LAW REFORM COMMITTEE

Inquiry into County Court appeals

Sydney — 10 April, 2006

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Ms C. Girotto, deputy solicitor, Office of the Director of Public Prosecutions (Operations), New South Wales; and

Mr M. Day, managing lawyer, Office of the Director of Public Prosecutions, New South Wales.

The CHAIR — We welcome to this hearing of the parliamentary Law Reform Committee into County Court appeals, Michael Day and Clare Girotto from the Office of the Director of Public Prosecutions here in New South Wales. Our proceedings are covered by the Parliamentary Committees Act. Therefore the evidence you give today is subject to parliamentary privilege, at least in Victoria. I do not know whether we have any extra-territorial reach, but we will produce a transcript of your evidence from today. There is a general presumption that it will be on the public record. You will have an opportunity to review the transcript, but if there is any evidence you would like to give us in camera, then please indicate that in advance so that we can treat that suitably. I am only doing that by way of general introduction.

Ms BEATTIE — General caution!

The CHAIR — General caution, that is right. Most witnesses are very happy to be on the public record unless they have indicated in advance that they would prefer not to be. In the normal course of these things people talk to us about how the system works and their views on it, and then we ask questions. Would you be happy to proceed that way?

Mr DAY — Certainly. About what am I talking?

The CHAIR — County Court appeals.

Ms GIROTTO — Michael is the managing lawyer of the short matters group in Sydney, which conducts all the non–trial litigation in the Downing Centre and in the Supreme Court for bails. The director and I thought that he would be useful to you because he is doing the work that you are asking about.

The CHAIR — Perhaps I should explain that in Victoria we have hearings both on sentence and appeal by way of de novo hearings to the County Court. The attorney has asked us to look at the question as to whether or not de novo appeals should continue, and we were interested, as part of our inquiry, when we came across the system in New South Wales, which involves a hearing on the transcript. We have been able to establish this morning that it is not necessarily technically on an error of law, but it is kind of like a de novo hearing but is not one that involves the full recalling of witnesses unless special leave is granted.

Mr DAY — There appears for some reason, it seems to me, in each of the jurisdictions that there is some parliamentary fear of the worth of magistrates. I am not quite sure why. The procedure for appeals from the District Court to each of the superior courts are quite well known, and generally the finding of the tribunal of fact, the jury, is a finding which is treated almost as sacrosanct within limited legal reasons, and there are ways that you are all familiar with on which appeals can be conducted.

In the Local Court, for reasons that escape this particular lawyer, magistrates decisions in each of the jurisdictions are not so treated. You just made mention of something a minute ago — I presume that was a notice of appeal document that you were looking at — and it specifies two grounds of appeal. One is that, 'I ought not have been convicted', or words to that effect, and the other is that, 'The penalty that I scored was too severe'. Usually they are called severity appeals or all-ground appeals, and the all-ground appeals are so-called because generally people whinge not only about the conviction but about the sentence. They have an appeal as of right if they lodge it within a certain amount of time, as they do I understand in your jurisdiction, and do not need to show any other grounds. They do not need to show an error in law; they do not need to show an error in fact. As you just said, they are de novo hearings.

As I understand it the only difference in our jurisdiction with your present jurisdiction is that the matters proceed by way of the tender of the evidence that was before the Local Court magistrate, and a tender of the transcript. The procedure we used to have years ago, prior to these amendments, was, I understand, similar to yours, and that was that effectively it was a total second

bite at the cherry. We were required to call all of the witnesses and call them in the Local Court and have a de novo hearing. It seems to me the system we have now is a heck of a lot better than that, but it is not without its flaws.

Ms BEATTIE — And those flaws are?

Mr DAY — I was just listening to Judge Price before he walked out of the room. He expressed a concern, I think I heard here, that magistrates reasons are not something that are considered by a judge in the District Court, and that concerns me. They are not. The act is quite clear — it is a transcript of the evidence that gets tendered, together with any documentary exhibits and other physical exhibits of the hearing.

The problem with that is, of course, that especially in oath-on-oath–type cases, or any cases where credibility is a matter in issue, the judge in the District Court, from a bare reading of a transcript, simply cannot possibly come to a view about the comparison of person A's evidence with person B's evidence, for the simple reason that they have not seen the red rash that I think I scored a couple of minutes ago.

Ms GIROTTO — And they are not allowed to hear about it and they are not allowed to think about it.

Mr DAY — Or the ums, the ahs, the I's — the sorts of things that magistrates observe in a witness box, and any trier of fact observes, are not the things that a judge in the District Court will have access to.

It is a very good system. The vast majority of appeals are appeals on very minor matters. The vast majority of these appeals are traffic appeals — somebody is sooky about a speeding fine they may have got or something of that ilk.

Yes, there are a lot of very serious matters that nowadays certainly are dealt with in the Local Court in this state because of the expansion of the jurisdiction, and a lot of hitherto indictable matters have been taken from the District Court and placed with magistrates, but nevertheless the vast majority of the appeals they hear are appeals that are of a quite limited minor nature in relation to those sorts of matters. Whereas a reading of the transcript is something that might only be a transcript of 9 or 10 pages. The appeals are getting on extremely quickly. They are going before judges, in the main sensible judges who adopt a sensible pragmatic view of the material that they are reading, and come to a very quick decision around an appeal which otherwise may have taken — I cannot give you statistics around how long these things take to get on, but the simple reality is they are getting on a hell of a lot quicker than they were.

