STANDING COMMITTEE ON PUBLIC ACCOUNTS

Review of Auditor-General's Report No 4 of 2005: *Courts Administration*

JULY 2008

Report 15

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Resolution of Appointment

The Legislative Assembly appointed the Standing Committee on Public Accounts on 7 December 2004 to:

(i) examine:

(A) the accounts of the receipts and expenditure of the Australian Capital Territory and its authorities; and

(B) all reports of the Auditor-General which have been presented to the Assembly;

(ii) report to the Assembly any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed;

(iii) inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question; and

(iv) examine matters relating to economic and business development, small business, tourism, market and regulatory reform, public sector management, taxation and revenue and sustainability.

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RECOMMENDATIONS

RECOMMENDATION 1

4.16 The Committee recommends that the annual report(s) of the ACT Law Courts and Tribunals be sent directly to the Attorney-General and published separately from the annual report of the Department of Justice and Community Safety.

RECOMMENDATION 2

4.22 The Committee recommends that JACS report to the Legislative Assembly providing details on the specific steps taken to ensure that risk management practices are being included in all business and project planning within the Law Courts and Tribunals Unit.

RECOMMENDATION 3

4.26 The Committee recommends that JACS continues to include in its annual reports a summary of the progress made in implementing the recommendations of Auditor-General Reports in that financial year.

RECOMMENDATION 4

6.18 The Committee recommends that the ACT Government approve an expanded duty solicitor scheme.

RECOMMENDATION 5

6.19 The Committee recommends greater use of pre-trial conferencing and mediation in civil matters be encouraged in the ACT.

RECOMMENDATION 6

6.27 The Committee recommends that, as a matter of urgency, the ACT Courts' information technology be upgraded, including effective links to other relevant agencies.

RECOMMENDATION 7

7.12 The Committee recommends that an independent comprehensive cost analysis for Court services be conducted to establish an appropriate level of base funding for the Courts.

RECOMMENDATION 8

8.27 The Committee recommends that the Auditor-General provide a follow-up report to the Legislative Assembly in April 2009 examining efforts to address problems in the ACT Courts Administration.

RECOMMENDATION 9

8.30 The Committee recommends that the ACT Government commission an independent report on the appropriateness of applying the South Australian model of courts administration in the ACT, including a comprehensive examination of the associated costs and benefits.

RECOMMENDATION 10

8.33 The Committee recommends that the Law Courts and Tribunals Unit prepare its own draft budget for submission to the Attorney-General and that a copy of its budget proposal be provided to the Standing Committee on Legal Affairs of the Legislative Assembly for comment at the same time as it is provided to the Attorney-General.

1 INTRODUCTION

Referral of the inquiry and terms of reference

1.1 On 21 September 2005 Auditor-General's Report No 4 of 2005: *Courts Administration* was tabled in the Legislative Assembly and consequently referred to the Committee for inquiry.

1.2 The Committee's terms of reference were to examine the Auditor-General's Report and report to the ACT Legislative Assembly.

1.3 Like the Auditor-General's Report the Committee makes no comment on the performance of the judiciary.

Conduct of the inquiry

1.4 The Committee was briefed by the Auditor-General on 8 February 2006. The Committee sought views from a range of people and organisations with an interest in courts administration.

Advertisement

1.5 The Committee advertised on 26 and 29 November and 1 December 2005 calling for submissions.

Submissions

1.6 The Committee received 10 submissions. The individuals and organisations that lodged submissions are listed at **Appendix A**.

Public Hearings

1.7 The Committee held public hearings on 1 and 22 March, 4 April, 16 and 17 May, and 29 August 2006, 21 March and 7 November 2007, and 12 March 2008. Witnesses who appeared before the Committee at public hearings are listed at **Appendix B**. The full transcript of public hearings is available on the

Assembly website at:
<http://www.hansard.act.gov.au/hansard/2005/comms/default.htm#public>

1.8 The Committee met on 23 and 24 July 2008 to discuss the Chair's draft report, which was adopted on 30 July 2008.

Acknowledgements

1.9 The Committee thanks all those who contributed to the inquiry by making submissions, providing additional information or appearing before it to give evidence.

2 BACKGROUND

2.1 This report falls into two parts. In the first part, the Committee looks at courts administration generally and considers issues with regard to the measurement of performance as applied to the courts. In the second part, the Committee reports on its review of the findings and recommendations of the Auditor-General's Report on Courts Administration[1], the response of the ACT Government to those findings and recommendations and the extent to which they have been acted upon. Finally, the Committee considers an alternative model of courts administration.

2.2 Before proceeding to examine the issues raised by the Auditor-General's Report in detail it is necessary to set down a description of the context in which this report should be examined, both at the level of the place of the courts in our constitutional structure and at the day-to-day level of the structure of the Courts in the ACT, their jurisdictions and their relationship to the other participants in the judicial process, which have a considerable influence on the practice and perceived efficiency of the courts themselves. The work of the courts cannot be reduced to bare statistical measures.

2.3 The independence of the judiciary from outside influence, particularly by the executive government, is one of the keystones of our constitutional democracy. An independent judiciary presupposes that appointments to the courts should be free of political influence and that the courts should be able to determine their procedures, hear cases and reach decisions free of political or other interference.

2.4 Threats to judicial independence are usually seen to come from political interference in the appointment of judges or in the actual conduct and outcomes of trials, legislative efforts to "tie the hands" of judges through practices such as mandatory sentencing, or media driven "campaigns" in relation to particular offenders or types of offence.

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[1] *Courts Administration*, Report No.4/September 2005, ACT Auditor-General's Office. Hereafter this Report is simply referred to as the Auditor-General's Report.

2.5 Public commentary on the judiciary tends to focus on the discharge of the judicial function. In recent years, for example, there has been much public debate on whether judges should be activists - applying legal principles and interpreting legislation in constructive ways; making “new” law in the eyes of their critics - or whether they should be restricted to the narrow and literalist application of the law. Issues with regard to severity, or otherwise, of sentencing excite both politicians and the media.

2.6 In contrast the administration of the courts has, until recent years, not been a subject to grab the attention much beyond a narrow group of those directly affected - judges, magistrates, court officials, the legal profession and those who come before the courts. The critical issue in considering this is the system of courts administration adopted by a jurisdiction can compromise judicial independence, most obviously where the control of the resources available to the courts rests with the Executive Government.

2.7 Consideration of courts administration brings together three fundamental principles of our constitutional system - judicial independence, accountability for the discharge of a public office and responsibility for the expenditure of public monies - and, as such, deserves very close attention. The subject raises complex issues of principle and practice.

2.8 The funds which provide the courts system come from public revenue. The Executive Government is responsible both for the raising of this revenue through taxation and for accounting to the legislature for its Expenditure. Thus courts administration cannot be totally independent of the executive. Neither can courts administration be isolated from public scrutiny. To demonstrate that public funds are being expended efficiently those directly responsible for expenditure, in this case the courts, must also be accountable for their performance.

2.9 The potential for conflict between the various principles involved can easily be seen. An Executive system of budgetary control and/or accountability which is too intrusive runs the risk of compromising judicial independence. Equally a system of courts administration that is not accountable or avoids scrutiny of purely administrative functions by invoking judicial independence is not acceptable. Thus an administrative structure which seeks to balance these competing demands and protects the competing interests engaged must be created.

Structure of the ACT Courts

2.10 The ACT has two levels of court: The Supreme Court (which also sits as the Court of Appeal) and the Magistrates Court. Magistrates also make up the Coroner's Court and the Childrens Court. The ACT does not have a District or County Court.

2.11 Administrative, policy and operational support for the courts in provided by the Law Courts and Tribunals Unit (LC & T), a business unit with the Department of Justice and Community Safety (JACS). LC & T provides registry and case management services to the courts and manages contracts for the provision of court reporting, transcription and physical security services. LC & T is subject to JACS policy, it staff are JACS staff and its budget is coordinated through JACS.

2.12 The Courts Administrator heads the LC & T and is a member of the JACS executive. Registrars, who exercise a judicial or quasi-judicial function, are also JACS staff.

2.13 It is clear from this description that the structure of courts administration in the ACT has the potential to embody the sorts of conflicts between the principles discussed above. This report looks at ways these conflicts are reflected in practice and how they could be addressed.

3 MEASURING PERFORMANCE

3.1 The Law Courts are publicly funded institutions, central to our constitutional and social structures. Whether their role is described in the contemporary language of consumerism and service provision or in more complex terms, the public, as citizen, taxpayer and user of the courts has a legitimate expectation that the courts will discharge their functions, including managing their resources, efficiently.

3.2 In recent years, there has been a growing emphasis on fostering greater efficiency and effectiveness of public services, broadly defined, by getting better value for money:

> Traditionally, much of the effort to improve the effectiveness of government services has focused on increasing the levels of resources devoted to them. This approach overlooks another important means of enhancing services – finding better and more cost effective ways to use existing resources.[2]

3.3 This is a worthy and uncontroversial aspiration. However, debate arises as soon as one sets out to measure cost effectiveness and enhanced services, particularly in an area as sensitive as the courts. How can the performance of the courts, as administrative units, be measured? What does that measurement tell us about the effectiveness with which courts discharge their primary function, which is the administration of justice? Equally importantly, can this be done without compromising the fundamental principle of judicial independence?

3.4 Public management requires comprehensive planning detailed in a Strategic Plan, supported by a Business Plan, which prescribes the process of annual implementation, and at the next level are Key Performance Indicators

[2] Productivity Commission, *Report on Government Services 2007* (Canberra, Commonwealth of Australia, 2007) [1.3].

(KPIs).[3] The purpose of performance measurement is to enable agencies to provide governments with indicators of their performance over time, to encourage ongoing performance improvement, to inform the wider community of performance, and thus to make public administration more transparent.[4]

3.5 The objective of *comparative* reporting is to identify good performance, identify peer agencies that are delivering better services, and generate incentives for addressing substandard performance.[5] "Finally, the process must be capable of independent evaluation, both within the unit of public administration and by investigatory and regulatory bodies, such as finance departments, auditors-general, and parliamentary committees".[6] Public management has led administrations worldwide to try to measure and assess court performance.

3.6 In seeking to measure the administrative performance of the ACT courts and make comparisons with other jurisdictions, the Auditor-General relied heavily on the statistics collected by the Productivity Commission and published in its annual *Review of Government Service (*ROGS*).* The performance indicators which the Commission uses to measure service provision are developed by a steering committee comprising representatives from all jurisdictions.

3.7 In considering the ROGS Reports and the use that the Auditor-General has made of them, it is important to give due weight to the reservations and qualifications that the Productivity Commission itself expresses with regard to the statistics it collects and the comparative use that can be made of them.

> Differences across states and territories in the jurisdiction of courts, and in the allocation of cases between courts, affect the comparability of equity, efficiency and effectiveness data. The different methods undertaken to collect the data can also have an impact on data

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[3] Spigelman CJ. 'It's a numbers game but not everything that counts can be counted', in "The Public Sector Informant", published in *The Canberra Times*, October 2006, p. 23.

[4] *Report on Government Services 2007*, [1.4].

[5] *Report on Government Services 2007*, [1.4].

