complex administrative structures and approaches appropriate for large bureaucracies are not desirable for what should be a relatively small and tightly run administrative body. The need for a properly calculated financial basis for a courts administration budget is undeniable, as is the need for that budget to be administered in a responsible and efficient manner. The Bar Association is of the firm view that these objectives would be best made by the creation of an independent courts administration body rather than attempting to patch up the current structure.

Recommendation 4

The LC&T Unit should, for recent and future audit and evaluation reports, establish implementation plans that address each agreed recommendation, and monitor and report on the progress against these plans.

Australian Capital Territory Bar Association - Response to Recommendation 4

The sad history of unimplemented review recommendations highlights the failures of the structure of court governance and administration over the past 15 years. The Bar Association is concerned that the current recommendation will not achieve any significant change from what has occurred in the past.

Recommendation 5

The LC&T Unit should analyse better practices from other jurisdictions, and consult with relevant government departments with a view to advising government and the judiciary on ways to reduce costs, with particular attention to the Children's Court.

Australian Capital Territory Bar Association - Response to Recommendation 5

As the Report notes statistical analysis of court performance is at best a rough measure when comparisons are being made with figures in other jurisdictions. Clearly much greater work needs to be done to standardise the basis on which statistics are kept so that the ACT outcomes can be validly compared with those from the States and the Northern Territory.

It is difficult to understand why the ACT Children's Court figures appear so anomalous. If these figures are valid then it does appear that there is a need for greater efficiency. However, the quality of justice should remain the first priority in the consideration of any significant procedural changes.

Recommendation 6

The LC&T Unit should review the effectiveness of compliance and other mechanisms to encourage efficiency in caseflow management, and advise the government and the judiciary on options.

Australian Capital Territory Bar Association - Response to Recommendation 6

The issue of case flow management is very complex. The reality is that quite different considerations apply to different types of cases. Thus the close control which might be taken over the progression of a criminal matter in the Magistrates Court would not be possible in relation to a personal injury case where the plaintiff's relevant medical condition had not stabilised. The suggestion of a case flow management committee (at paragraph 4.9) is a potentially useful one. The Bar Association proposes that this function should be specifically conferred on the rule-making committee established under section 9 of the Court Procedures Act 2004 and the advisory committee established under section 11 of that Act. In due course, if an independent courts administration body is created the funding of a small section dedicated to developing and maintaining best practice in case flow management would be a valuable initiative. In the context of these comments (and those under Recommendation 4 above) the Bar Association has some reservations as to the utility of the recommendation in its current form. In particular, the Association wishes to make the following comments in relation to problems in the criminal jurisdiction.

(a) Supreme Court

In respect of the listing in the Supreme Court it is worth noting that of the trials that did proceed during 2004 and 2005 only a tiny number resulted in convictions in respect of the most serious matter on the indictment. Of the matters that were resolved by way of a plea of guilty to a charge a significant proportion of those matters involved pleas to other than all counts of the indictment. These outcomes suggest that cases may not be sufficiently analysed beforehand by the DPP due to lack of resources and consequent lack of time and experienced staff. It also suggests that discussion between the defence and the DPP is not happening at an early enough stage. This may reflect the late involvement of counsel in trial preparation.

(b) Magistrates Court

In respect of the time taken to process both charge and summons matters through the Magistrates Court the time runs (for measuring purposes) when the AFP creates the charge or summons "on line". In practice this means that in respect of summons matters time runs from a date almost two months before the matter is first mentioned in Court (the return date). Where a person is bailed it may be some days or weeks before the person is required to appear at Court. The very adverse outcome this process produces in respect of average time taken to process cases could be readily reversed by increasing the number of matters that are allocated to an "A" list on any given day. This might involve adjournments being handled by a Registrar as is the case in other jurisdictions. If adopted this process will see cases dealt with much more expeditiously.

