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Senate Legal & Constitutional Committee

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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
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Canberra ACT 2600
Australia

re: Inquiry into Australia's judicial system and the role of judges
re: Inquiry into Access to justice
(formerly Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice)

Thank you for the opportunity to provide comments on these inquiries.

Attached is our submission. As it was completed before we received notification of the revised inquiry references, we have indicated in the introduction and the section headings the specific paragraphs of each inquiry which is being addressed.

The views expressed are our own, not those of Flinders University or the Australian judiciary.

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Submission to

Senate Standing Committee on Legal and Constitutional Affairs

- **Inquiry into Australia's judicial system and the role of judges**
- **Inquiry into access to justice**

(formerly inquiry into Australia's judicial system, the role of judges and access to justice)

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INTRODUCTION

These inquiries are expressed in terms of the role of judges, a term that includes the magistracy in Australia. However, the magistrates who preside in the Local Courts and the Magistrates Courts have a distinctive role to play in access to justice. Magistrates courts quickly process a very high volume of less serious cases - at least 90% of all criminal and civil lodgements. Most cases are finalised within 6 months. Though relatively few Australians have direct experience of a court in Australia, for most Australians who do attend court, their only experience of any court will be a magistrates court.

Although magistrates are the public face of justice, some aspects of their term of appointment, including provisions for discipline and termination of employment, are less favourable than those accorded to the judges of the higher courts. This submission will report on issues relating to the judiciary as a whole, as well as distinctive issues relating to the magistracy, as they relate to the terms of reference.

This submission is drawn from research findings about the Australian judiciary based on data gathered as part of the Magistrates Research Project and Judicial Research Project,[1] beginning in 2001, including the

[1] This research initially was funded initially by a University-Industry Research Collaborative Grant in 2001 with Flinders University and the Association of Australian Magistrates (AAM) as the partners and also received financial support from the Australasian Institute of Judicial Administration. Until 2005, it was funded by an Australian Research Council (ARC) Linkage Project Grant (LP210306), 2002-2005, with AAM and all Chief Magistrates and their courts as industry partners and with support from Flinders University as the host institution. From 2006, the research has been funded by an ARC Discovery Grant (DP0665198), 2006-2008.

- National Survey of Australian Magistrates 2002
- National Court Observation Study 2003
- National Survey of Australian Judges 2007
- National Survey of Australian Magistrates 2007

Further information on the research projects is available from the project website: http://ehlt.flinders.edu.au/law/judicialresearch/

More detailed and in-depth analysis of this research has been published in articles and research reports, which are listed below as references. For simplicity, footnotes and other references have been omitted from this submission and no bibliography is included; complete references are contained in the articles or research reports as indicated in the text.

This submission is in four parts:

- Procedure and qualifications for appointment (paragraphs (a) and (c) of the Committee's original inquiry), now (a) of the revised inquiry into Australia's judicial system and the role of judges;
- Method of termination and judicial complaints handling (paragraphs (a) and (g) of the Committee's original inquiry), now paragraphs (a) and (d) of the revised inquiry into Australia's judicial system and the role of judges;
- Timeliness of judicial decisions, adequacy of legal aid and cost of delivering justice (paragraphs (f), (j) and (e) of the Committee's original inquiry), now paragraphs (b) and (c) of the revised inquiry into access to justice; and
- The term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements (paragraph (b) of the Committee's original inquiry), now paragraph (b) of the revised inquiry into Australia's judicial system and the role of judges.

1. Procedure and qualifications for appointment (paragraphs (a) and (c) of the Committee's original inquiry), now (a) of the revised inquiry into Australia's judicial system and the role of judges;

There is widespread commitment to the principle that judicial appointment must be made (solely) on merit, but there is relatively little agreement, and certainly no formal binding statement, of what constitutes merit for appointment to judicial office. Failure

to establish clear formal criteria is particularly problematic because of the closed nature of the judicial appointment process in Australia.

Whatever merit for judicial appointment might include, at the very least it must relate to those qualities and skills which are needed to carry out the institutional role and the specific everyday tasks of the judicial position. Judicial appointments must be made on the basis of a close correspondence between the attributes of the candidate and the requirements of the job.

Skills and qualities needed for judicial work

Qualities identified by the judiciary

Our research identifies the qualities which magistrates and judges regard as essential and important for their every day work, in and out of court.[2]

Judges and magistrates draw on a wide range of skills and qualities in their daily work, both on and off the bench. The surveys asked magistrates and judges to indicate, from a pre-defined list, whether a particular skill or quality was essential, very important, important, somewhat important, or not important in the performance of daily tasks. Some of the skills listed are specifically legal, but many are not distinctive to legal professionals or to legal work.