[6] Spigelman CJ. 'It's a numbers game but not everything that counts can be counted', op cit, p. 23.

consistency and quality.[7]

3.8 The ROGS defines the role of courts administration as to:

- Manage court facilities and staff, including buildings, security and ancillary services such as registries, libraries and transcription services;
- Provide case management services, including client information, scheduling and case flow management;
- Enforce court orders through the sheriff's department or similar mechanism.[8]

3.9 All of these services are to be provided in an efficient manner. The agreed objectives for courts administration are:

- To be open and accessible;
- To process matters in an expeditious and timely manner;
- To provide due process and equal protection before the law;
- To be independent yet publicly accountable for performance.[9]

3.10 The Committee notes the Law Society's observation that: "[U]ltimately any public organisation has to be accountable for the way it spends its money. Ultimately, all public organisations need to move to a position where they are responsible for those results".[10] The provision of open and accessible performance measurements demonstrates commitment by the courts to public accountability for their performance.

Is Performance Measurement appropriate to the courts?

3.11 The general questions of the application of performance measures to the

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[7] Productivity Commission, *Report on Government Services*, 2005, 6.47.

[8] Productivity Commission, *Report on Government Services*, 2008, p.7.1-7.2.

[9] Ibid. p.7.20. The actual findings of the Auditor-General with regard to these indicators are discussed in subsequent chapters.

[10] Public Accounts Committee, Auditor-General's Report No 4 of 2005, *Courts Administration*, *Transcript of evidence*, 4 April 2006, p. 54. Hereafter referred to as *Transcript of Evidence.* These transcripts are available through the Legislative Assembly's web site.

courts and the usefulness of comparative statistics to make judgements with regard to the efficiency of the courts provoked considerable debate before the Committee. This reflected the continuing concern of many participants in, and observers of, our legal system with regard to attempts to measure the efficiency of our courts and the potential implications of that process for judicial independence and the quality of justice delivered by the courts.

3.12 There is not even unanimous agreement on whether the courts are a "service" in the sense in which that term is used by government. The services government delivers are concerned with providing public goods - "those where one person's consumption does not reduce consumption by others, and where it is not possible to exclude individuals from access".[11]

3.13 According to the Australian Government, a legal framework that encompasses the work of courts is a public good.[12] It is, however, questionable whether the quality of provision of that public good can be reduced to statistical measurement.

3.14 Perhaps the most trenchant comment on this has come from New South Wales Chief Justice Spigelman, who along with a number of other key participants, does not accept that public service consumerism is applicable to the court:

> This court does not provide a service to litigants as consumers. The Court administers justice in accordance with the law. This is a core function of government. [13]

3.15 The substance of this view is that the quality of justice is not a function of the time taken to complete a case, the average cost per case nor of trends in backlog indicators. In the culture of attempting to reduce every activity to a set of statistics which can be measured and compared[14] there is a tendency to

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[11] *Report on Government Services 2007*, [1.2].

[12] *Report on Government Services 2007*, [1.2].

[13] Spigelman CJ, Address on the occasion of the 175th Anniversary of the Supreme Court of New South Wales, May 1999, as cited in Submission No. 8, April 2006, p. 3.

[14] "I will revive a word that has fallen into disuse: pantometry, which means universal measurement – the belief that everything can be counted": Spigelman CJ. 'It's a numbers game but not everything that counts can be counted', in "The Public Sector Informant", published in *The Canberra Times*, October 2006, p. 22.

overlook the quality aspects of courts' performance, such as "how well the cases were conducted and with what impact on subsequent behaviour, not just how many were dealt with".[15]

3.16 Further, the reliance on such measures can create perverse incentives in the delivery of the service or discharge of the role, which militates against the achievement of the desired outcome. For example, in the case of the courts, reliance on a simple measure of throughput of cases or a drive to reduce backlogs would privilege the speed with which cases could be finalised over the delivery of just outcomes, which is what the courts are actually seeking to do.

3.17 A number of participants and academics have made reference to the implications for the administration of justice born of a managerial approach to the courts:

> [T]his has allowed the executive branch version of modernisation to take root within the judicial branch rather than allowing a different one to develop; one that better reflects the distinctive circumstances and conditions of the courts and which, above all, would better respect their constitutional independence. [16]

3.18 Justice David Ipp identifies some possible consequences of a strictly managerial approach:

- Judges may become more concerned with statistics than with the quality of their decisions;
- Competition and peer pressure may tempt judges to rush litigants;
- Time standards may pressure them to seek less formal procedures.[17]

3.19 To those concerns should be added the impact on public confidence in the courts when constant criticism is directed at them for failing to reach certain statistically-driven, but not necessarily appropriate, standards.

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[15] John W Raine, 'Modernising courts or courting modernisation?' (2000) 13(5) *The International Journal of Public Sector Management* p. 390.

[16] John W Raine, p. 390.

[17] D A Ipp J, 'Reforms of the Adversarial Process- part 1' (1995) 69 *ALJ* 705 at 719, as cited Submission No. 8, April 2006, p. 7-8.

3.20 Magistrates have expressed concern that selective quoting of statistics out of the Auditor-General's Report, particularly by the media, suggests they are not performing their functions. However, it is often the case that the statistics do not accord with the experience of litigants, practitioners and other stakeholders.

3.21 Canberra criminal lawyer Mark Fleming believed criticism of the efficiency of the ACT's courts to be misplaced and argued that defendants were generally treated more fairly in the Territory than in NSW or Queensland. He claimed that people who came before the courts in Canberra were dealt with more comprehensively than in other jurisdictions, and the wider community benefited from a system which attempted to rehabilitate people and prevent them from re-offending. "That can't happen if you're running the courts like a corporation."[18]

3.22 These are persuasive arguments but they have not gone unchallenged. Concerns with regard to threats to judicial independence or the creation of perverse incentives within courts administration are real but cannot be allowed to exclude efforts to ensure accountability. "Complete regard for judicial independence as it extends to the administration of the courts occurs to the detriment of accountability for those actions."[19]

3.23 KPIs can assist the management of court time and resources and, "It is in the interests of the ACT community that the administration of the ACT courts system is efficient, cost effective and delivers timely and appropriate judicial outcomes for stakeholders."[20] The gathering and analysis of statistical data is vital to efficient case management.[21] It elevates the status of information and encourages a spirit of enquiry.[22]

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[18] Ben Houston and Ben Doherty, 'Budget cutback for courts will see jobs go: magistrate', *The Canberra Times*, 9 September 2005, 2

[19] Robert McMahon, *Courts Administration Models in Victoria and South Australia: Lessons for NSW* (1995) <www.premiers.nsw.gov.au/our_library/ps_reform/RobertMcmahon1.pdf> at 24 May 2007, as cited in DPP, Submission No. 8, April 2006, p. 14.

[20] Richard Mulcahy MLA, quoted, 'Inquiry on ACT court efficiency', by Ben Houston, *The Canberra Times*, 29 September 2005, 6.

[21] D A Ipp J, 'Reforms of the Adversarial Process- part 1' (1995) 69 *ALJ* 705 at 719, cited in Submission No. 8, April 2006, p. 3.

[22] John W Raine, p. 390.

3.24 This information, if carefully interpreted, is useful for determining how the ACT is performing against other jurisdictions and against internal benchmarks. Court performance measurements are therefore appropriate measures within the administrative sphere of court activity.

3.25 Further, the process of collecting and analysing performance information and considering similar information from other jurisdictions is useful in focussing the administration's attention on its performance even if, ultimately, it is considered that jurisdictional differences render comparative measures of little use. The year by year consideration of this information within a jurisdiction provides valuable indicators of how that jurisdiction is progressing.

Qualitative Indicators

3.26 There was broad agreement before the Committee that qualitative measures of performance were more important than quantitative as indicators of how effective courts were in discharging their primary function. Equally there was agreement that useful qualitative indicators were not available.

3.27 The Productivity Commission uses a standard template which requires the development of quality indicators. However, to date, indicators of quality for courts administration have not yet been identified.[23] "Of course, the quality of the outcome is quite challenging to measure and yet integral to the effectiveness of the system".[24] Many stakeholders have stated that quality indicators for the courts are not the subject of public administrative analysis.

3.28 A number of submissions made reference to the question of quality of outcomes by reference to juvenile justice:[25]

> The quality of the outcomes in terms of administration of justice in the Childrens Court are certainly considered by the profession and, I believe, by litigants to be high as far as the results produced are concerned. …

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[23] *Report on Government Services 2007,* [6.24]

[24] ACT Law Society, Submission No. 7, April 2.006, p. 7.

[25] ACT Bar Assoc., Submission No. 5, March 2005, p. 5; Law Society of the ACT, Submission No. 7, April 2006, pp. 2, 3; DPP, Submission No. 8, April 2006, pp 15-16; ACT Magistrates, Submission No. 10a, May 2006, pp 3-4.

> Failure of the juvenile justice system to adequately deal with the situations that come before it can lead to much more expensive problems arising down the track.[26]

3.29 In making that point the Law Society noted that nobody was monitoring the savings that flowed from successful interventions in the juvenile justice system that kept people out of the legal system at a later date. It may, in practice, be extremely difficult, if not impossible, to measure such savings yet there is clearly an important benefit to society in a system that seeks to achieve this objective.

3.30 The Committee notes that underperformance as represented in KPIs by no means reflects the overall effectiveness of the courts in the performance of their functions, as expressed by the ACT Bar Association:

> 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.[27]

3.31 There was also concern that pursuit of qualitative analysis could lead to a widening of performance monitoring to encompass judicial performance. Such an encroachment upon judicial independence can only be supported in a narrow construction of judicial independence:

> This stealthy trend of executive branch influence over the judicial branch owes much to the prevailing uncertainty as to the meaning of "judicial independence". As indicated, increasingly a narrower, more individualistic, definition of independent decision making in each case in the courtroom is being adopted and, in the process, is trumping the wider, institutional and constitutional definition based on the doctrine of the separation of powers.[28]

3.32 Chief Magistrate Cahill contended that the purpose of the concepts of judicial independence, accountability and the separation of powers, "is to

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[26] *Transcript of evidence*, 4 April 2006, p. 46, G W Walker, Law Society of the ACT.

[27] ACT Bar Assoc., Submission No. 5, March 2005, p. 5.

[28] John W Raine, 'Modernising courts or courting modernisation?' (2000) 13(5) *The International Journal of Public Sector Management* 390.

ensure that there is confidence in the court system and that the interests of the consumers of court services can be assured that there is equal treatment for all before the courts without any inappropriate interference from any other source”. [29]

3.33 The Chief Magistrate cautioned that care needed to be taken to ensure the demands of public management do not inappropriately impinge on judicial independence.[30] Any notion of quality that is influenced by the outcome of a judicial decision compromises the independence of the judiciary, and therefore falls outside the scope of public management.

3.34 The Committee is therefore of the view that *qualitative* analysis of a court’s performance is more valuable than simple statistical measures. To do this with respect to courts administration requires a process of regular discussion and review which enables the wide range of factors which can influence the courts’ business to be taken into consideration.

3.35 Statistical measures of performance against KPIs can contribute to this process as long as their limitations are recognised and allowed for.

Distinguishing Characteristics of the ACT Courts System

3.36 Before commenting specifically on the Auditor-General's Report it is important to look at the distinctive features of the ACT jurisdiction, and to distinguish those features of the ACT's courts system that might tend to undermine the validity of national comparisons:

> [N]ational comparisons need to be approached with caution as they are not always easily adaptable to the different legislative and cultural milieu of the Territory.[31]

3.37 The factor that distinguishes the ACT (and Tasmania and the Northern Territory) most clearly from most other Australian jurisdictions is a two-tier court system. Other jurisdictions have three tier systems with a Supreme Court (or equivalent), a District or County Court and a Magistrates Court.

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[29] ACT Magistrates, Submission No. 10, May 2006, p. 3.
[30] ACT Magistrates, Submission No. 10, May 2006, p. 4.
[31] DPP, Submission No. 8, April 2006, p. 16.

