C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 25 February 2008

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Witnesses

Commander T. Carter, Manager, Policy and Secretariat Division,
Mr F. McRae, Director, Legal Services Department, and
Inspector P. Hayes, Legal Services Department, Victoria Police.

The CHAIR — I thank the witnesses for coming. I think you are familiar with the status of the hearing. It comes under the Parliamentary Committees Act which means it is protected by parliamentary privilege. Hansard staff will be recording the discussion we have. You will be sent a transcript of it and you can make some slight amendments. You obviously cannot change the substance of it. We will leave it open to you, but you will have seen our discussion paper and the terms of reference. Thank you for sending us the material that you have sent to us. I cannot say that I am absolutely across the statistics at this point, but we will leave it to you to start.

Mr McRAE — We will try to confine it to the salient facts.

The CHAIR — You are very welcome. It is over to you.

Cmdr CARTER — Good morning, ladies and gentlemen. The Victoria Police welcomes the opportunity to provide a submission to this parliamentary committee and appear today to discuss further issues raised in the submission and matters of interest to the committee. I would like to introduce my colleagues who are appearing with me this morning. Mr Fin McRae is the Director, Legal Services Department of Victoria Police. Fin is a member of the Victoria Police corporate committee and has a broad responsibility for ensuring the delivery of a range of legal services, including prosecution services to the Magistrates Court and civil litigation. On my right is Inspector Paul Hayes. Paul is a member of the Legal Services Department and has extensive experience in prosecution matters and policy relating to prosecution. I am a Commander with the Corporate Strategy and Performance Department and have a range of responsibilities, including the development of both legal and corporate policy.

The Victoria Police supports alternative dispute resolution, particularly as it relates to the criminal justice system. Our submission focuses primarily on the issues concerning restorative justice and therapeutic justice in the criminal justice system as this is the main enterprise we undertake in our dealings with offenders in courts. The Victoria Police has for some time used an alternative dispute resolution model in dealing with a range of offenders and offences. In particular, the Victoria Police has successfully operated a cautioning program for children for a complete range of offences for many years. More recently Victoria Police has expanded its cautioning program to specific offences for theft from a shop and drug use under certain circumstances. We have provided the committee with our current policy in respect of the program and statistics for the previous three years. It is our intention to expand that program in the near future and we would be happy to provide further details during the course of the hearing.

Victoria Police, in conjunction with courts, has also operated a successful diversion program for adults. The diversion program provides an alternative means for resolving a justice issue without recording a conviction. Diversions are used for a range of offences and are suitable for offenders who have met certain criteria. Diversions provide a tangible example of alternative dispute resolution where the outcome benefits the offender and the community.

Shortly I will ask Mr Fin McRae to discuss some of the issues around prosecution services and alternative dispute resolutions for Victoria Police. Victoria Police understands that the Committee would like to focus on several themes arising from the responses and we would be pleased to provide advice today or provide a further written submission should that be required. I will ask Fin to talk about a few issues in relation to his area.

Mr McRAE — As has been said, I am responsible for civil litigation as well, and I understand the committee has been dealing with civil litigation in the last few days. I have one comment to make in regard to Victoria Police and civil litigation. Although the numbers are low thankfully in regard to litigation against Victoria Police at the moment, we mediate almost 100 per cent of our matters and that mediation through the court process is usually through a consent referral to mediation. Every matter that we can in the civil jurisdiction we mediate. That is just a note.

In terms of the criminal jurisdiction, I have responsibility for summary prosecutions, Magistrates' Court prosecutions, the Children's Court, and flowing from that all the special divisions and services within the Magistrates' Court: the Koori Court, the Drug Court and the new Neighbourhood Justice Centre. I will touch briefly on a few matters in regard to them.

Firstly, in terms of our workload we have over 85 000 summary prosecutions a year. That is our benchmark, I suppose, and we also have some 4000 matters in higher jurisdiction prosecutions that work their way through the system. In crimes, family violence, there is police involvement in almost 10 000 matters a year, and this

involvement has almost doubled over the last few financial years. There has been an enormous change in terms of domestic violence and intervention orders and the amount of participation now of Victoria Police and Victoria Police prosecution services in regard to crimes, family violence. In the Children's Court the numbers are lower but it is still a significant workload with some 3000 matters across the state.