The only inhibition to the listing of these things is the preparation of Local Court transcripts, which in many cases can take quite a while, given the lack of resources to the transcription services — what do they call themselves? Recording Services Bureau, or RSB.

The CHAIR — You referred to the difficulties of a District Court judge being able to — obviously body language is such an incredibly important part of communication.

Mr DAY — It certainly is with witnesses.

The CHAIR — Absolutely. So in that sense what you are saying is you think it is a better system because appeals are being heard, getting on more quickly and being heard more quickly. But on the other hand you seem to be indicating that there is a fundamental flaw which is that it is very difficult for a District Court judge to actually look, on the transcript, at the credit of witnesses. How would you overcome that problem?

Mr DAY — Unless there is something to hang their hat on elsewhere in the Crown case.

Ms GIROTTO — Sometimes there are inconsistencies and so on.

Mr DAY — Inconsistencies in the evidence or material that is corroborative of a complainant's version such as injuries, whatever else — photographs of the speed camera, that sort of material. If there is nothing like that to hang your hat on it is a very difficult thing for the District Court judge to come to a view other than one favourable to the appellant for the very obvious reasons that it is the Crown that bears the onus of proof in these things.

Mr LUPTON — Would supplying reasons overcome that deficiency, in your view?

Mr DAY — There are two questions. In answer to that one, if I can — it may.

The CHAIR — Could we establish the other you were talking a little bit about before we go to the next point?

Mr DAY — A way, it seems to me, to overcome the flaw is to convince the legislators in this place, and you good people if you happen to put it before your Parliament. It seems to me that magistrates these days are a heck of a lot more qualified than they used to be. They are not career public servants generally in this state any more, who come through a Local Court, put stamps on bits of paper and suddenly get elevated to the bench. They are people of some standing in the law, some learning in the law, such as the good judicial officer who proceeded us to this table, whose decisions, having heard a matter as to some factual issue, tend to get it right. And unless there is some basis upon which someone can put forward a proper appeal rather than simply, 'I should get a second bite of the cherry in the District Court', then I just do not see the value of it, quite frankly.

The CHAIR — So you do it on errors of law?

Mr DAY — Either there is an identifiable error of law, there is some obvious error in terms of the factual finding of the judicial officer such as a demonstrable error — something approaching but not quite approaching that test that is required in the Criminal Court of Appeal in this state these days of unreasonable verdict, unsatisfactory verdict — —

Ms GIROTTO — Unsafe and unsatisfactory verdicts.

Mr DAY — I do not know that it needs to be quite at that higher level because obviously we are not talking about matters that are going before the Court of Criminal Appeal; we are talking about an appeal from the District Court, and necessarily, because of the nature of them and the number of them, the appeal process should be something that is less complex; and bear in mind this is my view, not necessarily the views of the director, I would have thought. But it just seems to me that there had been, forever, through the Justices Act and now the Crimes (Local Court Appeal and Review) Act, a belief by the legislature that magistrates generally get it wrong, and a nice easy insurance against that is to allow for a process of appeal where nothing more than simply, 'They got it wrong' is — well they do not even need to say they got it wrong. They simply file a piece of paper saying, 'I am not guilty', I think it says.

Mr LUPTON — 'We just don't like it'!

Mr DAY — 'We don't like it!'. And there is a rehash. What used to happen, if I can just digress for a second, back prior to the introduction of this legislation was something akin to the matter you were putting to the chief judge just before he left, and that is that lawyers were invariably, not just occasionally, but in my view invariably tailoring the way they were running Local Court proceedings with a view to an upcoming appeal. A very obvious example of that is in a lot of these cases people were not calling their clients in circumstances where it was almost mandatory. In a case where, for example, alibi was raised or in cases where you would have to think that to beat this charge we need to call client, they were not calling clients.

Quite obviously to me at least the reason they did not call the client was that an appeal would be lodged, they would go to the District Court, there would be a de novo hearing and that was then their opportunity to call their client. They suffer no penalty because they did not call their client in the lower court. If a client was not called in a District Court the prosecution would not have an opportunity at any stage to investigate the truth or otherwise of the evidence the accused gave in the Local Court. The advantage to a defendant in a case like that is obvious, and that was happening regularly but it does not happen any more.

Mr LUPTON — Would the reason for taking that kind of tactical course be a suspicion in the mind of the legal representative that they had a far better chance of an acquittal at the higher level?

Mr DAY — You may have drawn a magistrate who is perhaps notorious in a certain way, or perhaps the case today has not proceeded as well as you thought it might. I am talking anecdotally from experience, and Clare may agree or disagree with these comments, but in my experience it is certainly something that occurred too often and does not occur any more.

Ms GIROTTO — It cannot occur now because you cannot call a client unless something new has come up.

Mr LUPTON — So you cannot just for tactical reasons — —

Ms GIROTTO — No; you either call them or you do not.

The CHAIR — Could you say, 'They couldn't be called at the time. We could not locate them but now we have.'?

Ms GIROTTO — The client would have to be there.

The CHAIR — No, the witness; someone who is providing an alibi, for example.