3.38 Many matters are heard in the ACT Magistrates Court that would be heard in an intermediate court elsewhere:[32]

> Many of these cases are difficult and time consuming ones. For example, sentencing criminal offenders with a drug or alcohol addiction is often a time consuming process.[33]

3.39 Complex criminal matters require attendances in the Magistrates Court that would be spread between the Magistrates Court and intermediate courts elsewhere.[34] This skews the attendance figures for criminal matters in the Magistrates Court. As well as this overlap with middle tier district/county courts, the role of the Magistrates Court extends to the Childrens Court, Coroner's Court and a host of tribunals:

> Whilst our work on these Tribunals does not count towards the ABS key performance indicators, our work on these Tribunals reduces the judicial resources available to the Court to undertake core business measured by the ABS, thus affecting timeliness and other key performance indicators.[35]

3.40 In other jurisdictions these bodies would be separately accommodated, administered, and staffed.[36]

3.41 A number of submissions made reference to the significance of systemic differences. ACT Chief Magistrate Ron Cahill believed it to be, "the most complex and general jurisdiction" of any court of first instance.[37] Robert Crowe, past-president of the ACT Bar Association, told the Committee that this meant it was not valid to compare the performance of the Magistrates Court with other bottom-tier courts.[38] He did not accept “as a general proposition” that the Magistrates Court was performing poorly compared

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32 The Productivity Commission's *Report on Government Services, 2008*, chapter 7, provides a comprehensive and accessible summary of the matters heard at different levels in each jurisdiction.

33 In NSW such cases are directed towards the Drug Court: ACT Magistrates, Submission No. 10a, May 2006, p. 2.

34 ACT Magistrates, Submission No. 10, May 2006 p. 4.

35 ACT Magistrates, Submission No. 10, May 2006 p. 3. Note that legislation currently before the ACT Legislative Assembly will reform the Tribunal system in the ACT and significantly reduce the demands on the Magistrates Court to support tribunals.

36 ACT Magistrates, Submission No. 10, May 2006, p. 3.

37 ACT Magistrates, Submission No. 10, May 2006, p. 2.

38 *Transcript of evidence*, 22 March 2006, p. 25.

with courts interstate.[39]

3.42 The Committee notes the ACT Law Society's concern that the statistics in the report do not reflect that disputes serviced by Magistrates in this area, "involve a much wider range of skills and experience than the skills and experience usually required of a Magistrate in a standard Australian local court".[40]

3.43 A further explanatory factor is that the ACT is a relatively small jurisdiction, which affects the impact of the types of cases that come before the court on statistical measures. The DPP spoke of the difficulty in accurately comparing jurisdictions; "In a small jurisdiction such as the Territory, a few difficult cases can alter the proportions and rates widely".[41] Thus it is better to look primarily at other small jurisdictions in comparative assessment as the larger jurisdictions have the benefit of economies of scale.

3.44 Renee Leon, Chief-Executive of JACS stated:

> [U]nless one is confident that the jurisdictions in question are directly comparable you can't really be certain that you're comparing apples with apples. We [the ACT] are often compared with Tasmania as being a jurisdiction of similar size. But the matters that are handled in the Magistrates Court aren't quite the same in Tasmania and the ACT, because of jurisdictional rules and so on.[42]

3.45 The ACT Law Society commented:

> It ought to be borne in mind that unless a valid "apples with apples" comparison can be drawn between two jurisdictions, the statistical comparison can in fact be quite misleading.[43]

3.46 In addition, the Audit Report notes the claim that legislative requirements in

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[39] *Transcript of evidence*, 22 March 2006, p. 25.

[40] ACT Law Society, Submission No. 7, April 2006, pp. 2-3.

[41] DPP, Submission No. 8, April 2006, p. 8.

[42] *Transcript of evidence*, 1 March 2006, p. 21; For example, in Tasmania few committals are run with a full hearing, whereas the ACT has a full committal that can 'go for day and days': *Transcript of evidence*, 4 April 2006, p. 64.

[43] ACT Law Society, Submission No. 7, April 2006, p. 2.

the ACT limit the opportunities for improving efficiencies.[44] The Auditor-General's Report concludes that the Childrens Court was the most expensive of all jurisdictions, with the second highest number of attendances.[45] Recommendation 5 of the report relates to this finding. In response to this comment, the ACT Law Society stated:

> Looking at these comments in isolation, it would suggest on its face that the Childrens Court was inefficiently run… The Childrens Court in the ACT has by statutory requirement a dedicated Magistrate and this of itself can serve to increase cost. However, the quality of the decision making in the Court has traditionally been very highly regarded by members of the local profession.[46]

3.47 The Committee believes that the Auditor-General's Report findings do not fully reflect the limitations of comparative statistics and the weight that should be given to the structural differences and distinctive legislative requirements of the ACT system.

3.48 In addition to recognising distinguishing characteristics of a jurisdiction and handling statistics with care, an editorial in *The Canberra Times* speculated that the small size of the ACT jurisdiction may give rise to a culture that can have a negative impact on the courts' performance with respect to timeliness:

> [T]he judiciary here is not perhaps as focused on closing cases in brisk fashion as it might otherwise be… easy familiarity between the judiciary, the legal profession and the police results in a certain leniency when it comes to seeking, and getting, adjournments.[47]

No particular evidence was cited to support this comment.

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44 ACT Auditor-General's Report No. 4 of 2005: *Courts Administration*, p. 34. hereafter referred to as the Auditor-General's Report.

45 Auditor-General's Report, pp. 4-5.

46 ACT Law Society, Submission No. 7, April 2006, p. 2. See above n 25 for other submissions that make this point.

47 'Justice delayed is justice denied', *The Canberra Times*, 26 September 2005, p. 10.

Conclusions

3.49 Performance measures are appropriate for assisting managers to achieve courts administration objectives. They can provide managers with indicators of workload and resource use which facilitate better decision making. However, it must be remembered at all times that administration is a complementary function of the courts which supports the delivery of justice. Consequently performance measures must be used carefully and the various qualifications and reservations discussed in this chapter need to be borne in mind.

3.50 The use of KPIs should not influence the functions of the courts in the administration of justice. Emphasis on KPIs to the extent that they create perverse incentives within the courts to focus on costs or throughput at the expense of fairness, independence and accessibility is not appropriate:

> The Auditor-General's Report into Courts Administration reflects some underlying tensions and contradictions within the community and within government about the function and purpose of courts. The most fundamental of these is whether to deliver quality justice outcomes that adequately reflect the circumstances of any given case whilst protecting due process, as opposed to pushing cases through on measures of quantity and timeliness.[48]

3.51 The intent of the Auditor-General's Report was not to criticise the courts' performance based on a statistically driven approach (despite the statistics bandied around in media suggesting inefficiencies). The Committee concurs with the ACT Law Society that:

> The tenor of the Report overall does not suggest that this is the case and the unfair use of specific figures from it does little to advance the issue which is ensuring the effective operation of the Court system in the ACT.[49]

3.52 The Committee does not support the view that this aspect of the findings in

[48] Victims of Crime Co-ordinator, Submission No. 6, April 2006, p. 6.

[49] ACT Law Society, Submission No. 7, April 2006, p. 1.

the report reflects the courts' performance overall. The scope of the Auditor-General's inquiry was limited to the courts' performance with respect to courts administration. Questions of the performance of the judiciary were, quite correctly, specifically excluded from the inquiry. The KPIs cited in the report are only one measure of court performance that do not and should not influence the quality of justice.

4 STRATEGIC PLANNING AND GOVERNANCE; ANNUAL REPORTING; RISK MANAGEMENT

4.1 The Auditor-General's Report made a range of findings and recommendations covering all aspects of the courts' administration. This chapter considers those recommendations concerning: strategic planning and governance, annual reporting and risk management, the government's response to them and summarises the progress made in implementing them.

4.2 The Auditor-General concluded that, while "… [a]dministration of the ACT Court system is adequate to ensure that the business of the courts functions smoothly" there were deficiencies, particularly that the "…current governance arrangements … indicate a lack of alignment between responsibilities and accountability."[50] As a result there was a need to make improvements in the areas of accountability, strategic planning, risk management and courts governance.

4.3 This was in large measure a result of:

> … different ethos and processes, and a degree of misunderstanding between the organisations. In particular … there exists a concern from both the judiciary and the Department to potentially step over the boundary separating executive and judicial responsibilities,[51]

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[50] Auditor-General's Report, p. 3-4.

[51] Auditor-General's Report, p. 25.

and was reflected in the sometimes conflicting responsibilities of the Courts Administrator, who was answerable to the Chief Justice, the Chief Magistrate, the Attorney General and the Chief Executive of JACS. The Auditor-General found that accountability was weakened by the lack of direct reporting by all of the courts.[52]

4.4 The Auditor-General's Report commented that, "… better governance arrangements would give the courts full control over their staff, internal financial management, facilities and operations, with the role of the Executive being confined to the appointment and remuneration of judges and the provision of an annual global budget."[53] However, the Auditor-General stopped short of making a formal recommendation to that effect.

4.5 The Auditor-General's Report did recommend that a more collaborative arrangement between the judiciary and JACS be pursued; that regular forums for communication be put in place and that the courts be given greater administrative independence and "… hence better alignment of courts' responsibility and public accountability". To improve accountability the report also recommended that the courts submit their own annual reviews or reports including reporting on budget outcomes.[54]

4.6 The response from JACS to the report accepted both recommendations and the Chief Magistrate was strongly supportive of recommendation one, noting that it would, "… provide the opportunity to develop a structure that delivers a clearer recognition of the judiciary as a truly independent arm of government … ."[55] JACS' response announced that a Courts Governance Committee, comprising the Attorney General, the Chief Justice and the Chief Magistrate, the Chief Executive of JACS and the Courts Administrator would be established. Among its responsibilities, the new Committee would consider future models of governance for the courts.

4.7 In the time that has elapsed since that report, considerable progress has been

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[52] The Coroner's Court is required to present its own annual report by the *Coroners Act 1997* as is the Childrens Court. Both are annexed to the JACS Annual Report.

[53] Auditor-General's Report, p. 25.

[54] Auditor-General's Report, p. 26, recommendations 1 & 2.

[55] Auditor-General's Report, p. 8.

made in implementing the government's commitments with regard to the recommendations. In a public hearing of the Committee in March 2006 the Chief Executive of JACS noted that the Courts Governance Committee had been established and had held its first meeting in December 2005 and was scheduled to meet again in March 2006.[56] JACS later reported to the Committee that the Governance Committee continued to meet at three monthly intervals.[57]

4.8 In addition, a Memorandum of Understanding (MOU) "providing a framework for cooperation and collaboration" between the CEO of JACS and the heads of the three courts - the Chief Justice, the Chief Magistrate and the President of the Court of Appeal - was signed in May 2007. A service level agreement, which will define administrative support to the courts, is in preparation.[58]

4.9 The objectives of the MOU are:

> … to improve governance arrangements for the Courts by clarifying responsibilities and accountabilities; foster a culture of partnership, collaboration and cooperation … and facilitate the exchange of information. The MOU provides a framework to define more detailed service agreements between the parties …"[59]

4.10 The Committee notes that this MOU, together with the establishment of the Courts Governance Committee, puts the courts' administration on a much firmer and more collaborative footing. As the JACS annual report noted, the service agreements prepared under the MOU are still being developed.