When the list of specific attributes from the surveys is clustered into broader groupings, it is clear that legal values (impartiality, integrity/high ethical standards, a sense of fairness) are by far the most important type of quality to all judicial officers and equally important to judges and magistrates. Nearly all magistrates and judges rate impartiality and integrity/high ethical standards to be essential, while the rest regard these qualities as very important. These survey findings are similar to the lists of qualities which are usually identified as necessary for merit in judicial appointment, which consistently stress qualities of integrity and character.

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[2] Kathy Mack and Sharyn Roach Anleu, "The National Survey of Australian Judges: An Overview of Findings" (2008) 18 *Journal of Judicial Administration* 5, 16-20; Sharyn Roach Anleu and Kathy Mack, "Judicial Appointment and the Skills for Judicial Office" (2005) 15 *Journal of Judicial Administration* 37; Sharyn Roach Anleu and Kathy Mack, *The Qualities and Skills Important for Magistrates' Daily Tasks: Preliminary Findings* (May 2004) Report No. 4/04, Flinders University, Adelaide, Australia; Sharyn Roach Anleu and Kathy Mack, *Magistrates' Judicial and Non-Judicial Functions, Including Working Relationships* (May 2006) Report No. 4/06 Flinders University, Adelaide, Australia; Sharyn Roach Anleu and Kathy Mack, "Magistrates' Everyday Work and Emotional Labour" (2005) 32 *Journal of Law and Society* 590-614.

The next most important groups of skills are legal skills, (especially legal knowledge, legal analysis, fact-finding, and problem solving), then interpersonal skills, (communication, courtesy and being a good listener). Legal skills are rated as essential by a higher proportion of judges, compared with magistrates, whereas higher proportions of magistrates regard interpersonal skills as essential. A much larger proportion of magistrates (58%) than judges (29%) regard settlement skills as essential or very important. For judges "writing skills" are rated as essential or very important (89%) to a much greater degree than for magistrates (66%). A further noteworthy comparison relates to "managing the emotions of court users". For two-thirds of magistrates (65%) managing emotions is essential or very important to their daily work, just about half of judges agree (49%).

These differences reflect some of the distinctive features of the work of magistrates: long lists each day, unrepresented litigants, disadvantaged litigants and significant time pressure. Magistrates' work requires greater direct engagement with those who appear before the court, and perhaps magistrates have a greater awareness of their practical needs, with less frequent need to prepare written decisions. Nonetheless, judicial officers at all levels should always be expected to possess interpersonal skills, such as courtesy, being a good listener, compassion and patience, which the magistrates value so highly. This is reflected most clearly in the criteria articulated by the Lord Chancellor's Office for judicial appointment in England and Wales.

Public views about judicial skills and qualities

An interesting insight into the importance of skills for the judiciary is shown by the findings from a large national social survey (Australian Survey of Social Attitudes [AuSSA] 2007; 2769 respondents) which asked respondents to indicate the importance of various qualities for the judiciary. Table 1 (below) shows that the largest proportion of respondents to the AuSSA survey rates legal knowledge (75%) as essential, more than their ratings for any of the other qualities, and 63% rate impartiality as essential. In contrast, 91% of Australian judiciary (magistrates and judges combined) rate impartiality as essential, while 62% identify legal knowledge as essential. There are few other differences between judicial officers and general public assessments regarding the importance of certain skills to judicial work. General life experience and compassion are valued equally by the judiciary and the public, while diligence is valued slightly more highly by the judiciary than the public.

Table 1: Importance of skills for judicial work: public opinion and assessment by judicial officers

Quality/skill	Australian Public* (n = 2769)		Australian judiciary⅄ (n = 547)	
	Essential	Very important	Essential	Very important
Legal knowledge	75%	19%	62%	28%
Impartiality	63%	24%	91%	8%
General life experience	46%	33%	46%	37%
Diligence/hard work	44%	38%	53%	39%
Compassion	36%	30%	33%	32%

* Phillips et al (2007) the Australian Survey of Social Attitudes 2007 [computer file] Australian Social Science Data Archive, Australian National University, Canberra

⅄ National Survey of Australian Judges (2007)
Second National Survey of Australian Magistrates (2007)

Why become a judge or magistrate?

Another aspect of the procedure for appointment to a judicial position is self-selection. Information about how and why people become judges or magistrates provides an important basis for effective recruitment. In what circumstances do potential candidates consider judicial appointment and what is it about the position that they find attractive?[3]

Perhaps the first point to note is that relatively few judges or magistrates appear to have planned to undertake a judicial career. More than one-half of respondents identified "long-standing desire to be a judge [or magistrate]" as unimportant or not very important in deciding to become a judge or magistrate, while only one-third indicated that this factor was important or very important.