Mr DAY — As I understand it the applicant needs to show that it is in the interests of justice. Before they get over the threshold of getting an order, leave is required to call additional evidence. I have an application on my desk at the moment in relation to a matter similar to that which I have described — that is, the legal representative made a decision for tactical and forensic reasons not to call a client at the Local Court and is now seeking leave to call them. The lawyer has himself filed an affidavit setting out the reasons — almost falling on bended knee — as to why this application should be allowed. That is a good thing. I think it is possible given the content of that affidavit, although I cannot recall the exact circumstances they are relying on, that the court will find that it is in the interests of justice and the client should be called. But effectively a lawyer is required to fill out a quite comprehensive affidavit explaining what the forensic decision-making processes were, and that is a reasonable test to get across. As I said, I think in this case it might well be successful, although the cynical prosecutor still thinks it smacks of tactically-based decision-making right at the start — but perhaps not.

The CHAIR — But I understood that what you were saying was you would prefer to go to a much higher test anyway. You would like to see an error of law test of some description, both against conviction and against sentence.

Mr DAY — I do not see such a problem with sentence appeals, and the reason is that they take up so little resource from our point of view. Yes, they are giving accused persons a second bite of the cherry, but their nature is such that they are not taking up much of our time. All we are presenting to the District Court following a Local Court sentence appeal are the same papers that were in front of the magistrate, and the judge comes to a view on hearing some evidence — or whatever evidence is before the judge, again on a de novo basis — of what the proper penalty

should be. I suppose an argument would be almost logical from the comments I have already made that perhaps there should be some sort of test. I am not so sure that I am hugely in favour of that.

So far as sentence appeals are concerned in this state, I do not know that it causes as much grief. I just do not see a problem with it. It allows a judge, who is perhaps a little bit more learned than a magistrate, to cast an eye over it. Of course, they are sentencing very serious offenders all the time and they are dealing with different matters to those before a magistrate, and they bring a different view. It is difficult to give evidence here as to on what basis I believe it is not necessary, but I just do not know that it is. I think the system works quite well on severity of punishment.

The CHAIR — But implicit in your position appears to be that you think that magistrates are not likely to get it wrong in terms of innocence of guilt, but there is more variability around the state of New South Wales amongst magistrates in terms of the sentence they might impose.

Mr DAY — Yes, of course, and you remind me of one argument perhaps, and that is this: judges come from the city on circuit, and they bring a wealth of experience from all the various circuits around the state rather than the magistrate at Bourke or Nyngan or somewhere dealing with that area. The contra-argument to that is that people might say that that magistrate is someone who is better able to bring the local values and things to a particular court, but I do not see such an issue with sentence appeals. They do not clog our lists up.

The judges deal with them in a reasonably quick — if not hasty, but certainly reasonably quick — fashion. They are not supplied to the magistrate with reasons for judgment, which is one of the matters that Judge Price raised earlier.

Mr LUPTON — The 1999 reforms presumably support those changes because they have led to more efficient sentencing appeals?

Mr DAY — The sentencing appeals were almost identical prior to the 1999 reforms.

Mr LUPTON — So the prosecution did not run have to turn up and run through all the material — —

Mr DAY — In sentencing?

Mr LUPTON — In sentencing matters?

Mr DAY — No. The way the matters invariably operate in the Local Court in this state, and perhaps because of the tyranny of the amount of work they have to do in the place — the amount of work listed — is to simply put a court attendance notice before a magistrate. There is a plea, and the prosecutor invariably hands up some facts. Generally there are facts which are agreed, together with whatever criminal antecedents or traffic antecedents someone might have. The defence will present whatever documentary or other material they wish to present. Very rarely will either side go into oral evidence in sentencing matters before a Local Court, unless there is some dispute about the facts of the case — whether it is as to quantum or the amount of the drug or whatever it might be.

Very rarely will they lead character evidence short of just documentary testimonials. All of that paper is the paper that makes up the brief that is put to the judge. It is not often that any more material will be presented. Frequently, though, in the District Court an appellant would be giving evidence or would be likely to give evidence, but it does not happen in the Local Court. Simply put, the difference is that magistrates are much more willing to accept the evidence on face; judges are less likely to do that. It is a practice that has arisen — simply, appellants will give evidence, maybe with a character witness doing the same. Generally that evidence gives some sort of explanation as to why he did the badness that he did, and perhaps some issue around — those sorts of mitigating factors.

Mr LUPTON — And it will change things?

Mr DAY — Yes. The run-of-the-mill appeal will be some sort of drink-driving or traffic matter or something of that ilk. It would be rare for it to take more than 20 minutes to half an hour in front of a judge.

The CHAIR — Given the high level of self-representation in the Local Court — Judge Price referred to 52 per cent being self-represented — from your point of view is that one of the things that has driven appeals in the past? Having gone off and subsequently got legal representation, they may have decided that maybe they have got a case that is defensible either in relation to the conviction or in relation to the sentence?

Mr DAY — Figures are always fairly rubbery things. Fifty-two per cent is the figure that is quoted. I accept that figure from the judge, obviously, but I would caution the bare use of a figure like that for the simple reason that the greater majority of the work in the Local Court is work which involves quite minor matters — spitting in the street, littering or whatever it might be.

Ms GIROTTO — Parking.

