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Speech delivered by Chief Magistrate Kelvyn Prescott

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1. This is the second year in which the JCA has had a focus on the Magistrates Courts and the jurisdiction of the Magistrates and I want publicly to acknowledge the support of the JCA for the Magistrates throughout Australia.

2. One of the tasks of Court Administrators is to ensure that courts are smoothly run and that citizens whose cases come before the courts are dealt with as promptly as possible. The general run of criminal matters that comes before the Magistrates come in several separate categories and the numbers and percentages will vary according to the location and the demographic makeup of the population. Australia wide though, it is my understanding that about 45 per cent plus of all the cases which come before the Magistrates relate to the use of motor vehicles in some way or other. I want to mention this important statistic at the outset because in the development of Specialist Courts and in the articulation of a principle of therapeutic jurisprudence we have not yet placed full recognition upon the fact that in a modern world the motor vehicle is by far the most common means of committing an infringement against the mores of society.

3. There are a small number of cases that the Magistrates hear and determine whether there is – on a major indictable matter – a case to answer. These cases numerically comprise about 7 and a half per cent of all cases Australia wide. There has been a detectable legislative trend throughout Australia and throughout the western world to make matters major indictable and Australia has not been immune from this phenomenon. In South Australia for instance certain firearm matters are now major indictable offences.

4. There is a detectable change in the way in which major indictable offences are dealt with by summary courts. That detectable change relates to the provision of DNA evidence and the delays associated with the production of reports that relate to DNA material which is associated with the case. This phenomenon means that on any given charge of murder that the forensic results will not be available until about 12 months from the date of the commission of the alleged offence.

5. This phenomenon of delay occurring across jurisdictions means a change in the work of Magistrates. It means that we are required to hold and to 'manage' the major indictable case until it is in fact possible to make a determination that there is a case to answer. This has a serious implication for the managing of the court lists. What was a relatively compressed process and which was capable of compression, was reflected in the approach adopted by the Magistrates and reflected at least in South Australia in the rules established by the court. For the concept was for a prompt determination – in South Australia on the papers unless there are special reasons – for a determination that a citizen should be placed on trial in a superior court.

6. Australia wide about 10 per cent of the cases that come before the court are associated with charges of assault. This group of cases has undergone considerable change as social behaviour has changed in Australia. Licensed premises are now dominated by poker machines and by security staff. Behaviour at these public venues is usually videotaped and

scrutinised. Licensees do not want disturbances at licensed premises because it severely interferes with the cash flow.

7. There has been a rise of reported incidents of family violence and in most jurisdictions that reported rise in family violence has been reflected by separate legislative recognition of the social evils of family violence. In South Australia the charge of 'assault family member' carries a maximum penalty of 3 years imprisonment. The charge of common assault carries a maximum of 2 years imprisonment. The rise of reported incidents of family violence also takes place against a society's background where there is an increase in the per capita consumption of units of alcohol and, I suspect, more consumption of that volume of alcohol occurring within the family home rather than at licensed premises. There are powerful incentives – random breath tests – which are likely to place at least some pressure on citizens to do most of their consuming of alcohol within their family residences.

8. And so it is that police, ambulance and social workers as well as you and I are now familiar with the scenarios established by patterns of family violence and the necessity for professional intervention. We are familiar with the social need for shelter accommodation for women with young children who are in desperate need of self contained accommodation in the major urban areas. We are familiar with the legislative provisions recognised now by the Parliament which permit courts to make orders excluding a property owner from being in attendance on the property in the making of restraint orders or apprehended violence orders. These legislative reflections deal with this area of family violence but as Court Administrators it has taken the lead of the Canadians and the Americans to encourage us to develop our own specialist family violence courts.

