LAW REFORM COMMITTEE

Inquiry into County Court appeals

Melbourne — 13 February 2006

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Superintendent S. Leane, Manager, Legal and Corporate Policy Unit;
Sergeant K. McDonald; Member, Research and Training Unit; and
Ms P. Maroulis, Policy Officer, Victoria Police.

The CHAIR — Welcome to the hearing, and thank you for taking the time to come and appear before us. You are well versed in these hearings, but I remind you that we are governed by the Parliamentary Committees Act. It is therefore subject to parliamentary privilege. There is an expectation that your submission today is a public one, and therefore it will appear on our web site as a public submission unless you ask for any part of it to be given in camera. Would you like to speak to your submission and then we will ask questions?

Supt LEANE — Thank you for the opportunity to address the committee. I will introduce the Victoria Police representatives here. Firstly, I am Superintendent Stephen Leane, and I am the manager of the legal and corporate policy unit for Victoria Police, which is part of the corporate strategy and performance department. We are a corporate department, which supports the chief commissioner and the members of our Victoria Police corporate committee with regard to conducting the business of Victoria Police.

To my left is Sergeant Kyle McDonald — a very experienced prosecutor and member of our research and training unit within our legal services department. He is actively prosecuting matters before the Magistrates' Court, and providing advice and instruction to other police prosecutors in how to do their day-to-day job; so I am fortunate to have the availability of Kyle to come with me today to answer the more complex and detailed questions that you might have with regard to prosecutions from the Magistrates' Court.

Also with me is Penny Maroulis, who is a policy officer from my office, who did a lot of work with Kyle to prepare our submission, and also to prepare for today.

I will address you on a number of issues. We believe there are a number of simple conceptual matters that need to be considered with regard to Victoria Police's approach to appeal. But I am pleased to have the opportunity to expand on aspects of our written submission to the committee during this hearing, and to the extent possible answer any specific questions the committee might have.

As a key stakeholder in the summary jurisdiction of the Magistrates' Court, Victoria Police has a particular interest in the appeal process from the Magistrates' Court to the County Court.

Perhaps at that point I make it clear that Victoria Police is the prosecuting agency in regard to the majority of criminal matters appearing before the Magistrates' Court. The DPP does have a role in matters and can take over a prosecution at any time, and there are other agencies that conduct prosecutions on their own behalf in the Magistrates' Court

As you are aware the Magistrates'' Court Act 1989 provides automatic rights of appeal from the Magistrates' Court to the County Court. A person may appeal against any sentence order made against them in a criminal proceeding, and criminal proceedings are the basis for which Victoria Police has an interest.

The act does not require the appellant to establish that any area of law or fact occurred in the first instance, but provides an automatic right to seek a second hearing of the same facts. This varies from other appeal mechanisms in Victoria which require an appellant to demonstrate some mistake of law, or are limited to an appeal against sentence.

I was aware of the submission of the law institute before we appeared, but with regard to consistency, there are certain inconsistencies between the various levels of courts which you would be aware of from your time in deliberations.

The rationale for this procedure appears to be in the past that summary hearings were conducted by justices of the peace, who were not necessarily legally qualified, but this is no longer the case. Justices of the peace have now been formally removed from any adjudicative role, and all Magistrates' must be legally qualified and must have been admitted to practise for a minimum

period of five years. That requirement is similar or identical to the requirement for the appointment of judges or justices of the Supreme Court. Other avenues of appeal in Victoria all require some form of error or wrong to be found in the action, and we expanded on this in our written submission.

Essentially, in summary, from Victoria Police's perspective there are some shortcomings in the present system, these being that it offends against the principles of res judicata, with little justification to do so. That doctrine is that the court's judgment is final, and that legal proceedings should be finalised and the re-litigation of disputed matters should be minimised.

Appeals are the exception to this doctrine that where appropriate in cases typically involving error the doctrine may give way to an appeal process. The automatic right of appeal differs from all other bases of appeal in Victoria which are on some form of error — I point out that I use the words 'some form of error'. The underlying rationale for an automatic right of appeal no longer applies, as all Magistrates' are now experienced lawyers prior to appointment. The automatic right of appeal applies regardless of what may have happened in the Magistrates' Court so a person may appeal against sentence and conviction even if they have pleaded guilty.

The appeal process incurs additional cost to the community, the parties, the witnesses and complainants. These costs include financial costs as well as stress and anxieties that witnesses and complainants go through in an appeal after the matter has been dealt with in the Magistrates' Court.

In other appeals based on error a gatekeeper process exists to screen out unmeritorious and vexatious appeals. Practical problems exist in the current system — for example, the Magistrates' Court does not routinely produce transcripts. Consequently there is no automatic verification of the evidence relied on during appeal and that causes some delay if there is a need to wait until the transcript becomes available. It is usually not possible to identify whether the appellant is providing a different version of events on appeal. This is an issue of experience with Victoria Police because of the two different prosecuting agencies, depending on what court you are in at what time.

Finally, the appeal process can have the effect of rendering a Magistrates' hearing a mere rehearsal. It is not uncommon for barristers to admit that if their client is unhappy with the outcome in the first instance they will simply have another bite of the cherry to an appeal process somewhere down the track — particularly relevant with regard to technical driving offences, which has been our vast experience in Victoria Police.

Appeals against manifestly excessive sentences and other miscarriages of justice must remain, and we are not saying that there should not be a process which picks up those issues and deals with them. Rehearings are appropriate and desirable in these cases, depending on the circumstances.