Mr DAY — Yes, from time to time people charged with serious matters are not represented, but I would suspect — obviously it would be easy to find; I imagine the figures are able to be obtained — that the great majority of the 52 per cent you have spoken about would relate to people who are turning up to defend speeding fines. I would be surprised if burglars regularly turn up in the Local Court unrepresented.

The CHAIR — The more severe, the more likely they are to be — —

Mr DAY — So in answer to your first question — —

Ms GIROTTO — Also legal aid is not available for some very minor things. It is very expensive to get a lawyer for a day, and legal aid is not available, so they are forced to be unrepresented, I suppose.

Mr DAY — In answer to your first question, it is the case that a number of appeals are lodged by law firms in relation to people who are unrepresented in the Local Court. As to what that figure is, I have no idea. Obviously enough lawyers have somewhat of a vested interest in these things. At the District Court it is a de novo hearing, so if a person who is aggrieved as to whatever the result might have been in the Local Court wanders into any law firm in this state, I would be surprised if they did not get certain advice.

Mr LUPTON — There may be the practice where people will get some advice before the hearing about what to say and told, 'If you do not like the outcome, come back'.

Mr DAY — I used to work for the commission, and I would happily be giving people that advice for very good reason — that is, 'You are entitled to another go without penalty'. There is provision — I suppose there is provision in the legislation, but it is not often used — in that there is the ability of judges in the District Court to increase penalties in certain circumstances. Generally what is required is that a warning be given to the appellant to give them notice — that is, 'If you want to withdraw, your chance is now, otherwise you are taking a huge risk'.

I have heard not an insignificant number of judges say in court simply that unless the Crown lodges an appeal — which it has the right to do — they are not prepared to increase penalties. It almost encourages the lodging of these sentence appeals, but I still do not see them as a problem — Claire, perhaps, or the director might.

Ms GIROTTO — I do not see that as a problem either. I do not know the figures on how many we process, but I have the figures on how many all-grounds appeals were processed. We are

not in every all-grounds appeal either. We are in most of them. We are not involved in some private appeals or some commonwealth matters, so all I can say is about how many appeals where the New South Wales Director of Public Prosecutions is the respondent.

Ms HADDEN — Given that 52 per cent who appear are self-represented, would that be because there is a culture — you know, offenders who come in before the courts are mainly recidivists, and it does not take too much for them to talk amongst themselves to find out they have an appeal as of right, so that culture is also ingrained into the system here.

Mr DAY — I am not sure I understood the very start of your question. I thought the 52 per cent figure came from the judge saying, 'That is the number of matters in my court where people are unrepresented' rather than — —

Ms HADDEN — Yes, self-represented. There is no penalty for appealing, and it gives you a bit of time to talk amongst your mates as to what the likelihood is, with or without a lawyer, if you are not going to be eligible for legal aid.

Mr DAY — An interesting figure — if you have not got it already, and I certainly do not — is the percentage of people who are convicted and penalised in some fashion and actually lodge any sort of appeal. I expect it would be extraordinarily low.

Mr LUPTON — I think the 5 per cent figure was mentioned compared to our 3 per cent of — —

The CHAIR — That is, all appeals, yes.

Mr DAY — There is no doubt that a bit of that goes on.

Mr LUPTON — But most of that 5 per cent is on sentence.

Mr DAY — As Claire said before, I know legal aid is obviously limited, as we all are, by resources. At the Local Court — unless they have changed the test since I worked there some years ago — in traffic matters where imprisonment was not a possibility they simply will not appear; they just cannot. Traffic matters, where there is no possibility of imprisonment, take up a very large amount of work the Local Court does, in terms of sheer numbers, if not time. Obviously if someone's liberty is at risk, clearly legal aid will come subject then, of course, to the means test.

Ms GIROTTO — Yes, that is my understanding of it.

The CHAIR — Could I just ask you a little bit about when you are prosecuting and there is an appeal to the District Court — —

Ms GIROTTO — Is this in the Local Court as well?

The CHAIR — No, we have appealed from the Local Court to the District Court, and the appellant says, 'I would like to call these witnesses again because I did not get the chance to call them in the Local Court' or 'because they were not available' or 'because there is fresh new evidence that has become available'. What would be your typical response to that as the Office of Public Prosecutions. Are you fairly relaxed about the idea of new witnesses being called, or do you rigorously pursue the case that they had the opportunity in the Local Court, they were not called, they should have been called, there was that opportunity then; there are not any special grounds on which they should now be called? I am just trying to get a sense of how it works.

Mr DAY — The last commentary is the one that obviously appeals, when the application for leave is made. But down the track and prior to the hearing of that application, the defence will be serving us with affidavits. It would not be an unusual thing for our office to walk across the road and concede an application.

I could not assist you with percentages, but we are guided obviously by our director's policies around how we process these things, just more generally. That means that — I like to think, and I am sure that we do — we approach these things with a reasonably open mind. If there are proper forensic reasons consistent with the director's guidelines as to why it is we should not concede such an application, then we will not. The thing that first occurs to mind, as I said, is 'We will oppose this' which is what happened in the Local Court.

But if someone presents to us reasons that cause us to come to the view that it is in the interests of justice — which I think is the test in the act, that additional evidence be led — then it would not be unusual for us to oppose it — in fact, it would be unusual for us to oppose an application if we came to that view.

The CHAIR — Do you have any statistics on the number of cases where you might actually concede that it would be in the interests of justice to allow new witnesses to be heard?

