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Australia's Lower-level Criminal Courts: Tackling 21st Century Problems in a 19th Century Paradigm?

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I. Introduction

Australia's courts have been significantly impacted by change over the past 30 years. They have, to some extent, modernised their procedures and practices, but are caught very much in a period of transition: between approaches to dealing with criminal cases that would be familiar to 19th century lawyers, and are focused on efficiency and volume, to those that require greater engagement with the needs of court users. This is particularly the case in the high-volume magistrates' courts that deal with most of the criminal caseload.

Magistrates' courts are characterised by high judicial workloads. They have accounted for most of the rise in criminal caseload over the past five years² and, in 2014–15, accounted for nearly 97 per cent of all matters finalised.³

1 Professor, La Trobe University Law School.

2 Productivity Commission, *Report on Government Services 2016* (Commonwealth of Australia, 2016) Table 7A.1.

3 *Ibid.* 7.16.

In a 2007 survey of Australian magistrates, three-quarters of respondents agreed that ‘The volume of cases is unrelenting’.⁴ Notwithstanding, most of these courts have maintained positive clearance rates,⁵ with the same, or, in some cases, fewer, magistrates,⁶ and backlogs have remained relatively constant.⁷

A 2004 National Court Observation Study found that the average time taken to dispose of a criminal matter in magistrates’ courts was 4 minutes and 13 seconds.⁸ Recent research commissioned by the Victorian Royal Commission into Family Violence (VRCFV) found that the average duration of family violence matters observed across eight court locations varied from 3 minutes 34 seconds to 10 minutes 17 seconds.⁹ However, there are no established benchmarks for disposals of matters in any Australian criminal court.

II. Current Practice

The only measures for assessing the institutional performance of Australian criminal courts are those used by the Commonwealth Government Productivity Commission’s annual ‘Report on Government Services’ (RoGS) – on backlogs and clearance rates, and judicial officers per finalisation.¹⁰ These have been the focus of much debate,¹¹ and the absence of any more sophisticated methods of performance measurement arguably disadvantages courts in making the case for additional resources.

It is also arguable that focusing limited court resources on collecting RoGS data impedes courts’ ability to collect and analyse data that assist their workforce planning. Research into caseload allocation found very few lower courts keep records of allocations, so that while all aim to equalise

4 Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (Australasian Institute of Judicial Administration, 2013) 31–32.

5 That is, an excess of finalisations over lodgements: Productivity Commission, above n 2, 7.36.

6 Ibid. Table 7A.28.

7 Ibid. Table 7A.19; Table 7A.21.

8 Mack, Wallace and Roach Anleu, above n 4, 52–53.

9 Karen Gelb, *Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates Court of Victoria* (March 2016) 54.

10 Productivity Commission, above n 2.

11 Brian Opeskin, ‘The State of the Judicature: A Statistical Profile of Australian Courts and Judges’ (2013) 35(3) *Sydney Law Review* 489, 491–92; J J Spigelman, ‘Measuring Court Performance’ (2006) 16(2) *Journal of Judicial Administration* 69.

the volume of judicial workload over time, and to deploy specialist judicial skills most effectively, they are unable to track whether or not these outcomes are achieved.¹²

The focus on RoGS data has also not assisted courts to identify and service the needs of court users, first identified as a pressing issue in 1998.¹³ For example, despite widespread perceptions of an increase in numbers of unrepresented persons appearing before them in recent decades, most courts do not collect data about this, or do so only minimally or sporadically.¹⁴

An 'increasing diversity amongst court users, especially in terms of ethnic and cultural background and capacity to understand the language and procedures of courts'¹⁵ was also identified in 1998. There are ongoing attempts, including Indigenous sentencing courts¹⁶ and cultural awareness training for judicial officers,¹⁷ to improve court outcomes for Aboriginal and Torres Strait Islander (ATSI) Australians and their communities. However, there is little data available on ATSI populations in courts, or the cultural and linguistic background of any court users.

In 2015, the newly-formed Judicial Council on Cultural Diversity (JCCD) conducted consultations to assess the capacity of the courts to provide access to justice for women from both groups. The subsequent reports identified a number of issues that impede effective communication with and participation at court by these vulnerable groups.¹⁸ Previously

12 Mack, Wallace and Roach Anleu, above n 4, 9, 66, 73–74, 95–96, 99–100.

13 Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration, 1998) 159–60.

14 Tania Sourdin, Elizabeth Richardson and Nerida Wallace, *Self-represented Litigants: Literature Review* (Monash University, 2012) 23.