In regard to restorative justice and therapeutic justice, I note for the committee that our position in simple terms in looking at therapeutic justice, or 'TJ' as it seems to be called these days, is that it is more focused on treatment of the accused and modifying the behaviour of the accused in the future. We take a position in terms of restorative justice that in simple terms it involves the involvement of the victim. Typically we have a case conference-type scenario where the victim meets, under controlled circumstances, with the accused and other professionals who may be able to remedy the situation and restore the parties back to where they were before. In simple terms that is the position we have taken.

In terms of what it is we do at the moment, you have heard that we have a cautioning system. I will quote a couple of numbers for the record so that it is on the record. In the financial year 2006–07 in the Children's Court jurisdiction we had 6859 cautions issued and in the adult jurisdiction we had 2433. They are the numbers that we are dealing with — those sorts of numbers — and I think we should bear that in mind in terms of the total numbers that we are dealing with in terms of prosecutions.

Why is it that the number of cautions is way more than the number of actual prosecutions in the Children's Court itself? It is because we deal with a lot of these matters at the front end when we are dealing with juveniles. So with first-time offenders, in looking at the severity of the offence our members will try to deal with the situation at the time, speak to the parents or an independent person and resolve matters so that people can get on with their lives. That is happening all the time and is an informal mechanism. It may at some stage be enhanced by a more formal case conferencing procedure.

One of the things under consideration that we need to bear in mind is not to overcomplicate the system so that if we do bring in formal structures it does not hold up the actions taken on the spot using the discretion of the member who understands the situation. So that is cautioning.

In terms of juvenile cautioning, our numbers have increased since 2002–03. The percentage of cases where a caution is received in terms of matters reported has increased from 30 per cent to 40 per cent. It has been a matter of policy for us to pick up on our cautioning, because with our Productivity Commission figures, although there is a lot of debate about what is measured between the different states — because what we call 'cautioning' the other states have slightly different systems — we wanted to make sure that we were at the Australian standard of the levels of cautioning of the other states, so there has been an expansion of that.

In regard to adult matters, Trevor has mentioned that we have broadened the base there. In the statistics that we provided the bulk of cautions are in regard to shop steal, but you will see that there are cautions in other areas that may surprise you, such as sex offending and others. As a matter of principle we do not limit the range of offences in considering the cautioning — or at-court diversion, which is the next step — process. We use the same policy considerations in terms of moving into the next step, being diversion at court. So we might do a diversion brief that recommends diversion, or at court a solicitor might recommend a charge because the nature of it means it would be better off being dealt with by diversion. Whereas five years ago diversion would have been limited to probably shop steal, there are a few other offences going in there now, although the numbers are not large. I suppose if we were going to make a policy decision, it may be to place my emphasis on other offences which may be achieved by training and other things.

In terms of the approach that prosecutions take, bearing in mind that we have over 85 000 prosecutions a year, we know that only some 2000 of those will be in contest at the end of the day. Even matters listed for contest, over 90 per cent of them will either be withdrawn or there will be a plea of guilty at the end of the day, so the public interest for us is to ensure that there is early identification of feasibility so that happens as early as possible.

In terms of case conferencing, as a matter of principle and as a matter of policy we would be saying that case conferencing should occur at the earliest possible point. There should be an incentive to participate in the hope that there would be an early identification of what may be an inevitable plea of guilty that would otherwise take months. To support that we argue that there should be some sentence consideration in terms of involvement in a case conference. Another factor that I should mention is that it is our position that case conferencing is more fruitful

where the parties know each other, because there may be an ongoing relationship there, whereas if it is just a random offence there is less incentive in terms of rebuilding the relationship between the accused and the victim.