Ms GIROTTO — No.

Mr DAY — No.

Ms GIROTTO — Our system does not — —

Mr DAY — The District Court might. What the District Court would be able to give you is the number of applications for leave that are made — I presume they would be able to give you this — and the number that are granted. Now the only way I would be able to obtain those statistics is if I knew what the cases were. It would be a bit difficult if you had to go case by case.

The CHAIR — Could I ask another question then about the policy, which is: what would be the grounds on which you would concede? We have just had this discussion about whether or not you should be able to appeal against a conviction. What would be the grounds on which the office of public prosecutions would say, 'Yes, it is in the interests of justice for these witnesses to be heard.'? What would be the broad grounds on which you would be conceding that?

Mr DAY — I do not think I could respond to that. It really is a case by case — —

The CHAIR — But you said there was a policy that guided it.

Mr DAY — No, there is no policy that guides this specific subject. Overall we are bound by the director's policy — and that is a published document and available — as to the way that we prosecute matters, with someone like one of you good people — a minister for justice, perhaps — adopting a reasonable approach to things, not prosecuting matters where there is no reasonable prospect of conviction, or not putting forward an argument that you did not believe was based on the evidence. You pile all those together and come out with a view as to how you approach a case. It is difficult — —

The CHAIR — I was really trying to explore the appeal process.

Mr DAY — I understand what you are saying, but there is no specific.

Ms GIROTTO — We have *A Guide to Short Matters*, which is available to every lawyer. I have just pulled out the section on 'When do you agree to witnesses being called?'. It states:

> Commonsense and fairness do provide some assistance. Where the appellant, for example, was unrepresented at the local court and has representation for the appeal, it would generally be unfair if the matter were to proceed on the transcript only. Also where the facts are to be determined having reference to the credit of the witness it is advisable to seek to have that witness available. Where it is the word of one witness against the other and on the face of the transcript there is no obvious way of differentiating them —

this goes back to the fact that the judge does not have the remarks on sentence —

> it is arguable that the district court would be assisted by hearing or seeing the witnesses. However, where it appears that the appellant simply wants to have another go then it is legitimate to oppose.

That is guidance to our lawyers, which is on our intranet, on how to approach these things. If you were doing an all-grounds appeal for the first time, you would go here. Everybody would go to their research flyers, as we call them.

The CHAIR — That is very helpful, thank you.

Mr LUPTON — What about that question Ms Beattie raised earlier with the judge about the ability to call victims and other prosecution witnesses in the District Court, particularly in, say, sexual assault matters and things of that sort? I mean, one of the issues we face is putting victims through the ringer twice.

Mr DAY — It is a much harder test.

Mr LUPTON — From your experience tell us what the practice is and how often that may or may not happen.

Mr DAY — It is a much harder test, I am pretty sure.

Ms HADDEN — It is section 17 and 18, is it not, or section 19?

Mr DAY — Yes, somewhere around there.

Ms HADDEN — There is a summary here from the researchers. It is a very high test, actually.

Mr DAY — What section did you say it was?

Ms HADDEN — Section 19 on violence and on appeals against conviction.

Mr DAY — It is 'special and substantial', is it not? Yes. If it is a victim of a crime of violence, then the court needs to be satisfied there are special reasons, which is a very similar provision to that in section 91E, I think it is, of the Criminal Procedures Act — and prior to that, section 48EA of our Justices Act — about which there is a fair bit of case law and guidance from the Supreme Court. Essentially the test around special reasons is an extremely high one.

It does not mean we would not concede them in cases at committal level in various circumstances, but I am yet to see a case where an application has been made for the recall of a victim in a crime involving violence where the court has made an order, on a blanket basis, for that witness to be re-examined, since the introduction of this legislation.

Generally what happens is that the defence will put on a notice of motion and will accompany it with an affidavit or affidavits from whoever it believes might be relevant to support its arguments as to the basis of its application and the specific issue it wants to re-put, given that the complainant has already given evidence in the Local Court and has presumably been examined and cross-examined.

If there is some issue, whatever that issue might be, of forensic importance to the appellant isolated in the material before the judge, then it is not hugely uncommon for the judge to require that witness to come along, but to give evidence limited to only whatever that additional area might be. By 'uncommon', the reality is that the calling of victims at all, the notices of motion to seek the recall of victims of violent crime, is a very rare thing; it is not something that happens very often at all.

Ms GIROTTO — Anecdotally it is more the defence wanting to call more of their own witnesses rather than recall the Crown's because they run the risk of evidence getting better, too. That is simply anecdotal. I have not done this sort of work for a long time, but certainly when I did that was more what you got than their asking for the Crown case to be presented again.

Mr HILTON — If we have the test that it has to be on a point of law that an appeal is lodged, it has been suggested in Victoria that that would have the effect of the magistrate having to be far more careful and detailed in their reasons for making a particular judgment and that that would tend to hold up the entire process of the magistrates system, which tends to be very much summary with many cases over a short period of time. Does that resonate with you in any way?

Mr DAY — It is an argument that does not resonate with me too much — that is, I do not think asking judicial officers to be careful in their decision-making processes is an unreasonable thing.

Mr HILTON — Maybe not just being careful, but actually documenting it and having to spend the time justifying a 10-minute hearing with a two-hour preparation of reasons for decision.