9. For a Court Administrator these have many attractions but they are also a consumer of resources. It is my suspicion that of all the assault cases which come before the courts that about 20 per cent of those cases involve incidents of violence within families. Those family tensions are also represented by restraint orders which are separately sought before the court, they are a reflection of complex relationship issues which arise from within a complex society. They occasionally involve parents taking out restraint orders against children and vice versa. From the point of view of the Court Administrator it has been very pleasing to see the development of a new area of concentration for the helping professions. The administration of a family violence court in South Australia would not have been possible without the emergence and recognition of a children's worker, a women's worker and a men's worker. By the funding and intervention of these individuals it has been possible to manage these cases through the court system giving those cases time in the courtroom but also focussing on a considerable amount of time spent by the various professionals in the relationship building and relationship counselling outside the courtroom and so our focus is shifting from one where the courtroom is the entire dominated focus of attention to one in which the courtroom and the role of the Magistrates has become the dominant but not the only focus. There is I think a recognition that the Magistrates need to and do work with the dedicated professionals in this area reliant upon the various reports provided to comment and to create probing questions

about the nature of these relationships so that the matters before the court can in fact be determined.

10. With the assistance of dedicated police prosecutors and skilled public defenders these cases have tended – at least in South Australia – to require very little trial time. We now have a legal profession which has had in its training considerable emphasis on alternative dispute resolution. Those negotiating skills which our legal profession has, have been of great assistance to Court Administrators conducting this type of court. There is a natural desire on the part of parties coming into court for matters of this type not to have to express in open court their failings in their relationships and to have those failings exposed to public scrutiny. That is too a reflection of our own human fears as Court Administrators and as Judges and Magistrates.

11. South Australia conducted an inquiry many years ago. That inquiry had as its focus a particular question. That question was whether the use of cannabis should be and remain unlawful. The results of that debate in South Australia have had very widespread implications. The availability of cannabis in our society appears now to have a co-relationship with the rise of schizophrenic behaviour, particularly among young men who abuse cannabis. This social phenomenon has occurred at the same time as the rise and rise of 'principles of normalisation' or what is now known as 'social role valorisation'. These principles of normalisation have found some legislative recognition. Section 269S of the *Criminal Law Consolidation Act 1935* (SA) provides –

'*In deciding whether to release a defendant under this division or the condition of a licence, the court must apply the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community*.'

12. It is this principle which has had many beneficial societal effects. Those effects include an emphasis on maintaining the elderly in their own accommodation rather than moving them to 'old folks homes'. It has had the beneficial effect of promoting community housing for disabled people who are suffering a physical handicap or a mental disability. It is this principle which is associated with what is described as the 'de-institutionalisation' of our public institutions, particularly in mental institutions about which I wish to comment. It is frequently the case that newspapers carry comment about the lack of institutional mental facilities for those suffering mental disability.

13. We know as a society that most mental disabilities are transient. Most of us throughout our lives will suffer at least one bout of depression. It will affect us considerably for a period but we will recover from it. In that period we do not need institutionalised care. There are other more serious illnesses which render people unable to care for themselves. People severely affected by schizophrenia are in that group requiring considerable supervision if they are to maintain a semblance of a normal life.

14. Australia has yet, I think, to examine in any detail mental health of people coming before its courts. In South Australia there was one study conducted at the Women's Prison. The study was conducted by the University of Adelaide and produced the unsurprising result that 90 per

cent of the women the subject of detention orders at the prison had at least one diagnosable psychiatric disorder. The general suggestion among male prisoners is that the incidence is less, perhaps only in the region of 50 per cent.

15. There is then recognition of the type of matter coming before the court that is now different from that which came before Summary Courts in the 1940's, 50's and 60's. Our population was smaller, our societal taboos were greater and the cases that fill the Law Reports in those years are dominated by licensing matters or racetrack matters or appeals against sentence combined with the odd foray into a police 'verbal'.

16. These areas have changed substantially and so it is now that in South Australia we are conducting a diversion court which has as its principal focus people suffering from some mental disability. We are conducting these courts at Adelaide, Port Adelaide and other suburban areas together with our country areas of Whyalla, Port Augusta and Berri. The fact that we are able to do so is reflection on the funding provided to us for the provision of psychologists to carry out assessments and case workers to make recommendations for the placement of and connection between the citizens who are coming before our court and other agencies within our society that are able to extend assistance to those individuals.