4.11 In evidence to the Committee the Chief Magistrate, Mr Cahill, welcomed the MOU and service level agreements, describing the new process as a "very positive improvement",[60] but cautioned that the "devil was in the detail" particularly with regard to the level of resources to be provided to the courts. Mr Cahill favours a more independent courts administration model,

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[56] *Transcript of Evidence*, 1 March 2006, p. 1.
[57] CEO JACS to the Committee, 27 February 2008.
[58] CEO JACS to the Committee, 27 February 2008.
[59] JACS Annual Report, 2006-07, pp. 35-6.
[60] *Transcript of evidence*, 12 March 2008, p.156.

as discussed in this report among alternative models of administration in chapter seven.

4.12 With regard to annual reporting by the courts, recommendation two was agreed to in part. The government adopted the first part of the recommendation that "comprehensive annual reports [be incorporated] in the overall JACS annual report".[61] In practice it appears that, as the Committee was advised, the Law Courts and Tribunals provide "comprehensive information … which is incorporated into the JACS annual report".[62]

4.13 The JACS annual report for 2006-07 contains a section on Law Courts and Tribunals which summarises the work of the courts, identifies some significant legislative changes and their impact on the courts and progress in improving courts administration. Useful statistical information is provided about backlogs in both criminal and civil jurisdictions, clearance indicators and staffing levels. The report also identifies key objectives and specific targets for the courts in 2007-08 which will assist the courts, JACS and the Legislative Assembly to monitor progress in this area.

4.14 The Committee acknowledges that this level of reporting is more comprehensive and informative than past practice, however it would be preferable if the alternative course recommended by the Auditor-General was adopted, that "heads of jurisdictions provide their own annual reports directly to the Attorney-General or the ACT Legislative Assembly".[63] This approach would be more in keeping with the principle of judicial independence and would ensure that the views of the courts were provided to the Minister and the Assembly, unmediated by any departmental input.

4.15 The Committee notes that a number of agencies associated with JACS already produce their own annual reports. These include the Director of Public Prosecutions, ACT Legal Aid, the Office of the Public Advocate and the Victims of Crime Coordinator. There is no sound argument, indeed quite

[61] Auditor-General’s Report, p. 26.
[62] Letter, CEO JACS to the PAC Committee, 27 February 2008.
[63] Auditor-General's Report, p. 26.

the opposite, for treating the courts as any less independent than these other bodies.

RECOMMENDATION 1

4.16 **The Committee recommends that the annual report(s) of the ACT Law Courts and Tribunals be sent directly to the Attorney-General and published separately from the annual report of the Department of Justice and Community Safety.**

4.17 The Auditor-General did not make any specific recommendations with regard to strategic planning but was critical of the then current Strategic Plan for the ACT Criminal Justice System, noting that some parts of the Strategic Plan were better suited to a business plan and some parts of the Business Plan for the Law Courts and Tribunals should have been in the Strategic Plan. In specific instances the two plans were inconsistent.[64]

4.18 The Auditor-General was critical of risk management planning within the courts. The responsibility for developing risk management plans lies squarely with the CEOs of government departments. A risk assessment had been carried out in 2002, which concentrated on financial risk but commented on other areas as well and some risk assessment of specific projects had been undertaken but the Auditor commented that "there is no overall risk management plan [was] in place, and no evidence that the risks identified in 2002 were monitored and addressed".[65]

4.19 The Auditor-General recommended that, "[t]he LC & T Unit should develop a risk management plan to assist in identification and amelioration of significant risks."[66] At the Committee's hearing in March 2006, the CEO of JACS noted that development of a risk management plan was in progress. The Committee was advised in February 2008 that, "[a] comprehensive risk management plan for the Department has been developed which includes

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[64] Auditor-General's Report, p. 27.
[65] Auditor-General's Report., p. 27.
[66] Auditor-General's Report, p. 28.

the ACT LC & T specific risks."[67]

4.20 Details of the Department's approach to risk management are included in the 2006-07 Annual Report. The report notes that:

> The Plan provides strategic guidance allowing for risk management practices to be integrated into all business and project planning throughout the Department.[68]

4.21 The attention given to this Auditor-General's recommendation is welcome, however, the Committee would like to see further detail provided.

RECOMMENDATION 2

4.22 **The Committee recommends that JACS report to the Legislative Assembly providing details on the specific steps taken to ensure that risk management practices are being included in all business and project planning within the Law Courts and Tribunals Unit.**

Implementation of Agreed Recommendations of Previous Reviews

4.23 The Auditor-General's Report noted that the ACT courts have been the subject of many reviews since the granting of self-government and commented on the recurrence of particular themes in these various reviews, concluding that:

> … there has not been a consistent process of formally analysing recommendations and either accepting or rejecting them … There seems to have been a pattern of commissioning reviews and only partly implementing their findings.[69]

4.24 This criticism, which is not directed at any particular government, reflects an approach that is extremely wasteful of public resources and smacks of avoiding the difficult issues of substantive reform by commissioning reviews and reports rather than acting on the accumulated information and

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[67] Letter, CEO JACS to Committee, 27 February 2008.
[68] JACS Annual Report, p. 18.
[69] Auditor-General's Report, p. 28.

advice already available. The Committee would hope that the Auditor-General's comments on this matter, which apply to other areas of the public sector with equal force, are taken seriously throughout the ACT administration.

4.25 The Auditor-General recommended that the Law Courts and Tribunals Unit should establish implementation plans for agreed recommendations and monitoring of progress in implementation of future audit and evaluation reports.[70] This recommendation has been acted upon by JACS in regard to the report currently under review, with an implementation plan in place with regard to the agreed recommendations of the Auditor-General's Report. It is "reviewed and reported on at each Courts Governance meeting".[71]

RECOMMENDATION 3

4.26 **The Committee recommends that JACS continues to include in its annual reports a summary of the progress made in implementing the recommendations of Auditor-General Reports in that financial year.**

[70] Auditor-General's Report, p. 30.

[71] Letter CEO JACS to committee, 27 February 2008.

5 PERFORMANCE MEASURES & REPORTING

5.1 The Australian Bureau of Statistics and the Productivity Commission are the authoritative sources of comparative performance data on courts across Australia.[72] The Auditor-General's Report relies for its statistical data on the national ROGS prepared annually by the Productivity Commission.

5.2 The Commission recognises:

> The reporting process in this chapter [courts administration] is one of continual improvement and refinement, with the long term aim of ensuring a national data collection that covers court activities across the Australian, State and Territory jurisdictions in a timely and comparable way.[73]

5.3 The Law Courts and Tribunals Unit now collects data based on national counting rules and reports against Key Performance Indicators in the Annual Report. The data form a framework for assessing courts' performance. However, as indicated by the DPP, "it cannot be said that they are universally recognised as accurate measures of a court's performance".[74]

5.4 The Auditor-General's findings with regard to performance against KPIs and reporting are, on the face of it, quite critical:

> Based on comparative data available, and subject to its limitations, the performance of the ACT Courts did not generally compare well against other jurisdictions with respect to some performance measures … .[75]

5.5 These comparisons were:

- For the Magistrates Court, the highest proportion of cases taking longer to finalise than other states and territories;

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[72] Auditor-General's Report, p. 34.

[73] Productivity Commission, *Report on Government Services 2007* (Canberra, Commonwealth of Australia, 2007) [6.22].

[74] DPP, submission eight, p. 7.

[75] Auditor-General's Report, p.31.

- The ACT Childrens Court was the most expensive of all jurisdictions; and
- The average number of attendances for criminal matters before the Supreme Court, the Magistrates Court and the Coroner's Court was higher than for all other states and territories and those for the Childrens Court was the second highest.

5.6 The Auditor-General also found that the information available to the ACT community about the work of the courts was less than that available in "some" other states.[76] As indicated in Chapter four above, the Committee supports the view that the ACT courts should produce their own comprehensive reports to the Attorney-General.

5.7 The performance measures which apply to the courts come under two headings - strategic and accountability indicators. The former reads, in part, "The ACT justice system seeks to ensure fairness to all persons involved". To achieve this, matters must be dealt with as expeditiously as possible and in a manner that "promotes, protects and respects [the] rights" of those involved.

5.8 The strategic indicator "Fair Justice System" has two components: the Courts Clearance indicator and the number of complaints against criminal justice agencies upheld by the Ombudsman. The clearance indicator measures the number of cases finalised against the number lodged; thus a figure of more than 100% indicates that the courts are finalising more cases than are lodged in a year.

5.9 The limitations of this indicator as a measure of court performance are readily appreciable; while the courts' case management practices will have an impact on this indicator, a range of other factors beyond the courts' control can also have a major impact. For example legislative changes, resource levels and a whole range of social and economic factors that may influence the crime rate.

5.10 The general statistical qualification with regard to a small jurisdiction also applies - a small number of complex or drawn out cases can have a disproportionate impact on the outcome for any particular year.

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[76] Auditor-General's Report, p. 31.

5.11 Thus this indicator should be used with care. Given the qualifications mentioned in the previous paragraphs it may not be a particularly useful indicator of the actual efficiency of the courts. Its value may be as a management tool by indicating to the courts' administration and JACS the trend in clearances and thus the likely demand for resources in the next financial year.

5.12 The second indicator, complaints against criminal justice agencies upheld by the Ombudsman, was, according to the Auditor-General, a new measure. The Auditor-General also commented that it was of limited use to the courts and a specific measure of "complaints addressed specifically to the courts" would be more valuable.[77]

5.13 In the event, there does not appear to be any reporting against this indicator, specifically with regard to ACT Law Courts and Tribunals, in the JACS Annual Report for 2006-07. The Ombudsman's Annual Report for that year lists eight complaints received with regard to ACT Magistrates Court and Tribunals, three of which resulted in remedies.[78]

5.14 In addition to the strategic indicators there is a range of accountability indicators that the L C & T Unit indicated that it would report against:

- Attendance indicator - the number of times the parties to a matter attend the court;
- Judicial resources - the number of judicial officers[79] per 100 000 people;[80]
- Clearance indicator - described above; and

[77] Auditor-General's Report, p. 33.

[78] ACT Ombudsman, Annual Report 2006-2007, Table A 1, p.29. The remedies were 'action expedited', an apology and an explanation. There is no discussion of the nature or substance of the complaints. Nor is their any indication whether the Ombudsman's category ACT Magistrates Court & Tribunals is the same as JACS classification ACT Law Courts and Tribunals or simply reflects the absence of any complaints against the Supreme Court.

[79] Judicial officers are "officers who can make enforceable orders of the court", Productivity Commission, *Report on Government Services* 2005, Ch 6 p. 21.

[80] JACS Annual Report, 2006-07, p.44. This table shows that the figures for the ACT are slightly above the Australian averages for the Supreme Court, Magistrates Court, Childrens Court and Coroner's Court.

- Costs per case.[81]

5.15 In practice the JACS Annual Report for 2006-07 contains reports against the clearance indicator[82] and judicial resources. The backlog indicator shows "the proportion of a court's pending caseload that is older than the relevant time standard".[83] For the ACT Supreme Court the relevant time frames are cases more than 12 months old and two years old and for the Magistrates and Childrens Courts more than six months and 12 months.

5.16 The Annual Report does not state what the national standards for the backlog indicator are, which reduces the usefulness of the statistics. Where there is a standard relevant to any performance indicator included in the annual report it should be included. According to the Auditor-General, for the Magistrates Court no case should be more than 12 months old and no more than 10 per cent should be more than 6 months old. The comparable standards for the Supreme Court are, no case more than 24 months old and no more than 10 per cent more than 12 months old. None of the ACT courts met even these generous standards in 2006-07.[84]

5.17 In discussing the indicators of timeliness the Auditor-General commented that:

> Determining what time delay is reasonable for cases … is inherently difficult because in some cases delays may deliver a more desirable outcome. Timeliness … is also influenced by factors other than those in the control of the courts (e.g. a witness not being available) and in most cases (both criminal and civil jurisdictions) one party has an interest in delay.[85]

5.18 The Auditor-General's Report states that the courts “have more power over the system than other participants”.[86] Court practitioners who appeared

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[81] Auditor-General's Report, pp. 32-3.