Mr DAY — I do not know that I was urging there be a system of appeal where a point of law was the basis of the right to appeal. There is already a process by which — in both jurisdictions, as I understand it — if the judicial officer simply got it wrong on a legal basis, there is a procedure for review in the Supreme Court for both jurisdictions in any event. It would limit the process, I think, perhaps too far.

All I was saying is that, and the corollary, I suppose, is this: in the Local Court in civil proceedings there is no right to appeal on the fact finding of the magistrate. There is simply no right of appeal at all. But in the criminal jurisdiction there is not only a right of appeal, there is a right to have your case reheard. It seems to me that it would be a far better thing if these things were run in the District Court as appeals. Although they are presently called 'appeals', in reality they are not appeals at all. They are a fresh consideration de novo of the material that is available.

Ms GIROTTO — Not all of it, because the nuances are not there.

Mr LUPTON — But to take Geoff's point, what would the grounds for that hearing be, in your opinion?

Mr DAY — First of all I think it is important that there be an appeal so that there is some mention in the legislation, somewhere, that this thing is actually an appeal against conviction — that is, an appeal against the decision of the magistrate in circumstances where on some basis or other the magistrate can be identified as having gotten something wrong, not to have a system whereby, as I say, it is simply a fresh bite of the cherry. I do not know that is a system which in this day and age with magistrates of the quality of the person who preceded us to this chair, get it wrong so often that the Parliament needs legislation such as that. As to how such a system should work, that is a matter for you good people, I suppose.

Mr LUPTON — You say it should not go to as high a standard only on a question of law, but how else would you demonstrate error?

Mr DAY — If the issue was that the magistrate got it wrong on the facts, what would need to happen it seems to me is the appellant would have to show how. If there was a finding in an oath-on-oath case that witness A is to be believed beyond reasonable doubt for cause, then it seems to me the defence, the appellant, would need to show that the cause is wrong and that it is wrong obviously for this reason — whatever that might be.

How you put that down — I do not know if I am making sense or not — more regard needs to be had for the abilities of the magistracy to get right the decision as to which witness in this particular

case is to be believed, given the standards — beyond reasonable doubt if it is a Crown witness — in an oath-on-oath case. At the moment there is none at all. Not only is there none at all: the reasons that the magistrate gave for the decision-making process are not even before the District Court judge, which to my mind is ludicrous.

The CHAIR — The question is: what is the test? Do you keep appeals on the transcript but incorporate some of those features you are talking about so you have the reasons of the magistrate incorporated into the transcript or are you saying it should only be on errors of law? Are you saying the test — I assume we are now just talking on conviction rather than sentence because you said you can have a problem with a sentence — whether you go to that very high test of being an unsafe and unsatisfactory verdict before you can appeal? It seems to me there are potential options there.

Mr DAY — There obviously are. It would be very useful for our purposes if the legislation was identical to the that of the Court of Criminal Appeal. The reality is that the law institute in your case and the law society in our case and the bar association here are going to pillory any Parliament that tries to put legislation up like that. It is just not realistic, and it is probably not warranted either because of the very high levels of learning, one presumes, of someone who is elevated to the red judgeship as opposed to the purple judgeship and then the magistracy, to have the tiered system; it is proper to have different tests.

I think it would be very beneficial not just for the prosecutors but for the administrators of justice in your state and ours, can I say, if there was something enshrined in this legislation that indicated that when a judge or a magistrate came to a finding as to a particular factual issue which was in dispute, unless demonstrable error could be shown then, that factual finding binds the District Court when it considers the basis of this appeal.

It does not need to be a high test around 'unsafe' or 'unsatisfactory'. There does not need to be error of law. They are going to have to show, for proper reason, that there was some error factually in the magistrate's finding, otherwise the magistrate's findings as to those sorts of issues are presumed to be correct or are simply 'the findings', for the very obvious reason that the District Court judge in those cases does not see the witnesses. It is just something that you cannot reflect — —

The CHAIR — Is that the purpose of a hearing on the transcript in a sense, so that a District Court judge can actually look at the transcript and say, 'Well, look, it would not have been possible for the magistrate to find these facts based on this or that' plus any leave that was given to hear additional witnesses? Is not that what it is really about?

Mr DAY — If that is what the District Court judge is doing on review, then I would have thought that is precisely what the role would be.

Mr LUPTON — Given the pre-court trial processes that go on in the District Court when an appeal is lodged, and I understand from what the Chief Magistrate was saying before that there is a case management process that these matters go through where there is some delineation of the issues that are going to be before the District Court, one way or another does not the fact that you are dealing with this transcript — I assume that the District Court judge will say to counsel at the outset, if not beforehand, 'What is it that you say I should be looking at?'

Mr DAY — I do not want to get in dispute with the Chief Magistrate. I am not aware — plainly there is a case management process in the Local Court but I am not aware of something even approaching that in the District Court at this stage.

Ms GIROTTO — It just gets listed for mention to see if the transcript has arrived and if there is any implication; and if there is not, it misses the hearing. That is just one or two steps.

Mr LUPTON — Then go to the hearing date in the District Court: I assume that the judge will say to counsel, 'I have a transcript in front of me, direct me to what you believe is the essence of your case'.

Ms GIROTTO — It depends on the judge.