17. You and I will recognise that these cases will not result in custodial orders and that they will be managed by bail conditions or by conditions imposed on a bond. I have already remarked upon the rise of the helping professions for the courts and this area of 'forensic' assistance is one that I am keen to develop in South Australia. The workers in this field in South Australia are likely to have a considerable background with other agencies and to have perceived courts in a very different way prior to their contact.

18. In South Australia 3 per cent of our population is of aboriginal descent. More than 30 per cent of our prison population is of aboriginal descent. Aboriginal people are over-represented in our criminal justice system Australia wide. The reasons are complex but they include extraordinarily high rates of unemployment, poor health and poor education. How many of you personally know an aboriginal person who has graduated from University?

19. The development of a process of the sentencing of aboriginal people is in its infancy in Australia. The development of a Koori Court, Muri and an aboriginal sentencing court are reflections on the concerns of the Magistrates about the appearances of aboriginal people and they are consistent with a desire on the part of Magistrates to know more about aboriginal people, the difficulties that confront them and to consider other sentencing options for them.

20. Discussion of sentencing circles is consistent with the same issue. Is it possible to encourage people not to return to court in the future? Court Administrators have a vested interest in trying to prevent the recurrence of a particular individual in the court list. It is that interest which has partly motivated the development of additional sentencing approaches. Not all of those sentencing approaches have been sanctioned by the Parliament. Our traditional tools of fines, imprisonment (suspended or not) community service and bonds with or without conditions remain with us.

The amount of tools in the judicial tool kit in the summary courts remains quite restricted but we are attempting to use those tools quite imaginatively.

21. I know that this audience is familiar with the examples to which I have referred but I want to place these examples in a societal context. The societal context includes what I would describe as the 'cult of the individual'. We are moving in the examples to which I have referred, to a process of the individualisation of case management in the administration of justice.

22. If you reflect upon this for a moment you will realise that this is indeed what has occurred in the superior courts. The dealing with a plea of guilty for instance, on a charge of possession of an illicit substance for sale, consumes a considerable amount of time. The accused is present throughout, the lengthy allegations are put, both in the declarations and in the submissions of the crown and lengthy submissions are put by defence counsel. It will be usual for a pre-sentence report to be obtained. Indeed a sentencing Judge or Magistrate may be criticised for failing to order a pre-sentence report if counsel request it. It will be common for the public purse through the Public Defenders office or the Legal Services Commission to have funded the preparation of a psychological report or a psychiatric report. The funding of those reports places considerable weight on the value of the individual in our society. It will be common in the superior court for a sentencing Judge to spend two or three hours out of court examining the papers and submissions and preparing sentencing remarks. The necessity for those sentencing remarks has been sufficiently self evidenced – to avoid falling into error – that some Judges have even come to the view that those remarks should be 'published' rather than being read and that the prisoner should then be immediately sentenced, but even that has caused criticism! It has caused criticism because it fails to place the appropriate weight on the sentencing process and the value of the individual in our western society. That approach fails to 'eye ball' the defendant and to provide – on behalf of society – an articulated set of reasons for the result.

23. In the Family Violence Court, the Diversion Court, the Drug Court and the Aboriginal Sentencing Court, the number of cases that we can as Magistrates list has changed. We are listing in those courts the same number of cases or less than those numbers which are listed in the superior courts. Mostly the Magistrates have not been provided with additional resources to enable this to occur. Our numbers have not leapt in proportion to the numbers of sentencing courts which we operate.

24. It is my view that our society will continue to place more and more weight on the individual in the sentencing process. The individual will include the victim of a criminal offence and one can see in the increasing use of victim impact statements the necessity to consider not just the individual who is being sentenced, but also the impact upon individuals whose lives have been touched by the conduct of the defendant.

25. The cult of the individual means for the Magistrates to move away from rapid decision making into an area of considered, reflected determination of matters which is inconsistent with the concept of a

'summary' court that has hitherto been our province. It will be necessary for us as Court Administrators to ask government to recognise these changes and to fund us accordingly. We are aware of the comments particularly from the USA relating to issues of 'judicial burnout' which stand as a stark reminder of the territory into which we are moving. We are doing fewer cases in these areas with more intensity and we must equip ourselves appropriately.