When indicating factors which were important in the decision to consider becoming a judge, three-quarters of judges (77%) identified "a personal approach by someone in the court or government" as a very important or important factor. More than half

[3] See Kathy Mack and Sharyn Roach Anleu, "The National Survey of Australian Judges: An Overview of Findings" (2008) 18 *Journal of Judicial Administration* 5, 14-15; Kathy Mack and Sharyn Roach Anleu, *Australian Magistrates: Continuity and Change* (June 2008) Report No. 1/08 Flinders University, Adelaide, Australia; Kathy Mack and Sharyn Roach Anleu, *Becoming a Magistrate* (May 2006) Report No. 2/06 Flinders University, Adelaide, Australia.

(54%) indicated this was very important while nearly one quarter (23%) indicated that it was important. In comparison, less than half of magistrates (45%) identified this as important or very important.

The high degree of importance of an approach from the court or government suggests that if there is a desire to widen the pool of potential judicial candidates, it will take active outreach by courts and governments. At least in the present climate or legal culture, a process of self-nomination is unlikely to produce a wide or varied pool of judicial candidates.

In other respects, the reasons judges give for becoming a judge are very similar to the reasons given by magistrates for becoming magistrates. The decision to become a magistrate or judge is an affirmative desire to undertake that role, pulled into the work, rather than pushed into it by dissatisfaction with previous occupations or positions. The intrinsic qualities of the work itself are of primary importance including features such as diversity of the work and intellectual challenge. Extrinsic factors or working conditions are the next most important type of factor. Altruistic social factors and career path factors are the next most important groups. The idea of being of value to society is particularly important and the desire for a change is the most important of the career path group of factors.

However, there are some differences regarding particular factors. Job security was a more important consideration for magistrates (74%) than judges (65%). The diversity of work was slightly more important for magistrates (71%) than judges (60%). Salary was an important (including very important) factor for over half of magistrates (59%) in the decision to become a magistrate (and equally important to male and female magistrates), whereas salary was an important (including very important) consideration for only around one third of judges (35%). The converse obtains for benefits: for over one quarter (29%) of magistrates, benefits was an important (or very important) factor in the decision to become a magistrate, while benefits was an important factor for half of judges (51%) in the decision to become a judge.

It is not surprising to find that judges value benefits so highly, given the substantial superannuation and other entitlements they receive, compared to magistrates; although judges salaries are higher than those of magistrates, salary was a much more important factor to magistrates in their choice to become a magistrate. This may reflect perceptions of alternative income levels in other available legal occupations.

Another aspect of becoming a judge or magistrate is career path factors, which are generally less important to judges than to magistrates, in particular, desire for a change and dissatisfaction with previous position. Over one-half of judges (57%) identified a desire for a change as a very important or important factor, and over two thirds of magistrates (70%) expressed this view. However, it would not be correct to say that people become judges or magistrates because they are dissatisfied with the position held before undertaking judicial appointment. Dissatisfaction with previous position is not important to judges or magistrates, especially so for judges: 61% of judges identify "dissatisfaction with previous position" as unimportant and 19% indicate that this was not very important.

To sum up, survey responses indicate that most magistrates and judges are pulled into the position by the intrinsic nature of the work and some aspects of the working conditions and are attracted to the idea of doing something that they regard as valuable to society, in circumstances where they are ready for a change and are approached by someone in the court or government. Few appear to be motivated by a desire to leave their previous positions or as part of a longer-term career plan to become a magistrate or judge.

Promotion from within the judiciary

Promotion from one judicial office to a position on a higher court has been regarded as inconsistent with the principles of judicial independence as they have developed in the Anglo-Australian legal system. A number of survey respondents expressed this view. A judicial officer seeking promotion may appear to be tempted to decide cases in a way which will please the executive government or other individuals or groups which may have an influence on judicial appointments. In contrast, international norms expressly contemplate promotion, and promotion is a normal feature of European court systems.

Actual practices regarding appointments of judicial officers in Australia suggest that promotion from within the judiciary is more frequent than might be contemplated by the principles of judicial independence articulated above. Although there is no formal promotion structure in Australia, over one-quarter of respondents to the National Survey of Australian Judges (2007) report previous judicial appointment before their current position, and it is a matter of public record that all current members of the High Court of Australia were previously judges on other courts.

The lack of clarity about promotion as an aspect of judicial appointment is, in part, a consequence of the lack of transparency in judicial appointment criteria and process at all levels. If previous judicial (or tribunal) experience is thought to be an appropriate or desirable qualification for appointment to a particular judicial office, this should be openly stated so that the implications of promotion for the independence of all judicial officers can be appropriately resolved.