Mr DAY — Generally what happens is the judge has nothing before him or her. He will look to the Crown and say, 'What is this about?', which in itself is peculiar because this is an appeal by that end of the bar table, not this end of the bar table. The Crown then presents its case — because it is a de novo hearing — by the presentation of the documents and other physical exhibits that were before the Local Court, and the judge will read the transcript. He may seek assistance if it is a very large transcript at the outset by way of opening from either side as to what this case is really about.

Generally he does not because it is not necessary, there is not much paper usually, and then he comes back and will put to whichever the party the judge is of the view needs to make a case of a particular issue in a similar fashion to the way we are dealing with this now: 'Mr Crown, why is this?' or, 'Mr Appellant, why is that?'. That is generally the way these things operate. Case management is not something known, as far as I am aware, in the District Court at this stage.

The CHAIR — We are trying to narrow down the issues of appeal.

Mr DAY — But because it is not an appeal, that is not what happens, which is my point that I think these things should be appealed.

Mr LUPTON — We all struggle with this issue because it is neither fish nor fowl. That is the problem.

Mr DAY — If it was an appeal, these people, with respect to them, would open and they would say, 'Our appeal is because the magistrate clearly got it wrong. He found that Mrs Hobbs is not to be believed in this domestic violence; but the fact of the matter was there were two people giving evidence of identical circumstances; there is a different slant on each; there is nothing to corroborate this version; the standard is beyond reasonable doubt; they got it wrong'. It seems to me that is a better way of running an appeal rather than starting from scratch but without the ability to observe the witnesses.

Mr LUPTON — One of the things that bothers me about the transcript concept is that it would seem, just to put some burden on the judge in the District Court, that they would have to try and work against — it is almost a human nature thing to look at that evidence and that transcript and be weighing up whether the decision was correctly based, whether there were holes in it, what the pros and cons of it are when really, because it is not an appeal, that is not what you are supposed to be doing.

Mr DAY — That is right. As you were saying in the commentary you have just made, working out whether the decision was practically based is not what the judge's role is. The judge's role is to jump into the seat the magistrate used to have and hear the evidence, albeit by reading the documents, and come to a view independently of the magistrate and not knowing the basis on which the magistrate came to that view, which just does not make sense to me.

Ms HADDEN — I know it is circular, but what is the reason in the legislature for not including the magistrate's judgment in the paper appeal — in the documents before the Appeal Court? Is there a reason for not having the magistrate's reasons?

Mr DAY — There may be some mention of that in the papers or the — —

Ms HADDEN — To me it seems that is a document — —

Mr DAY — It would surprise me if there was, but — —

Ms HADDEN — It really should be there. If it is an appeal not de novo, why do you not have the magistrate's reasons?

Mr DAY — Indeed.

Ms HADDEN — It does not make sense to me, but that is — —

The CHAIR — It is a rehearing on the transcript rather than in the — —

Ms HADDEN — Yes, but the transcript of the magistrate's reasons, because clearly when it is recorded, the magistrate's reasons are recorded on the tape.

Ms GIROTTO — For believing one over the other. That is the sort of thing that judges have not got.

Ms HADDEN — Once upon a time they used to handwrite it. Anyone could go up and get a copy of the order, handwritten, in Victoria — before the proceedings were taped, you could. It does not make sense to me, unless I have missed something, why the magistrate's reasons are not part of the transcript of evidence on appeal.

Mr DAY — Because the legislation says that the proceedings are to be conducted on a transcript of the evidence, and the magistrate's reasons are not part of the evidence. I have issues around that, but then I suppose — I am again speaking from anecdote, because I do not know that we have come here with figures of how many appeals were successful from the point of view — —

Ms GIROTTO — Yes, I have, actually.

Ms BEATTIE — New evidence.

The CHAIR — New evidence. We would like to hear.

Ms GIROTTO — More appeals are dismissed than allowed.

The CHAIR — What are the figures?

Ms GIROTTO — Again, this only tells us of the appeals that were dealt with by the District Court, not any that were withdrawn beforehand. From January 2000 to today — I did it quickly this morning — 2059 appeals were allowed and 2751 were dismissed. That is a five-year — —

Mr LUPTON — Sorry, that does not include abandoned appeals?

Ms GIROTTO — It is only ones that are processed by the court. I did not look up 'abandoned', I can actually find — —

Mr LUPTON — No. It is just important to know that they have already been taken out.

Ms GIROTTO — They are the ones that are dealt with by a court.

The CHAIR — In what year?

Ms GIROTTO — That is from 1 January 2000 to today, to 10 April.

The CHAIR — So only 2000 allowed.

Ms GIROTTO — Two thousand and fifty nine.

Mr LUPTON — It is about 5000 all-up, about a thousand a year.

Ms GIROTTO — About 5000 run, and of those, 2751 were dismissed. I looked at January 2005 to today with the same figures — 584 appeals dismissed and 435 appeals allowed.

The CHAIR — Is that conviction appeals or — —

Ms GIROTTO — That is all-grounds appeals only.

Mr DAY — Which is conviction appeals.

Ms GIROTTO — Conviction appeals only, not severity appeals. There are many, many, many more severity appeals.

The CHAIR — We might need to just try to find a way of reconciling figures, but we have got New South Wales rate of appeal, total appeals registered and number of persons proven guilty in the Local Court and the appeal rate with the total appeals registered in each sphere, like in 2004 it being 6346.