Just to finish the context, we have case conferencing with the Children's Court in probably less than 5 per cent of matters. The participants in the Children's Court are aware of case conferencing and aware of victim involvement, so I think that is the test of if you roll it out, say, in the adult jurisdiction, that the numbers will still be a low percentage that fit the types of criteria that you need for case conferencing. I think it is probably reflected in the advice that you were given in that report from — —

Ms BUCHANAN — Jesuit Social Services.

Mr McRAE — Yes, where they were talking about hundreds rather than thousands. We are bearing in mind that as an organisation we are trying to move through thousands of cases in a timely fashion in the interest of justice, so there needs to be a balancing act between moving through the large numbers and the benefits that you can get in terms of restorative justice — where the victim and the accused are in a position to get together, which can be a problematic situation.

The Drug Court is a court of note, and probably one that would need its own session. It is worth noting the numbers are low there; the impact is about 60 cases a year. It is results-intensive to run, although it has been working very well from our position. The Children's Court I have mentioned. The Koori Court has elder involvement. Again, with the case sample, I would not quote statistics on it, because the numbers are low in the Koori Court, but there certainly are examples in terms of case conferencing and the elder involvement that are very effective.

With the Neighbourhood Justice Centre, since it has opened it has had more of a therapeutic accused focus so far in its problem-solving meetings, as it calls them, at the commencement of the case. The caseworkers get together and take a problem-solving approach. Sometimes the victims are present at those meetings, but it is not often. The court is moving to a case conferencing pilot for ages 18 to 25, and we will be interested in the data that stems from that. I think that is an important point — that is, that in moving into a case conferencing scenario that it be data driven, that we do not stumble in there and risk the sorts of risks that you have in terms of, for example, re-victimisation because a victim has a bad experience and that sort of thing. That is one of the risks that needs to be managed.

Just in terms of what we think are opportunities here, we think guidelines for referral would be useful for the magistracy and for the judiciary, because it promotes consistency and predictability for other players in the court system, so we would be happy to be involved in that.

I should note that there is currently law reform in the area of infringement processes for careless drive, but more importantly for this committee in terms of shop steal, which will allow for an admonishment notice. Actually I am not sure what that — —

Cmdr CARTER — It is infringement and/or official caution.

Mr McRAE — 'Official caution' is better terminology, and also what is loosely termed an on-the-spot fine or infringement notice process. What that will do that will benefit a restorative approach, is that it will potentially remove an extra few thousand cases from the court system which would potentially free up time, because it should be noted that arranging case conferences is time consuming. In terms of time management within the courts, maximising the infringement process on matters that have less priority with the courts, to concentrate on the sharp end of matters, with the view to reoffending, that would assist.

As a matter of policy, the prosecution services are seeking to resolve matters at the front end. We have a brief resolution system, which is really getting the parties together at the earliest possible stage, and a contest mention system that runs at the moment. What is noteworthy about that for this committee is the victims are not directly involved in those two meetings, if you want to call them meetings or events in the court process.

I might wrap that up there, because I am talking too much.

The CHAIR — No, not at all.

Insp. HAYES — Just one other matter in the Children's Court jurisdiction which has had quite a bit of success is what is called the Ropes Program. It is similar to the adult jurisdiction diversion program where, depending on the circumstances of the offending, the children — and everything else — are referred off to an

activity-based program in consultation with police members and everything else. Again it is more aimed at therapeutic justice for the juvenile offenders to show them ways and means of conforming to society's standards.

The CHAIR — You have given us a comprehensive view of how it works, in a sense a bird's eye view — a top-down view — which depicts some of the main structural areas. Could you give us a bit of a picture of what it feels like on the ground when you are processing one of these thousands of people through the system? A clear brief of ours is to look at how consumers — offenders, but also victims — experience the process that we have in place at the moment, and then look at ways forward to improve that both administratively but also in terms of people's sense of the justice system. Could you talk a bit about that?

Cmdr CARTER — Sure.

The CHAIR — Someone is picked up — a child or an adult. How does it work through, and how does it feel to them and to you?