15 Parker, above n 13, 159.

16 Michael King et al, *Non-Adversarial Justice* (The Federation Press, 2nd edn, 2014) 207–15.

17 Anne Wallace, *Australia's Indigenous People – A Curriculum Framework for Professional Development Programs for Australian Judicial Officers* (National Judicial College of Australia, 2013).

18 Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts: A Report Prepared for the Judicial Council on Cultural Diversity* (2016, Judicial Council on Cultural Diversity) 7 ('*JCCD Migrant Refugee Report*').

documented language and communication issues for ATSI populations¹⁹ were confirmed as ongoing problems.²⁰ The reports also documented serious concerns about the provision of interpreters in courts.²¹

The JCCD and the VRFCV reported a range of other concerns about the court experience of vulnerable women:

- inadequate, out of date and unsafe court buildings;²²
- lack of safe waiting spaces;
- lengthy, and indeterminate, waiting periods;²³
- lack of understanding of court processes;²⁴
- difficulty understanding forms, charges, orders, or judgments;²⁵ and
- courtroom dynamics, including the impact of actions and attitudes of judicial officers.²⁶

The JCCD and VRFCV's emphasis on user-focused court services is a key feature of therapeutic and restorative theories of justice that have informed the development of new approaches to criminal cases over recent decades. These approaches feature direct engagement with offenders by judicial officers, multidisciplinary collaborative processes between the courts and service providers, less-adversarial paradigms, and outcomes that address community needs as well as those of victims.²⁷

19 See, for example, Diana Eades, 'Judicial Understandings of Aboriginality and Language Use in Criminal Cases' in Peter Toner (ed), *Strings of Connectedness: Essays in Honour of Ian Keen* (ANU Press, 2015) 27–51.

20 Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts: A Report Prepared for the Judicial Council on Cultural Diversity* (2016, Judicial Council on Cultural Diversity) 23–24 ('JCCD ATSI Report').

21 *JCCD ATSI Report*, above n 20, 24–25; *JCCD Migrant Refugee Report*, above n 18, 16, 29.

22 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume III* (March 2016) 130–32, 138; *JCCD ATSI Report*, above n 20, 28; *JCCD Migrant Refugee Report*, above n 18, 37–39.

23 *Ibid.*

24 Victoria, above n 22, 129–30; *JCCD ATSI Report*, above n 20, 28–29; *JCCD Migrant Refugee Report*, above n 18, 39.

25 Victoria, above n 22, 137; *JCCD ATSI Report*, above n 20, 29; *JCCD Migrant Refugee Report*, above n 18, 39.

26 Victoria, above n 22, 132–33; *JCCD ATSI Report*, above n 20, 30–32; *JCCD Migrant Refugee Report*, above n 18, 40–44.

27 King et al, above n 16, 241–45.

In contrast to the development of more engaged and therapeutic styles of judging, modern magistrates' courts also feature increasing use of audio-visual (video) links. Prison videolinks are now the presumed form of court appearance for defendants in custody in less formal court proceedings (variously categorised) across most jurisdictions.²⁸ Although the exact extent of their use is difficult to quantify,²⁹ well over half (57 per cent) of all court appearances by defendants in custody in New South Wales during 2013–14 were made by audio-visual link.³⁰

Videolinks are thought to provide a more cost-effective and efficient, safer and less disruptive means of bringing prisoners to the court than physically transporting them.³¹ There has also been a trend to provide interpreting services by telephone or videolink in the interests of saving costs.³² Videolinks or CCTV are now used extensively to take evidence from vulnerable witnesses,³³ and the JCCD and the VRCFV recommended expanding this use.³⁴ Overseas, a recent review of efficiency in the criminal courts of England and Wales also recommended giving priority to audio and videolink hearings.³⁵

Yet, while vulnerable witnesses generally experience a technology-mediated court appearance favourably, there has been little research about its impact on defendants,³⁶ including those who are unrepresented, or on interpreting. Research has found that the way that videolinks are used can impact on the ability to achieve effective engagement.³⁷

28 Emma Rowden et al, *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings* (2013, University of Western Sydney) 27, 95–102.

29 Ibid. 22–23.

30 Department of Police and Justice, Government of New South Wales, *Department of Police and Justice 2013–14 Annual Report* (2014) 82, www.justice.nsw.gov.au/Documents/Annual%20Reports/2013-14_Annual_Report.pdf.

31 Rowden et al, above n 28, 21.

32 See, for example, Department of the Attorney-General, Government of Western Australia, *Videolinks*, www.courts.dotag.wa.gov.au/V/video_link.aspx?uid=3226-3984-5962-8567.