Credentials and the professionalisation of the magistracy

In addition to the research discussed above, another aspect of qualification for judicial office deserves mention: the increased professionalisation of the magistracy as result of the changes in formal qualifications.[4]

Admission to practice is a relatively recent requirement for the magistracy in most Australian jurisdictions. Until about the 1970s (depending on the state/territory) magistrates were appointed under public service legislation and employed in a government department, subject to the terms and conditions of public servants. Appointment as a magistrate often resulted from internal promotion after service as a clerk of court, not via external recruitment. Statutory requirements for appointment were not specific. For example, in South Australia the *Local Courts Act 1926* provided that a magistrate be a "suitable person". Admission as a legal practitioner was not always required though some magistrates did have legal qualifications in line with local convention.

The requirement of qualification for admission to practice was imposed, usually at the time magistrates were separated from the public service. This brought the formal qualification for the magistracy into line with that for the judiciary in other courts. The current minimum statutory qualification for appointment as a magistrate is admission as a legal practitioner (barrister and/or solicitor) of one or more named jurisdictions, usually for five years. Appointment to higher courts usually requires a slightly longer minimum time. However, most judicial officers have been in practice for much longer than the minimum before undertaking judicial office, on average 20 years.

Findings from the National Survey of Australian Magistrates 2002 show that 98% of magistrates have legal qualifications; almost nine in ten (89%) have been in legal

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[4] Sharyn Roach Anleu and Kathy Mack, "The Professionalisation of Australian Magistrates: Autonomy, Credentials and Prestige" (2008) 44(2) *Journal of Sociology* 185, 190-191, 193-194.

practice. However, according to the 2002 survey, educational qualifications and practice experience are somewhat different for longer serving (17+ years) compared with the most recently appointed magistrates (5 years or less). (2007 data has not yet been analysed.)

Nine in ten magistrates (90%) appointed five or less years ago (as measured at the time of the survey in 2002) report having an LLB degree (includes B.Juris/LLB) compared with about three-quarters (74%) of the longest serving magistrates. Half (53%) of the recent appointees have a BA degree (in addition to the law degree) compared with less than one in ten (9%) of the longest serving magistrates.

The legal practice experience of new recruits to the magistracy is more diverse than that of their longer-serving counterparts. Over half (56%) of the recent appointees have worked in both the private and the public sectors, contrasting most strongly with the longest-serving magistrates (13%). Half (50%) of the magistrates who have been on the bench for 17+ years have only private practice experience compared with less than one fifth (17%) of the most recent appointees.

Remnants of the earlier public service structure are shown by the career path of one fifth (22%) of magistrates responding to the 2002 survey who have worked as a clerk of the court, some of whom had not engaged in legal practice. The vast majority of the former clerks are male, their median age is 56, and nine in ten were appointed more than ten years ago. As direct promotion from the ranks of clerks of court, without admission to legal practice, is no longer a career path into the magistracy, it is likely that the numbers of magistrates with this occupational history will continue to decline.

2. Method of termination of judges and the judicial complaints handling system (paragraphs (a) and (d) of the Committee's terms of reference of the Inquiry into Australia's judicial system and the role of judges)

Guarantee of judicial tenure during good behaviour, with removal requiring executive and legislative action, is the core protection for security of tenure, which underpins judicial independence and impartiality. Methods of termination and handling of judicial complaints each raise issues of security of tenure. In general, as discussed below, the formal protections for the security of tenure of magistrates are less than that afforded the judges of the district, supreme and commonwealth courts, and the

provisions for dealing with complaints, including the possibility of suspension and the role of the chief judicial officers, are different. [5]

Although magistrates are becoming more like judges of the district and supreme courts in their functions and characteristics, the tenure of magistrates is not protected to the same extent or in the same ways as the tenure of judges in those courts, especially in procedures and standards for removal and suspension from office. There is no justification for these distinctions and they should not be maintained.

Removal

Magistrates in the Australian Capital Territory, New South Wales, Tasmania and Victoria have the same protections against removal as their colleagues in the district and supreme courts of their jurisdiction, with the same process requiring legislative and executive action. In comparison, magistrates in Western Australia, Queensland, South Australia and the Northern Territory do not have the same protections.

In Western Australia, removal of a magistrate on any basis other than physical or mental unfitness requires the same legislative and executive process as the district and supreme courts. However, the Attorney-General can initiate a proceeding to determine a magistrate's mental or physical fitness to discharge the duties of the office which can lead to relieving the magistrate of duties temporarily or terminating the magistrate's appointment, which is deemed a disability retirement.

In Queensland and South Australia, magistrates are subject to the supervision of the Supreme Court and the Attorney-General. Magistrates can be removed from office where there is "proper cause", as determined by the Supreme Court on the application of the Attorney-General. Proper cause includes such matters as mental or physical incapacity, conviction of an indictable offence, incompetence or serious neglect, or other unlawful or improper conduct in the performance of duties. Queensland also includes "proved misbehaviour, misconduct or conduct unbecoming a magistrate" and failing to comply with a transfer order. In South Australia, there is provision for a prior investigation or inquiry by a single Justice of the Supreme Court.