Ms GIROTTO — That would have to include severity appeals.

Ms HADDEN — Yes, it is all appeals.

Mr DAY — Remembering also that we are not responsible for all of the appeals.

Ms GIROTTO — We do not do them all.

Mr DAY — There is a large number of commonwealth appeals, a very large number, because, for example, every rude, offensive phone call is a commonwealth appeal, and those sorts of matters come up quite regularly.

Ms GIROTTO — Social security fraud.

Mr DAY — And RSPCA.

Ms GIROTTO — No, we do those.

Mr DAY — We do some of those; we did not, though, back then. There are some other authorities that we simply do not prosecute matters for. The RTA does some of its own work, and of course the private appeals where people are privately prosecuting people for whatever it might be.

The CHAIR — So the all-grounds appeals are actually very low when you consider the number of cases in New South Wales, as distinct from the severity of sentence appeals.

Mr DAY — Indeed.

The CHAIR — A very, very low number.

Ms GIROTTO — About 750 last year in our office were dealt with. I just looked at 1020, roughly, to today — that is about one and one quarter years — and took away roughly a quarter.

Mr LUPTON — Did these 1999 changes have any effect on that, do you think?

Ms GIROTTO — I didn't look at what it was before — —

Mr LUPTON — Just from your experience, what — —

Ms BEATTIE — Anecdotally.

Mr DAY — It is really difficult anecdotally, but it is something we could fairly easily — —

Ms GIROTTO — I could find out very quickly for you.

The CHAIR — That would be useful.

Ms GIROTTO — I can get you figures from the time our computer system started, which was about 1994–95.

Mr LUPTON — Why not give us about five years before and five years after — that would be a useful exercise?

Mr DAY — It has relieved an enormous amount of grief — grief for the complainants, the witnesses and the defendants who have to come along and go through the entire process, and grief for the court to have to sit there for 2, 3, 4 or 5 days rehearing matters that took 2 and 3 and 4 and 5 days in the Local Court. The listing of these things has come down quite significantly. I cannot assist with the exact figures but out in the country areas of this state the listings of these things are down a very significant amount on what used to be the case. They are only limited now by the amount of time it takes RSB to get the transcript together, pretty much.

Ms GIROTTO — What also happens in circuits is that before these amendments, if you were running an appeal on a country circuit you have to do it essentially between 10.00 a.m. and 4.00 p.m. or 5.00 p.m. because you are calling witnesses, but because you are doing this work on the transcripts it is a bit of a problem for us because our lawyers are required to work sometimes until 6.00 p.m. and 7.00 p.m., because there are no witnesses; it is just the judge, the defence and the prosecution. They can get more done because it they could do them outside those hours, you would normally call witnesses.

Mr DAY — To explain the figure — but I suppose it would be reasonably obvious — that around about half of these appeals or a little bit less than half are being allowed, it needs to be taken into account that it is only a very small proportion of the total number of matters where someone is actually so aggrieved that they are prepared to race up to the District Court. You might think that perhaps those people have, and clearly they do, some sort of argument to make, but the administration of the court has been significantly improved by the introduction of this legislation; there is no doubt about that. I raised those issues before simply because I think they are issues that need to be considered.

Mr LUPTON — Without any countervailing increase in the length of Local Court hearings?

Ms GIROTTO — I met with the Chief Magistrate a couple of weeks ago on other issues and he was with his deputy chief magistrate, and both of them were saying that they go to great lengths to provide reasons for their judgments. They were bemoaning the fact that the District Court does not get to see their reasons for judgments when they spend a lot of time and effort to put on paper the reasoning they use to get the judgments that they got. So I do not know that it would make that much difference if magistrates are giving a judgment justifying why they come to a decision. Of course I was talking to two magistrates, not how ever many magistrates there are, but they were talking on behalf of all the magistrates, that they go to a lot of trouble and no-one sees this stuff, so why do they bother?

Mr LUPTON — One of the things that is put in Victoria by some magistrates is that if we moved particularly to an error of law-type appeals system rather than what you do here that the

amount of time they would have to spend on their reasons would expand enormously and that would create — —

Ms GIROTTO — With a 5 per cent appeal rate, it would be a lot of work, if they are saying that.

Mr LUPTON — But I think you are saying that the kind of system you have here — —

Ms GIROTTO — They do it anyway.

Mr LUPTON — It does not really seem to have had any adverse effect on the Local Court function.

Ms GIROTTO — I do not think so. Well, I do not know, but certainly what those two magistrates were saying is that they do that now — they do give lengthy reasons for their judgments.

The CHAIR — Are there any other questions? Thank you very much for all your time.

Ms GIROTTO — Are there any other statistics that you want that I may be able to help you with? I can only give you statistics that the New South Wales DPP is involved in.

The CHAIR — That would be helpful. Perhaps we could — —

Ms GIROTTO — But if there is anything else you want, just let me know.

The CHAIR — If you do not mind, we could write you a letter or email you and indicate what would be of help to us.

Ms GIROTTO — I can go to 'charge categories' as well here if that interests you — I think I can.

The CHAIR — Thanks, Clare. That would be tremendous. Thank you both for your time; we appreciate it and your unique insight into how the system works here in New South Wales.

Mr DAY — Thank you very much.

Witnesses withdrew.