33 Rowden et al, above n 28.

34 Victoria, above n 22, 173; *JCCD ATSI Report*, above n 20, 40; *JCCD Migrant Refugee Report*, above n 18, 53.

35 Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales, January 2015) 17.

36 Carolyn McKay, 'Video Links from Prison: Permeability and the Carceral World' (2016) 5(1) *International Journal for Crime, Justice and Social Democracy* 21, 22–23.

37 Rowden et al, above n 28, 68–73.

III. The Future

The only recent systematic attention given to the operation of lower-level criminal courts in Australia has been as part of the VRCFV's investigation, and the increasing impact of family violence on the workload of these courts³⁸ also suggests that its findings bear close examination. The JCCD recommendations and academic research also identify ways in which these courts can complete their transition to a 21st century operating paradigm.

First, there is a need to recognise that the skills required for judicial work in these courts have changed. While magistrates have always needed to communicate effectively with self-represented parties, increasingly they need to be able to engage with individuals from diverse cultural and linguistic backgrounds and to work effectively with interpreters.³⁹ They also need to engage effectively with increasing numbers of people who will appear before them 'virtually' rather than physically.

There is also an increasing need for specialisation: in therapeutic courts, which require particular types of judicial skills, and to manage particular lists where other special expertise and knowledge is required.⁴⁰ Those allocating caseload to judicial officers already take into account a range of special skills and differential expertise.⁴¹ However, in most of the courts studied in the research, there are no formal mechanisms available for identifying and developing specialist skills and expertise.⁴² There would be merit in courts making more transparent the process by which the qualities and skills required for specialist judicial work are identified, fostered, and supported.⁴³

The VRCFV called for investigation into which matters need to come before a court, and which do not, and, of those that do, which need to be dealt with by a judicial officer. It noted that the time taken to deal with 'straightforward or procedural matters'⁴⁴ including 'adjudication

38 Victoria, above n 22, 148.

39 *JCCD ATSI Report*, above n 20, 9; *JCCD Migrant Refugee Report*, above n 18, 9.

40 Anne Wallace, Kathy Mack and Sharyn Roach Anleu, 'Judicial Caseload Allocation and Specialisation: Finding the "Right Judge"?' (December 2012) *International Journal for Court Administration* 68, 69.

41 Mack, Wallace and Roach Anleu, above n 4, 102.

42 Wallace, Mack and Roach Anleu, above n 40, 79.

43 *Ibid.* 79–80.

44 Victoria, above n 22, 148.

and administration of traffic matters, including low-level offences such as driving a vehicle in a toll zone without registration⁴⁵ can constitute 'a significant proportion of court business'.⁴⁶

The VRCFV and the JCCD focused on the need for courts to develop the role of court staff, to encourage and deploy specialist skills. To free up resources and improve services to court users, the VRCFV recommended that courts move away from inefficient manual and paper-based processes towards electronic and online processes, to enable the use of staff such as registrars as 'highly skilled and proactive ... case and list managers'.⁴⁷ The JCCD called for the introduction of Court Cultural Liaison and Indigenous Court Liaison officers in all courts.⁴⁸

The VRCFV drew attention to the current system of case-listing which requires parties to turn up at fixed times (usually 10 am) to wait for an indeterminate period for their matter to be dealt with.⁴⁹ This system was also highlighted in a recent review of efficiency in UK criminal courts, which called for a review of court opening hours.⁵⁰

The VRCFV recommended staggered listings and benchmarking waiting time to provide greater guidance to parties as to when their cases would be heard and how long they should have to wait.⁵¹ It noted that 'Effective use of benchmarks necessitates data-collection practices that allow courts to reliably measure performance'. It recommended capping family violence lists 'at a level that allows magistrates sufficient time to hear each matter',⁵² an exercise that also requires attention to benchmarking.

The JCCD and the VRCFV recommended improvements to court buildings, including waiting areas, security, support services and signage.⁵³ The VRCFV noted the importance of courts working in therapeutic mode being able to work in partnership with relevant court-based professionals and services.⁵⁴ The JCCD reports emphasised the importance of building relationships between courts and the community more broadly, including

45 Ibid.

46 Ibid.

47 Ibid.

48 *JCCD ATSI Report*, above n 20, 9; *JCCD Migrant Refugee Report*, above n 18, 9.