Further there is scope within the Case Management Hearing Process to collapse the time taken for the defence to consider the brief that has been served on them. However, and the reservation is critical, the brief that is served must be complete. One survey that has been conducted suggests that nearly 70% of briefs that are delivered to the DPP (and then to the defence) are incomplete or deficient in a material respect. The absent material may include such things as complex as forensic evidence or something as simple as a witness statement. The Case Management Process can only have an impact on efficiency when the product being delivered to the DPP and the AFP is of a high standard. At the moment it is not.

In respect of the overall number of matters the Report does not appear to note that the overall number of charges before the Court declined by about 20% in the latest reporting period (2004-2005). This will clearly impact significantly on times taken to dispose of charges. Further in respect of common offence categories there is clearly a case for more care to be taken when deciding to prefer particular charges. In the Magistrates Court and Children's Court in the last reporting period (2004-2005) only 65% of theft charges resulted in findings of guilt. For other offences the equivalent outcomes were burglary (57%); unlawful possession (49%), receiving (44%) and assault (48%) (Source DPP Annual Report 2005). These outcomes appear to be way below targets set in the AFP Purchase Agreement and thus of concern to the community at large and obviously contribute significantly to Court delays. The number of charges and hearings would be significantly reduced if sufficient resources were provided to ensure decision making in respect of initial charging was significantly improved.

Finally, the Sentencing Reform Package recently passed by the Assembly will have a significant impact on the processing of matters through the Court and the ways outcomes are recorded. This is not acknowledged in the Report. For example, breach action in respect of Periodic Detention Orders will now be dealt with by the Sentence Administration Board. Cases dealt with by way of Griffith Remands (where persons are placed on bail for lengthy periods to test their capacity to submit to therapeutic regimes imposed by the Court) will now be given the status of a sentence order. Statistically (because these will be recorded as completed matters) this will have a significant impact.

Recommendation 7

The LC&T Unit should ensure that there are procedures in both Courts for:

- a) collecting relevant statistics on long-wait cases; and
- b) analysing the information and informing the judiciary.

Australian Capital Territory Bar Association - Response to Recommendation 7

The Association agrees generally with this recommendation. Presumably this process could make use of computerised databases which could be expected as part of a modern court administration system. The reality is that the current state of ICT facilities is very poor. Various projects for updating these facilities have come to nothing. This is presumably a budgeting problem.

Recommendation 8

The LC&T Unit should:

- a) record and analyse the cause and extent of all short-notice adjournments or cancellations to hearings;
- b) report this analysis and assist in developing strategies to improve utilization of the Courts' resources; and
- c) consider, in particular, greater overlisting to compensate for the current pattern of case cancellations.

Australian Capital Territory Bar Association - Response to Recommendation 8

The Association accepts that there is a need for the objective recording and analysis of short-notice adjournments and cancellations. However, considerable care needs to be taken with the over listing of cases. As noted above quite different considerations apply to the various types of cases which tend to be listed together. Certainly in civil cases having realistic prospects of settlement over listing can in fact have the opposite effect from that intended. That is, over listing can result in more cases running and fewer settling just because of the logistical problems of coping with too many cases at once. Once parties realise that because of the size of the list there is little prospect of their particular case coming on for hearing the pressure generated by the imminent commencement of the case

dissipates and the prospects of achieving a settlement reduce.

The proposal to over list must also be approached with considerable caution in respect of criminal matters. Whilst the proposal (like running or rolling lists) has a superficial attraction the capacity of the DPP, the Legal Aid Office and the AFP to deal with such a process is limited. Whilst it is a fact that cases do not proceed on the day many of course do. It is simply not consistent with the dictates of justice that on a day when a significant number of matters do proceed for cases to be sent to another court for another prosecutor to prosecute on the run without having read the brief. If the courts on any given day cannot cope with the overlisted matters they will have to be adjourned to another day. This is done at the expense of witnesses (many of whom are children or victims of domestic violence) who have had to come to court to be told that they must come another day. Defendants will have to bear the costs of their legal representation for the day on which their matter is not reached. Prosecutors will have to prepare cases again. AFP informants will have to be rostered "off the road" on another day. The Legal Aid Commission will be forced to fund the briefing of more matters that may otherwise have been done by in-house lawyers.