[5] Kathy Mack and Sharyn Roach Anleu, "The Security of Tenure of Australian Magistrates" (2006) 30 *Melbourne University Law Review* 370-398. Kathy Mack and Sharyn Roach Anleu, "The Administrative Authority of Chief Judicial Officers in Australia" (2004) 8 *Newcastle Law Review* 1.120

Magistrates in the Northern Territory have the least formal protection. A magistrate can be removed by a decision of the Administrator on the grounds of incompetence or incapacity, failure to comply with a direction of the Chief Magistrate as to sittings, or if, for any other reason, the magistrate is unsuited to the performance of duties.

Suspension

In general in Australia, there is no formal process for addressing judicial misconduct which does not justify removal. Traditionally, when a judge or magistrate is not performing up to standard, it is the role of the chief judicial officer of the court to address the matter internally and informally. This emphasis on informal complaint handling is still the norm in most jurisdictions, except in New South Wales and the Australian Capital Territory which have each established a Judicial Commission empowered to receive and investigate complaints against judges and magistrates.

A key aspect of the handling of concerns about judicial conduct is the power to suspend a judicial officer while a complaint is being investigated. There are no formal provisions for suspension of the Commonwealth, supreme or district court judiciary except in the Australian Capital Territory and New South Wales, where all State judicial officers, including magistrates, are subject to identical regimes through their respective Judicial Commissions.

A properly designed and managed process for suspension of a judicial officer, while grounds for removal are being considered, is not in itself a denial of judicial independence. The transparency and procedural fairness of the Judicial Commission process provides significant protection for the constitutional values of public confidence and institutional integrity.

In contrast, in Queensland, South Australia and Western Australia, magistrates (but not judges) can be suspended on the basis of a preliminary finding that reasonable grounds may exist to justify removal from office. The precise procedures and grounds differ, though in all jurisdictions there is a role for a Justice of the Supreme Court, usually the Chief Justice. There do not appear to be any statutory grounds for suspension of a magistrate in the Northern Territory or Victoria. In Tasmania, the grounds and mechanisms for suspension are identical to those for removal – by the Governor on an address from both Houses of Parliament on grounds of proved misbehaviour or incapacity.

The suspension provisions which can be used against magistrates in Queensland, South Australia and Western Australia, and the absence of such provisions for judges in those and other jurisdictions raises concerns. First, there is no justification for treating magistrates differently than judges. Second, the process and grounds for removal lack the transparency and fairness of a well-developed judicial commission process, which is necessary for the process to generate public confidence. Third, having both the executive and a Justice of the Supreme Court involved in removing a magistrate threatens the institutional integrity of both courts.

3. Timeliness of judicial decisions, adequacy of legal aid and cost of delivering justice (paragraphs (f), (j) and (e) of the Committee's original inquiry), now paragraphs (b) and (c) of the revised inquiry into access to justice;

Much consideration of timeliness of court decisions focuses on the higher courts and the gap between filing and final resolution or between trial and delivery of judgment, especially in civil cases tried without a jury. However, the vast bulk of civil and criminal cases are heard in magistrates courts. In these courts, large numbers of cases are set each day. The challenge for the magistrate is to deal with each case in a reasonably expeditious fashion, to get through the list for the day and so enable all cases to receive some judicial attention. For those attending court, this can mean long waits in court on the day for a very brief and rapid processing of individual cases, as a result of the demands of the high volume caseload.[6]

The National Court Observation Study reveals how magistrates "get through the list" on the day and "move cases along" towards a final resolution under these difficult circumstances, specifically in their handling of the "criminal list". Magistrates determine adjournments, decide bail, set cases for other procedures and allocate matters to trial courts; they hear guilty pleas and impose sentences. People on the criminal list may be in custody or bail, legally represented or not.[7]

Typically all matters set for the criminal list are scheduled for the same time, usually 9.30 or 10.00 am, though some courts have staggered listings, with groups of matters

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[6] Kathy Mack and Sharyn Roach Anleu, "Getting through the List: Judgecraft and Legitimacy in the Lower Courts" (2007) 16(3) *Social and Legal Studies* 341-361.

[7] Kathy Mack and Sharyn Roach Anleu, *National Court Observation Study: Overview of Findings* (June 2006) Report No. 5/06 Flinders University, Adelaide, Australia.

set at two or three different times during the day. The number of matters scheduled for one court for one day during the study period ranged from 25 to 313.