49 Victoria, above n 22, 167.

50 Leveson, above n 35, 42 [146].

51 Victoria, above n 22, 167–68.

52 Ibid. 168.

53 Ibid. 172; *JCCD ATSI Report*, above n 20, 39; *JCCD Migrant Refugee Report*, above n 18, 53.

54 Victoria, above n 22, 181.

collaborative efforts to educate and improve understanding of court processes.⁵⁵ They also recommended clear court policies in relation to identifying the need for, engaging with and using interpreters.⁵⁶

The VRFCV found the information technology (IT) infrastructure in Victoria's magistrates' courts was inadequate and that: 'An upgraded, fit-for-purpose IT system is an essential precursor to change'.⁵⁷ It recommended freeing-up resources by creating an online electronic court registry to allow registry-related inquiries to be centralised and carried out by a specialist workforce⁵⁸ and IT upgrades to enable the court to better receive and share information. The JCCD called for improved data collection by courts about the cultural, linguistic and gender diversity of their users.⁵⁹ Research suggests that diary and calendaring systems also require updating from the manual and stand-alone systems used in most courts.⁶⁰

The VRFCV also noted the potential for newer smart, agile, technology solutions to craft user-centric services, such as a case management system using 'a real-time airport-style electronic display of listed matters, and alerts transmitted to parties' mobile phones, [to enable] parties ... to observe their place in the order of matters being heard on a given day',⁶¹ alleviate the anxieties of indeterminate waiting and enable those attending court to more effectively structure their time.⁶²

A further step might be the development of guided online resolution systems for minor or quasi-criminal offences, such as traffic matters. In addition to saving costs, this might appeal to a newer generation who are familiar with online dispute resolution systems in contexts such as eBay. The resource savings could be used to provide support to court users who are not digitally empowered and whose matters are more serious or complex.

55 *JCCD ATSI Report*, above n 20, 38; *JCCD Migrant Refugee Report*, above n 18, 8.

56 *JCCD ATSI Report*, above n 20, 39; *JCCD Migrant Refugee Report*, above n 18, 53.

57 Victoria, above n 22, 162.

58 *Ibid.* 163.

59 *JCCD ATSI Report*, above n 20, 9; *JCCD Migrant Refugee Report*, above n 18, 9.

60 Mack, Wallace and Roach Anleu, above n 4, 66–67.

61 Victoria, above n 22, 168.

62 *Ibid.*

Courts can improve their use of existing technology. Research has shown that court videolinks could be considerably enhanced by greater attention to configuration, supporting environment, protocols, procedures, and training.⁶³

It is clear from the JCCD and VRFCV reports that assessment of court performance needs to move beyond the focus of the RoGS data to a greater emphasis on assessing whether courts are meeting the needs of their users. Both JCCD reports call for the establishment of key performance indicators to measure progress against their recommendations,⁶⁴ and, as noted, a number of the VRFCV's recommendations require benchmarking.

The JCCD now provides resources and support to courts to deliver services to a culturally diverse community.⁶⁵ As it has noted, the International Court Excellence Framework, to which a number of Australian courts subscribe, could also serve as a forum for standard-setting and performance measurement with a focus on client perspectives and access to justice.⁶⁶ It has already been used, for example, by the Victorian courts to establish key performance indicators for use in the budgeting process.⁶⁷

IV. Conclusion

Australia's first-instance criminal courts are moving from an outdated paradigm – an operational environment focused on the convenience of the court and the professional participants – to one that is user-centric and places greater value on engagement with court users. But progress has been slow. Solutions designed to increase efficiency still often focus on 'throughput' and cost-savings for executive government. Many staff still operate largely in a transactional mindset, with the imperative of the yearly RoGS data collection hanging over them.

There have been significant pulls in the other direction – the development of therapeutic and problem solving approaches, methods of taking evidence to reduce trauma for children and victim witnesses, and greater awareness

63 Rowden et al, above n 28, 45–79.

64 *JCCD ATSI Report*, above n 20, 41; *JCCD Migrant Refugee Report*, above n 18, 55.

65 Judicial Council on Cultural Diversity, *Cultural Diversity within the Judicial Context: Existing Court Resources* (15 February 2016, Judicial Council on Cultural Diversity), www.jccd.org.au/publications/.

66 *Ibid.* 7.

67 Court Services Victoria, *Court Services Victoria Annual Report 2015–16*, 22 (November 2016, Court Services Victoria).

of the needs of unrepresented parties, of Indigenous Australians and those from migrant and refugee backgrounds. There has been strong judicial leadership for these developments, including the recent establishment of the JCCD. The current priority given to family violence at government level and the attention to court reform given by the VRCFV may provide the best opportunity yet to move the lower criminal courts fully into the 21st century.

This text is taken from *New Directions for Law in Australia: Essays in Contemporary Law Reform*, edited by Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton, published 2017 by ANU Press, The Australian National University, Canberra, Australia.

[dx.doi.org/10.22459/NDLA.09.2017.17](https://doi.org/10.22459/NDLA.09.2017.17)