[82] JACS Annual Report, 2006-07, Table 13, the Clearance indicator does not have any national comparative figures for any of the last three financial years which limits its usefulness.

[83] JACS, Annual Report, 2006-07, p. 42.

[84] JACS, Annual Report, pp. 42-3.

[85] Auditor-General's Report, p. 34.

[86] Auditor-General’s Report, p. 2.

before the Committee thought that this statement needed to be moderated. It is often the case that the Court has no control over delay.

5.19 The Chief Magistrate, Mr Cahill noted, "We can do all the listings we like, but if people aren't ready, people want adjournments, resources aren't there, etcetera, we are the ones at the end of the day who are criticised for not getting matters on." [87] The Committee notes that delay often results from the actions of other participants in the process, "the efficient running of the Courts is inextricably linked to the capacity of stakeholders in the system to perform their role adequately."[88]

5.20 Various submissions and witnesses provided examples of the range of factors contributing to delays in finalising matters or complicating scheduling:

- Preparedness of witnesses, e.g. the capacity of the AFP to deliver briefs of evidence, forensic services, and scientific analysis in timely fashion;[89]
- One party may have a tactical interest in delay: "I think that something that is often left out of consideration is that we are dealing with human beings and there is a human factor involved." People often prolong the process when they know they are guilty and can be proven guilty, "on the basis that they are putting off the evil day";[90]
- Removal of on-site corrective service officers meant that matters previously dealt with on the spot were adjourned for defendants to attend the Corrective Services office in Civic. The corrective services officer position was reinstated in late 2006 which was well received, particularly by the Chief Magistrate;[91]
- "Door of the court" pleas of guilty;

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[87] *Transcript of evidence*, 17 May 2006, p. 80.

[88] ACT Bar Assoc., Submission No. 5, March 2005, p. 5.

[89] ACT Bar Assoc, Submission No. 5, March 2005, p. 5.

[90] *Transcript of evidence*, 17 May 2006, p. 81. See also ACT Auditor-General's Report, p. 34.

[91] *Transcript of evidence*, 21 March 2007, pp. 139-40.

- Cases abandoned by the DPP or vacated for other reasons;
- Increase in self-represented litigants, linked to inadequacies in Legal Aid funding;[92]
- New programs, such as the Family Violence Intervention Program, Restorative Justice or Circle Sentencing, can delay finalisation of proceedings;[93]
- Use of Griffiths remand, which is an adjournment of 6-12 months following a finding of guilt to permit the offender to take part in a rehabilitation program (this option is especially exercised for addicted offenders but may also involve other assistance groups such as mental health bodies). This adjournment is represented in statistical data as a delay;[94]
- The New Sentencing Reform Package, introduced in June 2006 records outcomes differently. Periodic Detention Orders and Griffiths remands will be given the status of a sentence order (capacity to recognise suspended sentences).[95] Chief Magistrate Cahill detailed the delaying implications of this as, "It imposes extra demands upon us, such as having to give a lot more reasons for decision, which will slow us up…"[96]

5.21 These comments serve to emphasise the importance of treating the various statistical measures of performance with caution. They may be useful indicators of the workload or costs while having little value as indicators of the efficiency of the courts. However, despite this reservation, the Auditor-General considered that "… the setting of this standard [the backlog indicator] is a positive move toward identifying not only how the ACT Courts are performing compared to other jurisdictions, but also in

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92 ACT Bar Assoc., Submission No. 5, March 2005, p. 2.

93 DPP, Submission No. 8, April 2006 p. 9.

94 DPP, Submission No. 8, April 2006 p. 7. This is a clear example of the way in which a statistical indicator could give a false picture of what a court is trying to achieve.

95 ACT Bar Assoc., Submission No. 5, March 2005, p. 7.

96 *Transcript of evidence*, 17 May 2006, p. 91.

determining what are acceptable and reasonable timeframes".[97]

5.22 The Committee notes, again, that direct comparisons with other jurisdictions must be handled with care given the differences in the court structures of the various jurisdictions and other factors such as their size which have a significant bearing on outcomes for each jurisdiction.

5.23 The Auditor-General's Report advocates the collation of "consistent, comparable and meaningful information" so as to allow for standard and comparative reporting.[98] Various submissions commented on the absence of reliable statistics in the Territory.[99] The Committee notes that a report by the Legal Affairs Committee of the Assembly has already addressed this issue with regard to the Attorney-General's portfolio:

> In particular, the Committee is concerned that reliable, consistent and appropriate data is collected by agencies and made available to policy makers and other stakeholders. Consequently, the Committee will be keeping a close watch on this aspect of the Attorney-General's responsibilities. [100]

5.24 Some problems in collating meaningful information identified by the DPP include jurisdictional differences in the definition of a case, the basis for the measurement of delay, and the lack of distinction made between different types of cases before the court.[101] As a submission from the ACT Magistrates commented:

> The ABS has attempted no intellectually rigorous examination of similar types of cases heard by these courts, instead recording results across the range of cases … under the broad headings of "criminal" and "civil". Presumably the reason they have chosen to collect and collate data in this way is because it is relatively easy. In doing so they have sacrificed

[97] Auditor-General's Report, p. 35.

[98] Auditor-General's Report, p. 33.

[99] ACT Bar Assoc., Submission No. 5, March 2005, p. 5, Submission No. 6, April 2006, p. 7, Submission No. 8, April 2006, pp. 12-13, Submission No. 10a, May 2006, p. 1.

[100] Legislative Assembly for the ACT, Standing Committee on Legal Affairs, *Report on Annual and Financial Reports 2004-05*, Report 2, pp. 16-17.

[101] DPP, Submission No. 8, April 2006, p. 13.

> accuracy for facility.[102]

5.25 The Committee notes that the Productivity Commission was developing "… more useful workload measures that are akin to the case weighted workload used in the health system … based on classes of cases, such as "traffic offences, assaults, planning disputes, murders etc ". These measures will be particularly useful in the ACT where our two-tier system results in the Magistrates Court having a quite different "case-mix" from Magistrates Courts in most state jurisdictions.

5.26 The Auditor-General's Report makes one recommendation with respect to court performance:

> 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 Childrens Court.[103]

5.27 The response to this recommendation is indicated in the work that has been done to improve many aspects of courts administration performance particularly with regard to case management.

5.28 Although there is only this one recommendation regarding court performance, the audit discusses directions that might be explored in the continued use of performance indicators. The audit endorses sustained and cost-effective data collection as a means of enhancing accountability, with the aim of reporting against national benchmarks in 2005-06.[104]

5.29 The audit devotes particular attention to the Magistrates Court as an arena for advancing efficiencies in court performance: "The focus of the audit has been primarily on work supporting the Magistrates Court, as that is an administratively complex area, and where the greatest number of cases is handled".[105] Audit concludes that the ACT's key performance indicators are

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[102] ACT Magistrates, Submission No. 10a, May 2006, pp. 1-2.

[103] Auditor-General's Report, recommendation 5, p. 42.

[104]Auditor-General's Report p. 33.

[105] Auditor-General's Report p. 33.

below the average in other Australian jurisdictions.[106] The report highlights below average performance in backlog indicators, attendance indicators, and costs per finalisation.

5.30 Given the many qualifications and reservations about the validity of statistical measures of efficiency in the courts, particularly comparisons with other jurisdictions, the main benefit to be gained from the collection and publication of these results may be that the process focuses attention on areas where the courts may be able to improve performance and make savings.

[106] Auditor-General's Report p. 43.

6 SCHEDULING AND MANAGEMENT OF CASES; INFORMATION & COMMUNICATIONS TECHNOLOGY

6.1 The management of the courts' workload, which is the key to the perceived efficiency of courts, is an extremely difficult process. The performance measures discussed in the previous chapter almost all relate directly or otherwise to the throughput of cases. Thus failure to reach a particular standard or an adverse movement in a particular measure is all too often taken to indicate overall inefficiency, mismanagement or waste of resources.

6.2 In considering this subject it is important to note that scheduling and management of cases goes beyond the administrative processes of the courts and involves matters which are subject to judicial decision and thus beyond the scope of the audit. This again acts as a reminder that efficiency of throughput is not the primary objective of the judicial process.

6.3 Scheduling is subject to a wide range of factors, many of which are beyond the control of the courts' administration:

> It involves several interacting parties - the court, litigants, prosecutors, defendants, legal representatives, police, corrective services and other agencies - who have different aims. There are potentially conflicting objectives such as increased efficiency, increased timeliness, and improved justice. … Audit recognises that it is difficult to organise case flow so that clients receive expeditious service, the resources of the court are used efficiently, and … justice is not delayed.[107]

6.4 An alternative, or perhaps complementary, view of the determinants of the pace of litigation has been put forward in a study of courts in the United States. This found that the "'local legal culture' … the informal expectations, attitudes and practices of legal practitioners, judges and court staff" had a greater influence than court structure and procedure. The study concluded

[107] Auditor-General's Report, p. 45.

that active management of all cases by the court was "… the most influential technique for reducing delay".[108] It has been suggested that small jurisdictions tend to develop a "cosy" legal culture where the familiarity of all participants fosters a tolerant attitude to delay.

6.5 The authors of a study of the governance of Australian courts quoted in the Auditor-General's Report note that "[e]ffective case management requires close linkages between the judicial and administrative components of a court …Yet in most Australian courts [the administrative] staff is directed by, or subject to the direction of, another branch of government".[109] Thus case management goes to the heart of the administrative structure that supports the courts and the system of courts governance.

6.6 While acknowledging these complications, the Auditor-General's Report found that "[t]here was significant underuse of court time and facilities in both the Supreme Court and the Magistrates Court" in 2004 with only 101 days of criminal trials occurring in the Supreme Court compared with a scheduled 297 days and in the Magistrates Court "only about 50% of cases proceeded when scheduled".[110] The courts were criticised for making "… little use of demand management measures to encourage parties to resolve civil disputes outside the court system" and it was also suggested that the Magistrates Court maintained too many lists of types of proceedings which "… could be streamlined for improved efficiency".[111]

6.7 In the view of the Auditor-General's Report it is clearly the responsibility of the Courts to manage their caseload and "… to influence change and achieve better outcomes".[112] However, many studies of courts administration and many witnesses before the Committee have stressed that the scheduling and management of cases is highly complex. The DPP argued that "[t]he Courts

108 Auditor-General's Report, pp. 45-6.

109 Auditor-General's Report, p. 45, quoting Church and Sallman, *Governing Australian Courts,* AIJA, 1991, p. 4.

110 Auditor-General's Report, p. 44. It should be noted that more than half the scheduled criminal trials in the Supreme Court did not occur for reasons beyond the control of the court - 21 defendants changed their plea to guilty; the prosecution abandoned 10 cases; 9 trial dates were vacated and one accused absconded.