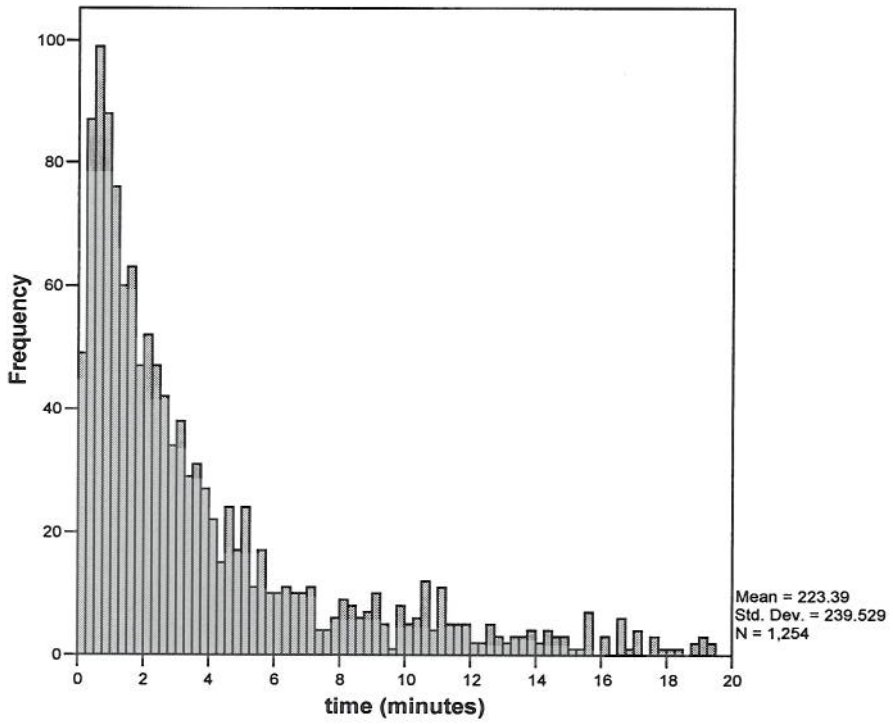
From the point of view of the magistrate at the beginning of the day, it is impossible to know with any certainty which matters will be heard at all and which will require significant time and attention and how long the list will take. From the point of view of court users, this unpredictability means they must simply wait, sometimes for hours, for their case to be called. Should they leave the room, even briefly, they risk missing the case, with potentially serious consequences. Other urgent and important demands, such as work or child care, must somehow be managed to remain at court.

Most courts had priorities for ordering the list, which could be formal or informal, expressly communicated or implicit. The main priority was usually to have the matters expected to be quickest heard first, to reduce the amount of time people must spend waiting. However, this strategy can itself cause confusion, as it means that matters are called out of the order on the posted lists, so that a person attending court cannot be sure when their matter might be called.

However, as the findings from this study demonstrate, the unpredictability of the criminal list is not something that can be managed administratively. The magistrate must still exercise considerable judgecraft to achieve effective time management during the list.

Once a case is called, the magistrate must deal with it very quickly to get through the list. The time taken for a single matter ranged from 15 seconds or less for 5% of the matters observed, to 15 minutes or less for 95% of matters. (See Figure 1 below.) One quarter (25%) of all matters were dealt with in less than one minute. Half of all matters were completed in only two minutes and 20 seconds (Figure 1), and the average time per matter was four minutes and 13 seconds. These findings are similar to other Australian and US research.

Figure 1: Time per matter [15 second intervals]



Source: National Court Observation Study 2003

This distinctive demand of magistrates' work is reflected in responses to the National Survey of Australian Magistrates (2007). Over half of magistrates (54%) identify the capacity to make quick decisions as an essential skill, compared with only 29% of judges in other courts.

Another aspect of timeliness in the magistrates court is the impact of limitations on legal services. In 2007, magistrates and judges were asked about the time taken up explaining things to unrepresented litigants and the extent to which legal representatives were well prepared. As shown in Table 2 below, one-third of magistrates indicate that their time is always or often taken up explaining things to unrepresented litigants, and over half indicate that legal representatives are only sometimes well prepared. In contrast, judges of the district and supreme courts do not face these challenges. Only 15% of judges in these courts indicate that they always or often spend time giving explanations to unrepresented litigants, and more than half indicate that legal representatives are always or often well prepared, rising to 70% when only supreme court responses are considered.

Table 2: Judicial experience of unrepresented litigants and preparedness of legal representatives

My time is taken up explaining things to unrepresented litigants	Judges* (n = 309)	Magistrates* (n = 243)
Always/often	15%	58%
Sometimes	53%	38%
Rarely/never	32%	5%
Legal representatives are well prepared		
Always/often	58%	38%
Sometimes	39%	55%
Rarely/never	4%	7%
* Columns may not total exactly 100% because of rounding.		

Source: Second National Survey of Australian Magistrates (2007), National Survey of Australian Judges (2007)

As judicial time is the most expensive resource in a court, adequately funded legal services would seem much more effective, both in cost savings and improving the quality of the experience of court users, than requiring the judiciary to take time, in open court, to give explanations to parties which could be done by legal advisors.