Whilst improved efficiencies are achieved at Court it may come at an expense of the quality of justice and at the direct costs to members of the public and other stakeholders.

In any event, the Association suggests that issues about listing are appropriate for the rule-making and advisory committees to consider and determine. It would not be appropriate for decisions about listing to be made within the Department.

Recommendation 9

The LC&T Unit should support the judiciary by facilitating the formal evaluation of the effectiveness of significant initiatives such as the Case Management Hearing in the Magistrates Court and the Pre-Arraignment Conference in the Supreme Court.

Australian Capital Territory Bar Association - Response to Recommendation 9

Agreed, subject to the comments in relation to Recommendation 8 above and the following.

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When introduced the CMH system significantly reduced the number of cases going to a contested hearing. In the early years of the process 60% of the cases (DPP Annual Reports) were resolved without the need for a full hearing. The present effectiveness of the system is difficult to evaluate because (as a cost cutting measure) statistics measuring CMH outcome have not been gathered. Pre-Arraignment Conferences have never been analysed for their effectiveness.

Change to case management processes in both Courts must be based on evidence. Whilst the recommendation has the support of the Bar Association it is recognised that there must be a financial provision made for the gathering of this information. Without such provision it is difficult for either Court to track the effectiveness of case management processes.

Recommendation 10

Given the effectiveness of conferencing, the LC&T unit should:

- a) monitor conferencing processes and outcomes in order to further enhance efficiency and court user satisfaction; and
- b) consider implementing measures such as improved guidance material and identification of training needs for conferencing staff.

Australian Capital Territory Bar Association - Response to Recommendation 10

Agreed.

Recommendation 11

The LC&T Unit should work with the Magistrates to formally analyse and advise on approaches to improving case flow management. These approaches might include, but not be limited to:

- a) modified running lists;
- b) managing timeliness of cases by exception; and

c) use of more efficient procedures for routine court appearances.

Australian Capital Territory Bar Association - Response to Recommendation 11

The Association refers to and repeats its comments under Recommendation 8 above. In addition, it is a matter of concern that in the Magistrates Court – in criminal and coronial matters in particular – there are delays (often amounting to years) for decisions handed down. It is essential that these exceptional cases are identified and something done to expedite the resolution of the matter. That process needs to be transparent.

Recommendation 12

The LC&T Unit should consider measures to improve services to court users, such as:

- a) identifying needs of different court user groups (including users such as unrepresented litigants);
- b) publishing combined court user service standards for all court services; and
- c) ensuring that court user service standards are met.

Australian Capital Territory Bar Association - Response to Recommendation 12

Agreed in general. It seems likely that the establishment of a clear service charter and statutory complaints procedure in relation to administrative matters as part of legislation setting up a courts administration body is likely to be far more effective than ad hoc measures taken by individual courts.

In this regard thought may be given to widening the Judicial Commission Act to address unsatisfactory judicial conduct that is not so serious that it warrants removal. The Bar Association believes that in the main the ACT is well served by a conscientious and hard working Judiciary but from time to time complaints are received which if made out may warrant some censure. At present there is no formal way of dealing with this.

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Recommendation 13

The LC&T Unit should improve the usefulness of court user satisfaction surveys by:

- a) addressing the surveys to a more diverse sample of court users;
- b) publishing the results in the Annual Report and on their web site; and
- c) implementing appropriate action to address issues identified in the survey.

Australian Capital Territory Bar Association - Response to Recommendation 13

Agreed, although see comments in relation to Recommendation 12 above.

Recommendation 14

The LC&T Unit should formalise processes for dealing with administrative complaints so that they are actioned, and feedback is given to complainants. This process could also include the identification of frivolous complaints, and where no further action is to be taken, this should be recorded.

Australian Capital Territory Bar Association - Response to Recommendation 14

Agreed, although see comments in relation to Recommendation 12 above.

Recommendation 15

The LC&T Unit should work to improve communication and liaison with stakeholders, including regularly running meetings and forums where these have been identified as desirable.