111 Auditor-General's Report, p. 44.

112 Auditor-General's Report, p. 45.

have an important role, but that role is reactive and determined to a large part by other participants in the system, each of which influences and affects the other".[113]

6.8 The Auditor-General's Report, at pages 44 to 48, provides a detailed description of caseflow management as it then operated in the ACT Courts. The Committee will not repeat it here, however it is important to note that both administrative requirements and fairness impose certain minimum time frames on the process of bringing a case to court and hearing that case; thus the layperson (or media commentator) should recognise that the mere passage of time between, for example, the initiation of a criminal charge and a first hearing does not represent delay.[114]

6.9 In fact caseflow management is a matter that has been the subject of almost constant review and refinement in the ACT and other jurisdictions. The Auditor-General's Report noted that in the ACT case management practices in the criminal jurisdiction of the Magistrates Court had been revised as a result of a review in 1999 drawing on the experience of Victoria and Tasmania.[115] Concurrently with the Audit the ACT Magistrates Court carried out a further review of its listing system which resulted in further changes aimed at more active management of listings.

6.10 The Auditor-General's Report particularly favoured the more extensive use of fees to encourage compliance. The report also favoured more extensive use of alternative dispute resolution practices to keep matters out of court in the first place. The Auditor-General's Report recommended the "…review of compliance and other mechanisms to encourage efficiency in caseflow management".[116] The Government accepted this recommendation.

6.11 In March 2006 JACS indicated to the Committee that the review mentioned above was being implemented and that JACS was actively supporting that

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113 DPP, Submission No. 8, April 2006, pp. 3-4.

114 For example in a criminal matter where a not guilty plea is entered, the DPP has 65 days to prepare and serve a brief. Auditor-General's Report, p. 46.

115 Although, as the Auditor-General's Report notes, a number of recommendations to attempt to build incentives into the system particularly by using financial penalties were not taken up.

116 Auditor-General's Report, recommendation 6, p. 50.

process. In addition, staffing in the courts' Registry was being rearranged "… so a new position can be created that will provide support to the judiciary for listing, case management and performance reporting".[117]

6.12 In February 2008 JACS advised the Committee that "… the Courts Case Management system is being updated to incorporate comment from an ABS officer who was seconded to the Court in June 2007. A review of listing practice and procedures has been implemented".[118] A range of other changes have been adopted to reduce unnecessary attendances and waiting times for those attending the courts.

6.13 In March 2008 the Chief Magistrate, Mr Cahill, advised the Committee that the Magistrates Court "… was case managing fairly extensively… We have case management hearings. We have police releasing the brief. There is overwhelming information provided to everyone…[but]…you still get a fairly high percentage of drop-outs".[119] With regard to criminal matters the Chief Magistrate identified defence tactics as a significant cause of delay.

6.14 Mr Cahill also expressed the view that, in civil cases, "… there are not too many … that should not be settled with the right sort of mediation. But people still want their day in court".[120] In Mr Cahill's view the majority of delays happened before cases reached the court - "Once it gets to the court, I think we deal with it fairly efficiently". Thus while the courts can seek to minimise delays by tighter organisation, better information and the provision of incentives, litigation can still be a drawn out process.

6.15 The Committee recognises that, given the complexities of the case management process, particularly the various agendas and incentives of a number of participants, and the need to give priority to access and fairness, case management will continue to be characterised by a degree of uncertainty and apparent inefficiency. It is, however, an example of a situation where constant scrutiny and "active management" can minimise

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117 *Transcript of evidence*, 1 March 2006, p. 2.

118 CEO JACS to the Committee, 27 February 2008.

119 *Transcript of evidence*, 12 March 2008, p. 167.

120 *Transcript of evidence*, 12 March 2008, p. 167.

avoidable delay.

6.16 Two areas that the Chief Magistrate identified as yielding efficiency gains were the introduction of a "true" duty solicitor scheme and pre-trial conferencing in civil matters. A duty solicitor scheme has the potential to reduce the delays caused by adjournments sought by unrepresented plaintiffs so that they can seek legal aid. A duty solicitor would be able to offer advice and get pleas dealt with much earlier in many cases.[121]

6.17 The use of pre-trial conferencing in civil matters has been effective in small claims and worker's compensation matters. A high proportion of cases can be settled before they go to court if the parties are properly advised about the likely outcome of the case. Mr Cahill emphasised that the mediator in such situations had to be an experienced practitioner who would gain the respect of all parties.[122] Both proposals depend on the availability of adequate resources to support them.

RECOMMENDATION 4

6.18 **The Committee recommends that the ACT Government approve an expanded duty solicitor scheme.**

RECOMMENDATION 5

6.19 **The Committee recommends greater use of pre-trial conferencing and mediation in civil matters be encouraged in the ACT.**

6.20 While recognising all the qualifications attached to the various statistical measures as discussed in the previous chapter, the Committee believes that the collection of accurate statistics on matters such as backlogs and clearances will enable the courts to monitor trends and respond to them.

6.21 The underlying problem for the ACT is that the courts simply do not have the information technology available to collate consistent, comparable and meaningful information.[123] In fact, as the Auditor-General commented, the

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121 Chief Magistrate Cahill, *Transcript of evidence*, 12 March 2008, p. 171.

122 Chief Magistrate Cahill, *Transcript of evidence*, 12 March 2008, p. 170.

123 ACT Magistrates, Submission No. 10a, May 2006, pp. 1-2.

Magistrates Court had stopped collecting statistics on case management as a cost-saving measure. The Committee recognises that actions to improve current IT structures are in train. Better caseflow strategies, particularly in the development of more sophisticated information technology, will in turn produce more reliable data.

6.22 The Auditor-General commented that:

> To put an effective method of scheduling into place, there needs to be reliable data that defines the likely length of court cases and the probability that they go ahead…[124]

6.23 The Auditor-General's Report made the following findings with regard to the use of information technology:

- Current Information and Communications Technology (ICT) equipment appears inadequate to meet the needs of the courts.
- Progress to replace the caseflow management system (CMS) has been slow and limited by funds.
- The Courts have not yet taken full advantage of ICT to improve administrative processes.

6.24 The CEO of JACS advised the Committee in February 2008 that, in response to the Auditor-General's Report recommendations, an upgrade of the case management system was underway and an IT sub-committee of the Law Courts and Tribunals Unit had been established chaired by a Justice of the Supreme Court and including representatives of the Magistrates Court and all aspects of the Courts Administration. While these developments are welcome the Committee is concerned that this is an insufficiently comprehensive response.

6.25 In his most recent evidence to the Committee the Chief Magistrate identified inadequate IT capacity as a continuing problem: "… to have appropriate IT for case management and performance measurement, would be a very big advantage". He described the then current approach as "pinch hitting" - a series of improvisations to extend the life of the existing system that is 15 to

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[124] Auditor-General's Report, p. 50.

20 years old. This followed the break down of a proposal to join with New South Wales in a very sophisticated computerisation project.[125]

6.26 In addition to shortcomings as an internal management tool, the ACT Courts' IT system does not offer adequate links to other related agencies. Mr Cahill identified the Sentencing Administration Board and the Australian Federal Police as examples where better data links would not only facilitate the courts' work but also avoid mistakes. An example given to the Committee was of the ACT Police executing a warrant in relation to a matter that had already been resolved by the courts which caused distress to the person involved and wasted police time.

RECOMMENDATION 6

6.27 **The Committee recommends that, as a matter of urgency, the ACT Courts' information technology be upgraded, including effective links to other relevant agencies.**

[125] *Transcript of evidence,* 12 March 2008, pp. 157-158.

7 BUDGET & EXPENDITURE, ADMINISTRATION, HUMAN RESOURCE MANAGEMENT AND SERVICES TO USERS

Budget & Expenditure

7.1 The Auditor-General's findings in this area are, perhaps, the strongest argument for a thoroughgoing review of Courts Administration in the ACT. The Auditor-General found that:

- There has been a continuing pattern of planned deficits … [and] a lack of effective effort to resolve these deficits.
- The ACT judiciary currently plays a limited role in generating budget proposals or approving expenditure …[which are] left primarily to the LC & T Unit and JACS.
- There appears to be a lack of ownership and clarity of accountability for the Budget outcomes.
- There has not been a fundamental review of the cost basis for Court services to support a decision for appropriate base funding.[126]

7.2 Expenditure control is a particularly difficult area "… where decisions and responsibility for expenditure are separate".[127] The Auditor-General's Report gave the example of a judicial officer ordering an expensive medical opinion as part of a matter before the courts. This decision cannot be questioned by the administrative officer who authorises the expenditure. Equally, judicial officers cannot be constrained by budgetary pressures in making judicial decisions; access to a fair trial cannot be determined by decisions made

[126] Auditor-General's Report, p. 66.
[127] Auditor-General's Report, p. 69.

about funding or overall budgetary matters.

7.3 Various attempts to address budget deficits were inadequate with additional funding provided in both financial years 2003-04 and 2004-05 less than the net financial outcome of the previous year. The Auditor-General’s Report also questioned the likely impact of savings measures introduced in the 2004-05 financial year which only partly met their targets. Audit concluded that the calculation of the 2004-05 budget, which had sought to identify all the components of expenditure in the courts, was deficient because it did not "…include a fundamental review of the resources needed to carry out the Court's functions.”[128]

7.4 It is notable that some of the cost increases that threw out the savings calculations "… were reasonably foreseeable, and should have been estimated and allowed for in the budget strategy". Audit speculated that "… the practice of budgeting for a deficit [in operating expenditure] …creates a culture that it is acceptable to be in deficit …".[129]

7.5 Exceptional and high cost activities such as the inquest into the 2003 Bushfires and the complex Eastman court processes are treated as “special projects” for budgetary purposes and are the subject of additional appropriations. Audit concluded that this was a reasonable approach but that there tended to be less rigour in the management of funding of special projects than for the overall budget because funding was forthcoming through supplementary appropriations.

7.6 The Auditor-General also noted that budget initiatives tended to originate in JACS and that it was rare for judicial officers to initiate such proposals and implied that "… greater involvement by judicial officers in budget planning and financial management"[130] was desirable.

7.7 The Committee notes, on the positive side, the Chief Magistrate’s comments that regular financial reporting within the Courts has improved considerably in response to the Auditor-General's Report and that liaison

128 Auditor-General's Report, p. 68.
129 Auditor-General's Report, p. 69.
130 Auditor-General's Report, p. 71.

between the Courts Administrator and the Chief Magistrate with regard to budget bids has also improved.[131]

7.8 In response to the report JACS advised the Committee that, in line with recommendation 16, the LC & T Unit was a separate Output Class for the purposes of financial reporting.[132] Recommendations 17 and 18 were that a fundamental review of the cost of Court services be conducted and that LC & T Unit should continue to seek efficiencies. [133]

7.9 JACS' response to recommendation 17 was not encouraging. It stated that, while:

> A comprehensive review of staffing … has been conducted to achieve greater efficiency…a fundamental review of the cost basis for Court services has not been undertaken, because such a review … would only reveal the cost of providing the services in their current form and delivery mode. The Department considers it desirable to seek to optimise the efficiency of service delivery before undertaking a review … .[134]

7.10 The Committee believes that to defer such a review until some unspecified time when optimal efficiency in service delivery, however defined, is achieved, is a recipe for inaction. Service delivery will never be "optimal" and the potential to make savings or increase efficiency will never be exhausted. It would be preferable to conduct such a review now and establish a reasonably accurate estimate of base funding for the Courts recognising that some adjustments might have to be made at the margins in the light of later improvements to services or efficiency gains.

7.11 This view is supported by the Chief Magistrate:

> … to defeat the ad hockery, [in resource allocation] we really needed to have a genuine, nuts and bolts examination of the resources required. In other words, we need to see what services the government and the community would wish us to perform and then marry that up with a

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[131] Transcript of Evidence, 12 March 2008, p. 159.