The volume of cases in the criminal list and their unpredictability, and the limitations of legal representation, require magistrates to make many different decisions very rapidly. These pressures can limit a magistrate's ability to provide the meaningful opportunity to be heard or the genuine engagement necessary for court users to experience the exercise of judicial power as legitimate.

Most of the decisions in magistrates courts, especially in the criminal list, are delivered orally and immediately. In contrast, there is considerably more emphasis on preparing written judgements in the higher courts, which creates different problems for the timeliness of judicial decisions. Responses to the 2007 surveys indicate that magistrates spend, on average, about an hour a day "writing/preparing decisions, judgments, orders", compared with judges, who spend about 2½ to 3

hours, on average, per day on this aspect of their work. Also, judges report a higher proportion of typical days including these tasks compared with magistrates. While most of the typical days described by judges and magistrates include at least some time spent "writing/preparing decisions, judgments, orders", judges undertake these tasks in a larger proportion of their typical days and for longer times, compared with magistrates.

The need to prepare written judgments can be a source of delay in rendering judicial decisions. While there were no specific questions in the surveys about this issue, several respondents provided written comments indicating that there is insufficient time available for judgment writing during the working day, so that this task must be done at home or in chambers after hours. This issue is especially emphasised by magistrates, while judges who commented on this issue also indicate that the demands of judgment writing are experienced as an ongoing obligation which is never fully discharged.

4. term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements [paragraph (b) of the terms of reference of the Inquiry into Australia's judicial system and the role of judges]

Retirement

Judicial retirement ages differ between jurisdictions and mandatory retirement ages for magistrates and judges are not always the same (see Table 3). Findings from the national surveys indicate that, while these legislative provisions are an important factor in the planned retirement age of magistrates and judges, other issues appear to be more significant. While the plans of some judicial officers might be affected by abolishing or changing compulsory retirement ages, it appears that, for most in the judiciary, decisions about retirement are more strongly driven by factors such as finance, health, and job satisfaction.[8]

Table 3: Statutory Retirement Ages

[8] Kathy Mack and Sharyn Roach Anleu, *Career Change and Retirement: A Preliminary Report* (May 2004) Report No 3/04 Flinders University, Adelaide, Australia.

	Judges	Magistrates
ACT	70	65
NSW	72	72
NT	70	65
QLD	70	65
SA	70	65
TAS	72	72
VIC	70	70
WA	70	65
CTH	70	70

In the National Survey of Australian Magistrates 2007 and National Survey of Australian Judges 2007, respondents were asked "what is your planned retirement age?" Results are shown in Table 4 below.

Table 4: Planned retirement age

	Judges* (n = 309)	Magistrates* (n = 243)
60 or less	14%	31%
From 61 to 64	9%	12%
65	24%	33%
From 66-69	11%	5%
70	31%	13%
71-72	10%	5%
* Columns may not total exactly 100% because of rounding		

Source: Second National Survey of Australian Magistrates 2007
National Survey of Australian Judges 2007

Of magistrates, 43% intend to retire before 65, compared with 23% of judges. One quarter of judges, compared with one third of magistrates, intend to retire at 65. Nearly one third of judges (31%) intend to retire at 70. These results reflect the differing statutory retirement ages for judges and magistrates, but there are other factors operating. Research based on the 2002 National Survey of Australian Magistrates shows that nearly two thirds of magistrates intended to retire before the

statutory age, especially magistrates in New South Wales and Victoria, where the retirement age was 72 and 70 respectively (as it is now).

The 2007 surveys also asked judges and magistrates about the factors which affected their planned retirement ages. Most respondents identified at least two factors. These answers were grouped into broad categories, to enable further analysis and comparison.

Table 5: Factors affecting retirement

	Judges* (n = 289)	Magistrates* (n = 227)
Finance	24%	53%
Health	34%	37%
Family	17%	23%
Job satisfaction	41%	26%
Statutory age	18%	11%
Plans for retirement	16%	9%
Other work-related issues	13%	11%
Quality of life	19%	13%
Other	5%	7%
*The figures in this column do not add up to 100% due to multiple responses to single question		

Source: Second National Survey of Australian Magistrates (2007)
National Survey of Australian Judges (2007

As shown by this table, statutory age was mentioned by only 18% of judges and 11% of magistrates as a factor affecting planned retirement age. Other factors were mentioned much more frequently, with somewhat different response patterns for judges and magistrates.

For magistrates, the most frequently mentioned factor, by more than half of the respondents, is finance, and superannuation is a significant element. Only one-quarter of judges mentioned finance as a factor affecting their retirement age. The most frequently mentioned single factor for judges is job satisfaction, identified by 41% of judges, compared with 26% of magistrates. Health is identified as a factor by over one-third of judges and magistrates, and is the second most frequently

mentioned factor for both groups. As the average age for judicial officers in Australia is 57, it is reasonable for them to consider health in future planning.