Cmdr CARTER — I will start off and then defer to my colleagues. Essentially, if you are talking about a child offender, that is a really good example of how we manage a lot of the diversions and a lot of the restorative justice programs. In essence, a child offender may commit a particular offence and we may get a complaint about it. We would walk through that and pass it on for investigation. If it appears an offender has committed a particular offence, we would get the child in with a parent or a guardian. We would do an informal discussion to start with — —

The CHAIR — At that point the child is probably terrified.

Cmdr CARTER — Absolutely.

The CHAIR — How do you deal with that?

Cmdr CARTER — There are a whole range of mechanisms we use to deal with that. It depends on the age of the child and their demeanour and their experience with the justice system. Some are very experienced with it, and it is like water off a ducks' back. For others who are exposed to the justice system for the first time it is quite a daunting experience. We provide a lot more support, I suppose, to the first-time offenders, for want of a better word, in actually getting them to understand what they are there for, and why we need to talk to them, what the issues are and how we need to do that. We get the parents involved if they are available. We get the guardian if they are available and talk to them about the process. We try to make it as open as we possibly can, so that all parties understand how we are going to proceed through it.

Having said that, it is not always that easy. Sometimes the parents are not available for a whole range of reasons, or there is difficulty in getting the guardian. It is a process that may take a considerable time.

The CHAIR — What do you do in those circumstances?

Cmdr CARTER — In those circumstances we get an independent third person to come in and sit with the child while we go through the process, depending on the type of offence we are dealing with, it may be a matter of a low-level summary offence or it might be at the higher end of indictable offences. It would depend on the range of offences. If it is a first-time offender there is a criteria that we use. We would consider a caution and then in the policy we have provided to you — —

The CHAIR — I have seen that.

Cmdr CARTER — There is a certain criteria that must be met. I have to admit that there is a whole range of issues there, but essentially if they fit the criteria and there is some agreement that the offender is suitable for a caution, then a brief is submitted and then a caution is dealt with. On that basis — —

The CHAIR — The exercise of the discretion happens at that initial point. If it is a young person who has never offended before, as I said before it would be a bewildering and terrifying experience for them. We want to make sure that that adult is better placed in society after that experience rather than worse. What sort of training do officers have in exercising that discretion? We have seen the policy steps. What is behind those?

Cmdr CARTER — The training starts right from recruit training at the academy. They do training that goes for 20 weeks and they cover a range of issues pertaining to the law, our internal policies and procedures.

They do a whole range of workshops and practices in relation to how they deal with offenders. The practices range from dealing with serious offences to issues in terms of cautioning. As well as getting education they practice it as well. That is reinforced when they go to their training stations — for want of a better word. There are certain criteria they have to meet and they are mentored in the way they go about doing their work. For instance, in an example of a child offender there are usually one or two people working together and more often than not one is more experienced than the other, so there is some guidance there. In particular, when the cautions are administered they have to be administered by the officer in change of the station. A constable does not administer a caution. A constable processes the offender, makes sure of the arrangements, makes a recommendation and then if the officer in charge agrees that is a suitable course of action to take then he or she will administer the caution. The administration of a caution is done by someone with a large amount of experience in dealing with the policy of Victoria Police. Usually they have a large amount of operational experience in dealing with offenders, and we find that is a good balance in terms of how we train our people to deliver those cautions.

Mr FOLEY — The crimes in family processes, presumably that is more cautionary than diversionary — obviously not so much cautionary or diversionary; it is a whole change of focus for Victoria Police now in dealing with it much more seriously and appropriately. One assumes there is much more adult offender focus associated with that. How does that feed through alternative dispute resolutions, restorative justice and/or a therapeutic approach in what must be a much more difficult — I imagine — environment with a lot more people in play? How is that going through the system? What are the challenges there?

Cmdr CARTER — I will start off and then hand over to Fin to answer the last part of the question. In terms of how we deal with adult offenders, currently our method for dealing with those going through the justice system and going through the court system is — how do I put it — through mediation, I suppose, in terms of practically on the day how you actually mediate an outcome, and if that does not work at that level, then we step it up through to prosecution. You try to deal with the matter on the day, and if we are successful in dealing with that, we do. But if we do not then we have to expand it through the court system.