[132] CEO JACS to the Committee, 27 February 2008.

[133] Auditor-General's Report, p. 71.

[134] CEO JACS to Committee.

> proper and detailed analysis of what resources staff, etc. are required.[135]

RECOMMENDATION 7

7.12 **The Committee recommends that an independent comprehensive cost analysis for Court services be conducted to establish an appropriate level of base funding for the Courts.**

Administration and Human Resources

7.13 The Courts' administration is part of the Department of Justice and Community Safety, within the Law Courts and Tribunals Unit. The issue of the appropriateness of this structure, having regard to the principle of the independence of the judiciary, is discussed in the following chapter. This section deals with internal administrative matters.

7.14 The Auditor-General's key finding with regard to administration was that:

> There has been a lack of integration between administrative areas of the Courts. In particular, there was little mutual support between different sections of the Magistrate Court Registry … [and] between the Registry, conferencing cell and the Magistrates.[136]

7.15 The Auditor-General's Report also found that "… there is, at present, little apparent direction and attention to improve administrative structure and processes to support Court functions …" and suggested very strongly that the underlying reason for this is that " …senior officers have a primary focus on judicial matters such as conferencing and … deciding cases".[137]

7.16 This is an issue of long standing. The Auditor-General's Report mentions two earlier reports identifying similar issues. A 1997 review concluded that "… Senior Deputy Registrars have managerial responsibilities [but] they spend most of their time conducting conferences and related duties" and an internal audit in 2004 found that owing to more immediate demands "…

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135 *Transcript of evidence*, 12 March 2008, p. 157.

136 Auditor-General's Report, p. 76.

137 Auditor-General's Report, p. 78.

attention to process improvement has been limited".[138]

7.17 Specific criticisms were directed at:

- The complexity of administrative tasks, particularly the multiplicity of forms required and the lack of standardisation in their content;
- The range and complexity of rules and procedures and the inadequacy of guides and manuals for staff;
- The physical and professional isolation from the Registry of counter staff, who have the often stressful job of dealing directly with the public;
- Specialisation within small sections resulting in a disproportionate impact on services in the event of absence of a staff member; and
- The division of various sections into "silos" particularly in the "registry functions of the Magistrates Court, Supreme Court and Tribunals".[139]

7.18 The Auditor-General's Report suggested that the most urgent need was to improve leadership within the administration by freeing up some of the time and resources of senior staff, allowing them to focus less on judicial and conferencing functions and more on management and administration. The Report proposed focusing on:

- improved caseflow management;
- greater use of non-court mediation services; and
- redeployment of senior staff from conferencing to registry management.

7.19 JACS evidence to the Committee suggests that most of these issues are being dealt with although the extent to which senior staff time has been reallocated to registry management is not clear.

7.20 A major project to produce harmonised court rules has been underway for

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[138] Auditor-General's Report., p. 78.

[139] Auditor-General's Report, pp. 77-80.

some years. New rules were introduced into the Supreme and Magistrates Courts in June 2006 and January 2007 respectively and revised forms under the rules were introduced in that period. The Court rules are subject to scrutiny by the Court Rules Advisory Committee which consists of representatives of most participants in the judicial process and meets monthly.[140]

7.21 In March 2006 the Chief Executive of JACS advised the Committee that a “registry renewal project and restructuring of staff” was already underway.[141] In February 2008 the Committee was further advised that:

> … a new [Registry] staffing structure has been implemented which achieves fewer and better trained teams and ensures cross training of staff in various areas to break down silos.[142]

7.22 The Committee also notes the introduction of neutral evaluation in the Supreme Court under the new court rules. This process encourages parties to negotiate resolutions by providing independent advice on the likely outcome of a court hearing, thus encouraging the settlement of matters outside the court and freeing up court staff for other duties.[143]

7.23 In addition staff are now managed as part of a single Registry of the ACT Law Courts and Tribunals. They have a specific location but may be deployed in other areas as required.

Human Resource (HR) Management

7.24 The Auditor-General was highly critical of LC & T Human Resource management. The report found that:

- The then current structure had too few senior officers in the Magistrates Court registry which gave "rise to a risk of lack of direction to staff and insufficient consideration to process

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140 Auditor-General’s Report, pp. 33-4. Note that the establishment of the Rules Advisory Committee predates the Auditor-General's Report.

141 *Transcript of evidence*, 1 March 2006, p.2.

142 CEO JACS to Committee, 27 February 2008.

143 JACS Annual Report 2006-07, p 36. The report estimates that the one completed neutral evaluation process at the time of reporting had saved the court approximately 5 days and 'significant expense'.

improvement";

- Poor human resources management was characterised by high numbers of temporary and acting positions; poorly written duty statements and a lack of forward planning; and
- There was lack of action to address staffing issues.[144]

7.25 This ill-performing structure was, to a large extent, the result of stripping out middle manager positions to create the Conferencing cell. This led to a lack of a "chain of command" and resulting inefficiencies as responsibilities were discharged at inappropriate levels and junior staff lacked a career path. This encouraged high staff turnover at lower levels. As a result there was a serious issue with regard to "succession planning" - in the absence of a clear career path junior staff were not receiving the training and gaining the experience to equip them to move to higher positions as senior staff retired or moved on.

7.26 A second problem was the large number of positions filled for extended periods on an acting basis and contract staff whose employment was repeatedly extended or renewed. Apart from the inefficiency of such practices, audit found that they imposed a significant workload on HR staff in dealing with the necessary paperwork.

7.27 Audit was particularly critical of staff development and training.[145] The training budget was considered "grossly insufficient", training was not "formalised or well documented" and staff undertaking quasi-judicial functions lacked required legal or conciliation skills.

7.28 Again it appears that a significant effort has been made to address these problems. Duty statements have been revised to put more emphasis on management roles and this has been supported by management training and a Collective Agreement that sets out the performance management structure.

7.29 With regard to staffing the Committee was advised that:

144 Auditor-General's Report, p. 82.
145 Auditor-General's Report, pp. 84-5.

> … workforce planning was undertaken. All vacancies were filled. Managers have full responsibility for recruitment. Succession planning is being addressed with the mooted rotation of managers into different sections to ensure continuity of business.[146]

In addition there has been a greatly increased emphasis on staff development.

Services to Court Users

7.30 In debate over the appropriateness of statistical measures of court performance the point is often made that the most important measure of the performance of a court system is the extent of public confidence in that system. To maintain public confidence it is extremely important that the courts are "user friendly", that users are given the opportunity to express their views, and, where complaints are made, that those complaints are dealt with promptly.

7.31 Audit found that "communication and liaison with stakeholders has been reasonable, but could be improved further"[147]. In this context stakeholders are predominantly the legal profession and others with a professional relationship with the courts.

7.32 With regard to complaints the report found that "... There was little evidence in the Magistrates Court of systemic action on substantive complaints [or that] … complainants are informed of progress". Recommendation 14 of the Auditor-General's Report states in part that "[t]he LC & T Unit should formalise processes for dealing with administrative complaints so that they are actioned, and feedback is given to complainants."[148]

7.33 The Committee finds that JACS' response to this part of the Auditor-General's Report was appropriate. The department advised that a courts' stakeholder forum, which meets every three months and is chaired by the Chief Justice, has been established. This forum includes representatives of

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146 CEO JACS to Committee, 27 February 2008.
147 Auditor-General's Report, p. 64.
148 Auditor-General's Report, pp. 60 & 63.

community groups.[149] A stakeholder satisfaction survey is to be completed by the end of June 2008.

7.34 The JACS annual report now notes progress on consultation with stakeholders. In addition to the Stakeholder Forum, the report identifies the Joint Rules Advisory Committee and the Law Society's Civil and Criminal Litigation Committees as key consultative forums in which the courts participate.[150]

7.35 The Supreme Court has prepared a detailed review entitled *Access to Justice in the Australian Capital Territory: Towards a More User-Friendly Supreme Court* with recommendations which will be implemented across both the Supreme and Magistrates Courts.

7.36 With regard to complaints, "a formal process for administrative feedback/complaints has been implemented …" and is publicly available.[151] Standards have also been set for the time taken to respond, action to be taken and reporting on results. JACS Annual Report also identifies as key targets for 2007-2008:

- Development, documentation and implementation of complaint management and handling process within ACT LC & T, and
- Continued monitoring and response to comments provided on the client feedback form available at the Supreme Court counter.[152]

7.37 The Committee has reviewed the specific findings and recommendations of the Auditor-General's Report on *Courts Administration* in this and the preceding chapters. As a general conclusion the Committee finds that the Government and JACS have responded to the report appropriately.

7.38 Virtually all the recommendations and findings have been accepted and

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[149] JACS, Annual Report 2006-07, p.38. Membership includes, in addition to representatives of both courts, JACS, the DPP, the Legal Aid Commission, the AFP, the Aboriginal Justice Centre, ACT Bar Association, ACT Law Society, ACTCOSS, Women's Legal Centre, Victims of Crime Coordinator, Violence Prevention Council, Canberra Rape Crisis Centre, Victims of Crime Assistance League and the Institute of Mercantile Agents.

[150] JACS, Annual Report 2006-07, pp. 38-9.

[151] CEO JACS correspondence to Committee, 27 February 2008.

[152] CEO JACS correspondence to Committee, pp. 40-1

progress has been made on their implementation. Reporting on that implementation both to the Committee and through the JACS Annual Report has been comprehensive.

8 ALTERNATIVE MODELS OF COURTS ADMINISTRATION

8.1 The judicial function in the ACT is discharged by the ACT Supreme Court, which also exercises the appellate function as the ACT Court of Appeal, and the Magistrates Court. Included within the functions of the Magistrates Court are the Coroner’s Court and the Childrens Court.[153] In addition a number of tribunals operate within the framework of the Magistrates Court.[154]

8.2 Supporting the Courts are:

- The Registry, " …responsible for maintaining up-to-date records of the Court, processing judgements and orders, listing cases and securing court records";
- The Sheriff's Office, responsible for "… civil processes of the Court, administering the jury system, court security" and a range of public functions associated with the courts; and
- The Russell Fox Library which provides services to the courts and tribunals and also to those appearing before the courts as litigants.

8.3 The ACT Law Courts and associated tribunals are administered by JACS. In the words of the Department’s Annual Report JACS provides:

> … integrated administrative, policy and operational support to the Territory's judiciary and direct registry, case management and associated services to the clients and stakeholders in the court system.[155]

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153 The *Magistrates Court Act 1930* s.291A requires that there be a designated Childrens Court Magistrate appointed for a two year term.

154 Administrative Appeals Tribunal; Credit Tribunal; Guardianship and Management of Property Tribunal; Residential Tenancies Tribunal; Mental Health Tribunal; Health Professions Tribunal. As noted above, legislation currently before the Assembly will if passed, create a single tribunal with a separate administration.

155 JACS, Annual Report, 2006-07, p. 33.

8.4 Thus staff members of the courts' administration are ACT public servants and the budget of the courts is determined as part of the JACS budget through the normal budgetary processes.

8.5 Throughout the Auditor-General's Report there are numerous findings which reflect, in part, the consequences of this administrative structure. These are considered in detail earlier in this report; the major, relevant findings are summarised very briefly here:

- Governance and accountability are not clear partly because of the division of responsibility between judicial and administrative functions;
- Clear accountability is difficult to achieve. The Courts Administrator has conflicting accountabilities to the Attorney-General, the Chief Executive of JACS, the Chief Justice, and the Chief Magistrate;
- Some financial and accountability issues are unclear;
- The ACT judiciary currently plays a limited role in generating budget proposals and approving expenditure;
- There appears to be a lack of ownership and clarity of accountability for the Budget outcomes; and
- The current structure gives rise to the risk of lack of direction of staff.