Legislation in every jurisdiction creates substantial superannuation entitlements for judges of the higher courts which can take effect well before mandatory retirement age. The usual provisions are that at age 60, after 10 years of service, a judge is entitled to an annual pension of 50-60% of salary. These entitlements do not depend on contributions by the judge or employer. Thus, a judge is very likely assured of a very financially secure retirement, which is not always the case for magistrates.

Magistrates in every jurisdiction (except the Chief Magistrate in Victoria, and Queensland) lack these substantial entitlements and, indeed, do not have any consistent superannuation entitlements, even within a given court. Magistrates are usually defined as employees for the purpose of the relevant legislation in their jurisdictions. This entitles them to whatever superannuation may be available to employees generally, based on employer and employee contributions. In some jurisdictions, magistrates who were previously members of state superannuation schemes are expressly allowed to continue to participate.

One consequence of these varied schemes is that magistrates within a single court may be on very different superannuation programs. Depending on their previous employment, some magistrates may have a lengthy history within a reasonably generous scheme, while others may have come from legal practice backgrounds with little or no superannuation entitlements. For some magistrates, there are strong financial disincentives for working after age 60, which is partly reflected in the higher percentage of magistrates intending to retire at age 60 or before. On the other hand, in 5 jurisdictions (see Table 3 above), magistrates must retire at an earlier age than judges. This earlier mandatory retirement can be especially undesirable for magistrates who lack the superannuation entitlements available to judges. Some magistrates may prefer a longer working life in judicial office to build up sufficient superannuation entitlements, comparable to those of their colleagues.

Security of tenure: remuneration

One aspect of the term of appointment for magistrates relates to security of remuneration, an aspect of security of tenure.[9] There is less protection against reduction in the remuneration of magistrates compared with that available for judges in some courts.

[9] Kathy Mack and Sharyn Roach Anleu, "The Security of Tenure of Australian Magistrates" (2006) 30 *Melbourne University Law Review* 370-398.

In all Australian jurisdictions (except Tasmania) the remuneration – sometimes expressed as salaries and allowances – of judges of higher courts is expressly protected against reduction by constitutional or legislative provisions, although such legislation is not usually entrenched against amendment or repeal. Tasmania achieves the effect of avoiding a reduction in salary for the Justices of the Supreme Court by legislation which links judicial salaries with that of the Chief Justices of Western Australia and South Australia, whose salaries are protected.

In contrast, the protection for magistrates' remuneration is much more variable:

- The Australian Capital Territory, New South Wales, the Northern Territory and South Australia have express provisions which protect magistrates' "remuneration and allowances" (Australian Capital Territory), "remuneration" (New South Wales), "salary, allowances and other benefits" (the Northern Territory), "salary and allowances" (Queensland) and "rate of salary" (South Australia).
- In Tasmania, magistrates' salaries are expressed in legislation as a percentage of the salary of a Supreme Court Justice which, as indicated above, is itself linked with other Chief Justices' salaries with express protection against reduction. This would provide some protection against reduction in salary for a magistrate.
- Victoria and Western Australia have no statutory guarantee that magistrates' salaries will not be reduced.

Clear and explicit protection for security of remuneration with an express prohibition against reduction in salary and allowances should be provided in Tasmania, Victoria and Western Australia.

Magistrates play a central role in the Australian legal system. The public who appear in the magistrates courts are entitled to have their cases heard by judicial officers accorded at least the same protections as judges.

CONCLUSION

Empirical research, especially when it engages directly with the courts and the judiciary, provides valuable data on public policy issues, such as those raised by the Inquiry. The research summarised in this submission bears on several issues raised by the Inquiry relating to the Australian judiciary as a whole and the magistracy in particular:

- skills essential for judicial work which could be incorporated into a more transparent judicial recruitment and selection process;
- lack of clarity about the importance of previous judicial office as a factor in appointment;
- the importance of a personal approach for recruitment into judicial office, especially for judges;
- the importance of the nature of work as a primary factor attracting candidates to all levels of the judiciary along with a desire to be of value to society and being ready for a change, while there is some difference in the importance of other factors – benefits are more important to judges, while job security and salary are more important to magistrates;
- the increased professionalisation of the magistracy, in terms of education qualifications and range of legal practice experience;
- the lesser formal protections for judicial independence, in particular, for security of tenure of magistrates in some jurisdictions, in relation to guaranteed remuneration, suspension and removal from office;
- the importance of financial and personal factors in the timing of retirement, rather than the statutory age; and
- the particular demands in the work of the magistrates courts and its impact on the timeliness of judicial decisions.