Australian Capital Territory Bar Association - Response to Recommendation 15

The rules advisory committee is the appropriate forum for this process. Although it has been almost totally focussed on the harmonisation process once the new Rules are in place this committee should be used to consider options and make recommendations to the rule-

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making committee for improved listing procedures. Consideration should be given to widening the statutory functions of these bodies for this purpose.

Recommendation 16

JACS should establish the LC&T Unit as a separate Output Class to provide more visibility of its budget and performance against it.

Australian Capital Territory Bar Association - Response to Recommendations 16, 17, and 18

The association has for some years been concerned by the insufficient number of jury courts, the insufficient number of witness and conference rooms in, and the generally rundown condition of, the Supreme Court building. It must also be said that the quality of the holdings in the Supreme Court library has steadily declined over the years. The provision of a good basic library for the profession and members of the public is an important and sometimes underrated adjunct to the administration of justice. Presumably all of these problems are the result of budgeting shortfalls. They provide "coalface" examples of the budget planning problems discussed in the report. It is essential that these issues be considered as part of any consideration of "appropriate base funding". The Bar Association strongly supports the proposition that any budgetary consideration take into account the out of date and, in some areas, non-existent Information and Communication Technology available to the courts and their registries.

Recommendation 17

For the 2006-07 Budget cycle, JACS, in conjunction with the Courts, should conduct a fundamental review of the cost basis for Court services to support a decision for appropriate base funding.

Australian Capital Territory Bar Association - Response to Recommendations 16, 17 and 18

See response to 16

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Recommendation 18

The LC&T Unit should continue to seek efficiencies, either through suggestions in this report or elsewhere, in order to achieve budget targets.

Australian Capital Territory Bar Association - Response to Recommendations 16, 17 and

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See response to 16

Recommendation 19

The LC&T Unit should put in place sound project management practices to deliver the case management system redevelopment with minimum risk.

Australian Capital Territory Bar Association - Response to Recommendation 19

Agreed, although see comments in relation to Recommendations 16-18 above.

Recommendation 20

The LC&T Unit should establish an Information and Communication Technology (ICT) advisory group comprising administrative and judicial officers to propose and sponsor projects for the better use of ICT in the Courts.

Australian Capital Territory Bar Association - Response to Recommendation 20

Agreed. As noted above, this should be a budget priority. In the longer term this function should be carried out by an independent courts administration body.

Recommendation 21

The LC&T Unit should:

- a) consult the judiciary and then advise Government on ways to simplify forms and reduce their number;

- b) establish consistent procedures for use by staff in the Magistrates Court registry; and
- c) prepare improved manuals and procedures to assist Magistrates.

Australian Capital Territory Bar Association - Response to Recommendation 21

Agreed, in so far as this does not duplicate the work being done to develop harmonised court rules. After these rules come into force it should be the function of the rule-making committee and the advisory committee to monitor and simplify those forms specified under the rules.

Recommendation 22

The LC&T Unit should:

- a) better integrate Magistrates Court counter services with the rest of the registry;
- b) in the review of registry functions, seek both to achieve fewer and better trained teams and to encourage multi-tasking within teams; and
- c) consider the merits of combining the Supreme and Magistrates Courts registries.

Australian Capital Territory Bar Association - Response to Recommendations 22, 23 and 24

Agreed, as short-term measures. Again, these issues should be eventually addressed in the context of an independent authority.

Recommendation 23

The LC&T Unit should seek to improve HR management practices and provide as much certainty as possible to staff by:

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- a) not recruiting at all if the position is not justified;
- b) recruiting permanently where the need has been established;
- c) recruiting for the period to the predicted completion of the Magistrates Courts renewal project if the future of the position is subject to this review; and
- d) where a temporary vacancy has been created, and requires filling, the position should be filled for the duration of the vacancy rather than for a portion of it.

Australian Capital Territory Bar Association - Response to Recommendations 22, 23 and

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See the response to 22.

Recommendation 24

The LC&T Unit should implement measures to address staff concerns raised, including performance management and staff training and development.

Australian Capital Territory Bar Association - Response to Recommendations 22, 23 and

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See the response to 22.