8.6 These general issues can be seen as contributing to the day-to-day problems identified in the audit: poor staff morale; unsatisfactory career structures; inadequate cooperation between the various components of the Courts Administration; insufficient consideration of process improvement; complexity of procedures; and failure to address long-term problems such as the inadequate current Information and Communication Technology (ICT).

8.7 The Auditor-General does not propose a thoroughgoing review of the ACT's approach to courts administration. Rather the report's recommendations seek to address the problems within the current administrative framework.

8.8 It is important to acknowledge that the ACT Government and JACS have responded very positively to the Auditor-General's Report, accepting the recommendations, putting in place an implementation plan which is being followed and reporting through the Departmental annual report on progress. Substantive and positive change is occurring.

8.9 It is, however, necessary to ask whether there are alternative administrative models that might better address both the issues and problems identified by the Auditor-General and support the principle of judicial independence more strongly. To raise this issue is not to imply that successive ACT governments have not recognised the importance of that principle or that current arrangements are in any way intended to limit the independence of the judiciary.

8.10 It is arguable that successive ACT governments have not devoted much attention to how the courts are administered because the independence of the judiciary is seen as so fundamental, so unchallenged, that it does not require underpinning by particular administrative arrangements. The ACT courts predate self-government[156] and the approach taken to them may reflect an earlier attitude to many constitutional matters where clearly established principles or unwritten conventions were considered sufficient to secure appropriate practical arrangements.

8.11 It may also be that the traditional approach by judges has been to leave administration and management to public servants and public service managers have tended to give courts administration a great deal of latitude to avoid any appearance of impinging on judicial independence.

8.12 In recent times more thought has been given to how the independence of public institutions and agencies that are distinct from the Executive can be secured while at the same time meeting the requirements of public accountability. A range of administrative models has emerged in courts in various jurisdictions and for other public bodies such as Auditors-General.

8.13 Judicial independence requires not only that the judiciary has security of tenure, is free from overt interference but also that the resources provided to the courts are sufficient to provide a reasonable service, that the courts control their own workload and that they make decisions about the

[156] The Magistrates Court was established in 1930 and the Supreme Court in 1933.

allocation of resources.

8.14 There should be a sufficient number of magistrates and judges, adequately resourced and supported to hear cases within a time frame and at a cost that is acceptable to all parties. The physical facilities available to the courts should also be designed to support the judicial process, with appropriate hearing rooms, and private and secure spaces for all participating in the process.

8.15 Clearly the resourcing of the courts is central to the preservation of judicial independence. A court starved of funds cannot consistently dispense justice. If the Executive Government dictates the level of resources available to the courts then the judiciary cannot be said to be independent in any real sense:

> I argue that a system of governance in which courts, or judicial heads of jurisdiction, must regularly ask the Executive Government for improvements and changes and adjustments to the administration of the courts, to ensure that the administration is conducted in a manner consistent with judicial independence, puts the judiciary in a mendicant position that is … inconsistent with judicial independence.[157]

8.16 The Chief Justice of South Australia, Justice Doyle, explicitly linked an independent courts administration with the independence of the judiciary:

> … judicial independence, as a central value of our society, will be best promoted if the staff of the courts (in the wider sense) share the judiciary's commitment to judicial independence, by being … part of a system for the administration of the courts which is under the control of the judiciary.[158]

8.17 The Auditor-General's Report quotes a study of Court governance in Australia to the effect that "… the thought, effort and resources put into developing career structures for court administrators and programs for professional advancement has paid off in terms of a high level of *esprit de*

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[157] Justice John Doyle AC, Chief Justice of South Australia, *Court Governance and Judicial Independence - The South Australian Approach,* Judicial Conference of Australia - Colloquium, 2006, p. 6.

[158] Justice John Doyle AC, p. 6..

corps and increasing levels of professional competence".[159]

8.18 In the context of the governance of Australian courts, the ACT's arrangement, where the administrative support for the Courts is provided by a unit within an executive department, may be described as being at the "traditional" end of a continuum whose other end is best demonstrated by the South Australian system, where an independent Courts Administration Council is responsible for providing "administrative facilities and services".[160]

The South Australian model

8.19 In South Australia the Council comprises the Chief Justice, the Judge of the District Court and the Chief Magistrate. The Courts Administration Authority (CAA) is the executive arm of the Council. The Administrator of the CAA is its chief executive and is responsible to the Council and subject to its control and direction. The Council and Administrator meet at least monthly.

8.20 The Administrator is independent of the Executive Government and manages the CAA in consultation with an Executive Management Committee of senior staff. The Committee also acts as an advisory body to the Council. All the staff necessary to keep the courts functioning, from cleaners to registry staff and including the personal staff of Judges, are employed by the CAA and the provisions of the relevant public sector employment legislation apply to them.

8.21 Funding for the Council comes through Parliamentary appropriation against a detailed budget prepared by the Council. However, the Council's budget requires the agreement of the Attorney-General, thus balancing the independence of the courts with the need for direct parliamentary accountability for appropriations. The Council has "considerable autonomy" in managing its budget, having some discretion in the application of monies,

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[159] Auditor-General's Report, p. 84 referring to Thomas A Church & Peter A Sallman, *Governing Australia's Courts,* AIJA, 1991, p. 59.

[160] The description of the South Australian system draws extensively on Chief Justice Doyle's paper.

the use of savings and responsibility for shortfalls.

8.22 The Authority's accounts are subject to scrutiny by the Auditor-General and the Chief Justice, as Chair of the Council, attends hearings of parliamentary Estimates Committees to answer questions about administrative matters.

8.23 In summary, Justice Doyle believes that the Courts Administration Authority in South Australia has:

> … as much autonomy as is consistent with the control of the Executive Government over our funding, and with our responsibility and accountability for the efficient delivery of the administrative service that the Council provides to the Courts.[161]

8.24 Justice Doyle does acknowledge that the level of funding remains an issue between the Council and the Executive, with the Council believing that it should receive more funds. However the Chief Justice notes that he has "… never encountered the slightest hint that the power of the purse might be used to exercise inappropriate influence".[162]

8.25 The Committee is of the opinion that many of the problems which the Auditor-General identified may have had their origins in the system of courts administration adopted in the ACT. This system encourages judges and magistrates to leave administrative and managerial tasks to others; leaves budgetary initiative and control in the hands of an executive department not necessarily sympathetic to, or cognizant of, the needs of the courts and creates a sense that courts administration is a backwater within a large government department.

8.26 There have been efforts to address these shortcomings, particularly in the wake of the Auditor-General's Report. Further time is needed to assess whether or not these changes have been effective.

[161] Justice John Doyle ACp. 13-14.

[162] Justice John Doyle AC, p. 14

RECOMMENDATION 8

8.27 **The Committee recommends that the Auditor-General provide a follow-up report to the Legislative Assembly in April 2009 examining efforts to address problems in the ACT Courts Administration.**

8.28 These changes, however, may be unable to address the weaknesses inherent in the underlying structure. The Committee believes that the South Australian model of court governance may be a better approach, aligning the interests of the courts and courts administration, making the courts clearly responsible for the management of their own resources while being fully accountable for administration through the Attorney-General to Parliament.

8.29 This approach also clarifies, strengthens and supports the principle of judicial independence by providing an administrative structure that is clearly under the control of the courts to the maximum extent that is compatible with Executive responsibility for public funding.

RECOMMENDATION 9

8.30 **The Committee recommends that the ACT Government commission an independent report on the appropriateness of applying the South Australian model of courts administration in the ACT, including a comprehensive examination of the associated costs and benefits.**

8.31 In promoting a comprehensive examination of the South Australian model the Committee re-emphasises its recommendation made in the previous chapter with regard to the need to establish a clear level of base funding required for the ACT courts to discharge their duties. Any approach to courts administration, whether it be the ACT's current system, the South Australian model or some other model, that is not based on a clear and agreed level of base funding from the outset will leave the courts financially vulnerable.

8.32 The Committee also believes that, regardless of the model used, there needs to be a greater degree of openness in formulating the Courts' budget, in keeping with the Courts' status as one of the three branches of government.

RECOMMENDATION 10

8.33 **The Committee recommends that the Law Courts and Tribunals Unit prepare its own draft budget for submission to the Attorney-General and that a copy of its budget proposal be provided to the Standing Committee on Legal Affairs of the Legislative Assembly for comment at the same time as it is provided to the Attorney-General.**

8.34 This is not a proposal without precedent. The Auditor-General, as an office of the Assembly, prepares her office's budget in consultation with the Public Accounts Committee of the Legislative Assembly and the Committee recommends it to the Treasurer.[163]

8.35 In practice, of course, the Auditor-General and the Public Accounts Committee have regard to the budgetary priorities of the Executive in framing a budget but the process of developing the budget is an open one and does allow the Auditor to put forward new spending proposals which can be scrutinised by the Assembly. If the government rejects or modifies a proposal then it must explain its reasons for doing so to the Assembly.

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[163] *Auditor-General Act 1996,* s.22.

9 CONCLUSION

9.1 The Committee acknowledges the views presented and conclusions made in the Auditor-General's Performance Audit Report No 4 of 2005.

9.2 The Committee has made 10 recommendations in relation to its inquiry into Auditor-General's Performance Audit Report No 4 of 2005: *Courts Administration*.

Dr Deb Foskey MLA

Chair

30 July 2008

APPENDIX A: Submissions received by the Committee

1. Australian Federal Police Association
2. Vocal ACT

2A. Vocal ACT supplementary submission

3. Ms Christine McKenzie
4. ACT Government
5. ACT Bar Association
6. Victims of Crime Co-ordinator
7. Law Society of the ACT
8. Office of the Director of Public Prosecutions
9. Confidential - this submission has not been published by the Committee.
10. ACT Magistrates

10A. ACT Magistrates - supplementary submission

APPENDIX B: Committee hearings and witnesses

1 March 2006

Renee Leon, Chief Executive Officer, Department of Justice and Community Safety,

Jennifer Cooke, Acting Courts Administrator, ACT Courts and Tribunals

Brett Phillips, Deputy Chief Executive, Department of Justice and Community Safety

22 March 2006

Bryan Meagher SC, ACT Bar Association

Robert Crowe SC, ACT Bar Association

4 April 2006

Gregory Walker, President, ACT Law Society

16 May 2006

Jonathon Hunt-Sharman, National President of the Australian Federal Police Association.

Dennis Gellatly, Vice-President, Community Policing. Australian Federal Police Association

Gary Shute, Zone Coordinator, ACT Policing, Australian Federal Police Association

17 May 2006

Ron Cahill, Chief Magistrate, ACT Magistrates Court

John Burns, Magistrate, ACT Magistrates Court

29 August 2006

Robyn Holder, Coordinator, Victims of Crime

Tu Pham, ACT Auditor-General

Rod Nicholas, Director, Performance Audits and Corporate Services ACT Auditor-General's Office

Graham Smith, Senior Manager, Performance Audits, ACT Auditor-General's Office

21 March 2007

Simon Corbell, Attorney-General

Renee Leon, Chief Executive, Department of Justice and Community Safety

Helen Child, Registry Manager, ACT Law Courts and Tribunals Administration, JACS

Michael Johnson, Courts Administrator, JACS

Philip Joyce, Deputy Chief Executive, JACS

7 November 2007

Hugh Jorgensen, Registrar, ACT Magistrates Court

12 March 2008

Ron Cahill, Chief Magistrate, ACT Magistrates Court