Mr FOLEY — Is it too early to see any pattern in how much of the family violence new protocols are seeing alternative dispute resolution approaches, or are there patterns emerging as to prosecutions being the main form? How is it looking on processing through the system?

Cmdr CARTER — I might pass that on.

Mr McRAE — It is early in our new approach in terms of looking at statistical trends, but I think the main gain there is the prosecutorial involvement, and in terms of the therapeutic approach in particular, I think the best showcase for that is a court like the Heidelberg court, which has other services available in terms of referral services for anger management and problems with alcohol, particularly for male offenders or participants. We need to remember that it starts off in the civil realm with the intervention order, and with the breach it moves into the criminal realm. Our main focus is really protection of people. We use the therapeutic approach to achieve that protection of victims. We are highly sensitive to group conferencing in that scenario because of the volatile nature of the risk to the victim. It is probably the most complex area.

Just to give the committee an idea of what happens at Heidelberg, I would ask Inspector Paul Hayes to describe the services offered there.

Insp. HAYES — What happens at Heidelberg — and it is still under a pilot situation — the matters of crimes of family violence that come through at the mention of the first stage are identified and streamed across to the Family Violence Court. The reason it was set up was to minimise the trauma to the aggrieved family member. They used to have to go through two streams. Firstly, the civil stream if you like — applications for intervention orders; — they would need to give certain evidence to the court. The court would look at the evidence. They might come under cross-examination, and then an intervention order may or may not be put in place. That is happening at the time or very shortly thereafter they have reported the matter to the police.

Running parallel with that may be a criminal brief, where it may be assaults, serious injury-type matters. Once that brief is put through for authorisation — it could be up to six months after the matter has been reported — they are then called back before the court. Potentially, if it is a contested matter, they are going to have to front the court and

give evidence as to what has occurred. They are cross-examined for a second time. The reason the pilot program was set up at Heidelberg was to have both matters heard in conjunction with each other, so that the aggrieved family member or the victim only has to give the evidence once, so they are not potentially re-traumatised 6 to 12 months later. If it works properly it is heard before the same magistrate with the same prosecutor and hopefully the same defence counsel.

The services that are in place there: they have a specialist case worker for both the defendant and also for the aggrieved family member. One of the dispositions at the first hearing is that if they are within a certain catchment area at this point in time, because it is a pilot court, they can be referred off for specialist counselling services. That is a decision that is done in conjunction with the magistrate and the case worker. A form of conferencing occurs where the offending has been discussed, the attitude of the victim and the demeanour of the offender, and if it is seen as appropriate — whether it is drugs, alcohol, anger management, depending on the underlying issues — they can be referred off to mandatory counselling to address those issues, and the matter is adjourned off pending the outcome of that counselling. The main reason there is for the benefit of the aggrieved family member, that they are not called again 6 to 12 months later to go through the process in the criminal jurisdiction.

Stalking-type matters remain within the criminal jurisdiction because they are obviously neighbourhood disputes or things such as that, so the Family Violence Court is specifically to do with the family environment.

Mr McCRAE — I think the key indicator there will be whether in the next year or so we see a decrease in reporting second-time reports. We always wanted reporting to increase, because we thought it was under-reported.

Mr FOLEY — That is right.

Mr McCRAE — The trend that would be helpful would be if first-time reporting continues, so that people are confident enough to make the report, but the second-time reports start dropping down because we are breaking the cycle.

Mr BROOKS — Following up on some of the stuff you mentioned earlier about the cautioning figures, I was wondering — —

Mr McCRAE — I should say that in terms of the cautioning figures I quoted the main ones, particularly in regard to shop steal, which is the bulk of it, but for the total figures, for juveniles it is around 9000 and for adults it is around 5000. So we have got a total of 14 000 cautions happening.

Mr BROOKS — Thank you. The question is around whether Victoria Police has an opinion as to whether at that cautioning stage there is an opportunity to divert some of those offenders to conferencing or other diversionary-type programs. I think in other states they are doing a similar thing at the moment, so I am wondering whether you have a view on the appropriateness of that particular suggestion.

Cmdr CARTER — At the caution stage a lot of the referrals to the services you are talking about happen informally. We do not have a formal policy or a formal position on doing this for everyone. It is very much a case-by-case proposition, and it is also about the services that are available in the local community. These are the informal discussions that are held quite often between the person who administers the caution and the child and the parent or the guardian. If there is a pattern of offending, or if there is a problem in terms of behaviour, then informally we will suggest that perhaps the child needs to seek some specialist services, but as a matter of policy we do not actually subscribe that to every case; it is very much on a case-by-case basis. There could be, in terms of developing our cautionary program further, some of those options you talk about.

The CHAIR — The key to restorative justice programs is the bringing into centre stage of the victim; the victim's issues and concerns. What kind of work do you do to make sure that victims are supported and brought into the process?

Insp. HAYES — Especially when it comes to juvenile or children-type matters, if we are going to be considering a caution, as part of the process we keep the victims informed all the way through. We let them know about the possibility that it may go to caution, the implications for the child, the reasons that the cautionary program is in place. More often than not, when the parties are known to each other, be it a schoolyard-type dispute or a neighbourhood dispute, they are fully supportive of it; they understand the reasoning behind it, and, as I said, they are fully informed. With diversions, in the adult jurisdiction — —

The CHAIR — Can I stop you there? What do the victims ask? You say they are fully informed; what occupies their head at that point?

Insp. HAYES — Does the child understand that what they have done is wrong? Are they sorry for what they have done? It is your normal-type questions that come through.

Mr FOLEY — Do you put the wind up them?

Insp. HAYES — Yes, that sort of thing — back in my day! They are the normal types of questions.

The CHAIR — I am sorry that some of these questions are a bit blunt, but we do not have that sense of what is a normal-type response because we are not doing your work.

Insp. HAYES — Sorry, yes.

The CHAIR — That is what I am asking you. It is that texture of how the transactions occur that I think in the end is the test of it all.

Insp. HAYES — It normally is, does the child understand what they have done is wrong or did they give a reason as to why they have done it; have they admitted that they have done wrong.

Mr McCRAE — So, Paul, it is fair to say that that is the time when the discussion is happening with the victim — early on.

Insp. HAYES — Yes.

Mr McCRAE — And later on, under the victims charter particularly, the key for us is to keep the victim informed on progress.

Insp. HAYES — Yes.

Mr McCRAE — But the discussion that happens with the victim tends to happen early on. After that they segment it to another compartment of their mind, hopefully, waiting for the inevitable — not the inevitable, but the legal progress to churn through, which may take months.

Cmdr CARTER — I would just add on to that in terms of diversions, one of the key aspects, particularly where there is a victim, is to get an appreciation of their views about the suitability of a diversion, and whether that would be in accordance with the outcome they are seeking. So not only are they consulted but they are advised. That is a key part of the diversions.

Mr FOLEY — If the victim and you have a different view, what happens then?

Cmdr CARTER — Ultimately the test for the diversion lies with the magistrate. He or she can make a decision on whether the diversion is suitable or not. We can go with a raft of recommendations in terms of what we would be seeking in terms of outcomes for the diversion, but one of those would be for us to have the commitment of the victim. Quite often there is disparity in those views.

Insp. HAYES — As part of those discussions a letter from the offender to the victim is almost mandatory in those types of matters. Sometimes you get the victim who wants to front the offender and get it verbally, which does happen on occasions — rarely, but it does happen. But more often than not they are happy with some form of written apology from the offender.

The CHAIR — We really are out of time. We did start a bit late, but I thank you very much for your time this morning and also for the material that you prepared for the committee's benefit. I will take up your offer that Kate and Kerryn will no doubt be in contact with you to follow up any matters that we have not had the opportunity to raise with you directly this morning.

Cmdr CARTER — We would be more than happy to provide any other advice you require.

Witnesses withdrew.