I would like to make some reference to Crown appeals, which is a slightly different issue. The effect of the present Crown appeal process is that some magistrate decisions are not appealable, the main example being where a charge is dismissed. If a charge is dismissed in a Magistrates' Court it is not a matter for appeal. In these circumstances the only avenue for appeal is to the Supreme Court on a question of law. However, there may be no real question of law involved; a simple misapprehension of the facts of the case may be involved. Essentially, while the defence has an opportunity to raise a matter of appeal without notice or without getting through some sort of gatekeeping process, the only avenue for appeal for the prosecution is to the Supreme Court and, as we can see, that is restricted.

In addition, the disparity between the restrictions on Crown appeal and defence appeal does not always achieve a fair outcome — for example, in a particular case in November 2005 a successful prosecution against a magistrate's failure to activate a suspended sentence did not result in the defendant returning to prison because of the special considerations attaching to Crown appeals. We

consider it an unsatisfactory outcome for an appellate court to hold that a court below has erred. However, the error that has been detected and identified and agreed to by the superior court cannot be corrected because of the nature of the appeal system in criminal matters.

The CHAIR — Are you able to tell us which case that was?

Sgt. McDONALD — *DPP v. Marrell.*

Supt LEANE — Arguments in favour of the right to retain an automatic appeal process and a full rehearing include the need for a simple procedure to counterbalance the speed and volume of the Magistrates' case loads and to smooth out inconsistencies between the many cases and venues of the Magistrates' Court. However, Victoria Police consider that providing continuous legal education specifically tailored to the needs of the magistracy would be a more effective and efficient way for the government and community to deliver consistency across decision making than retaining the current appeal process.

The committee has also sought comments on the desirability of change should the jurisdiction of the Magistrates' Court be broadened. Victoria Police considers that attempts to broaden the jurisdiction of the Magistrates' Court should also consider the sentencing jurisdictions of the court. If the court is to deal with more serious offences, it has to be able to impose adequate sentences where appropriate. I refer the committee to our written submission which provides further detail in relation to this issue. However, I wish to emphasise that Victoria Police considers there is no justification for granting a court of justice staffed by a professional legally qualified magistracy the power to adjudicate the majority of criminal cases and to allow an automatic right of appeal when no error is claimed or identified.

In South Australia grounds for appeal must be made out before an appeal is made, and the appeal is made directly to the Supreme Court. There are real prospects of time and cost savings if the process or a similar approach were to be adopted in Victoria. It would also allow the County Court to focus on the hearing of more serious cases rather than presiding over rehearings of cases by way of appeal, as the current system provides.

No doubt there would be a significant increase in work load for the Supreme Court, if the circumstances were more appropriate if that application were in the County Court in the first instance. Over time this would level out. Despite this we consider that this model has a number of benefits for Victoria. Superior courts deliver systematically better recorded and reported decisions that are binding over lower courts. This would provide better supervision and direction to judicial officers in those courts and would be part of ongoing legal training for Magistrates'.

Another advantage in the South Australian system is that it allows for both parties to appeal to the Supreme Court on a number of grounds and provides a broader scope for appeal of those cases where some injustice might occur but where an appeal is not available under the present system. If your committee considers the South Australian system to be unsuitable, we would seek that you might consider an amendment or a slight change to that system. In our view a gatekeeper restriction to limit appeals to the remedying of identifiable errors or injustice is more appropriate.

In conclusion I would like to thank the committee for this opportunity to express our views on the County Court appeal process. I invite questions, and we are happy to answer questions for the time you have available for us. I also would like to say that we are quite happy to take matters on notice and get back to you to assist you in your deliberations on the way forward.

I would like to make one final comment. I think what Victoria Police is suggesting to the committee is that there is consistency between appeal systems across the various courts and also that there would be some level playing field between the capacity of the prosecution — in the majority of cases it is Victoria Police who appeal matters — in the same way that the defence has

an opportunity to appeal. I invite any questions and perhaps Kyle would like to assist and Penny where she can.

The CHAIR — Thank you, Superintendent, for that submission. I think your submission indicated that in the Magistrates' Court there were close on 88 000 prosecutions by Victoria Police each year. The argument that has been put to us in essence for the counterview is that you have what has been called instinctive justice occurring in the Magistrates' Court at 100 miles an hour because it is essentially a very quick and speedy process. The majority of people appearing in the Magistrates' Court plead guilty, but even where they plead not guilty, the typical amount of time that might be taken up by a case in the Magistrates' Court is fairly quick. I think you indicated that a magistrate might hear many cases in a day.

The argument essentially for a de novo appeal is that you are not going to dot every i and cross every t in terms of the process or the procedure, nor are the lawyers who appear going to set out every aspect of every legal argument in their case. Nor is the judge going to feel compelled to dot every i and cross every t simply because there is the de novo process. But if the de novo process is taken away, the argument goes that the Magistrates' Court will become bogged down on procedural questions from both sides, making sure that everything is either spelt out or done to the letter of the law in terms of every avenue of possible appeal later on. In other words, they are saying if the intent is to save money and court time, you will not achieve that result because more time will be taken up in the Magistrates' Court unnecessarily, so the argument goes, going through all the finer legal points in order to make sure that if there is to be an appeal, there will be grounds for an appeal later on; or from the Magistrates' side, making sure that they have it right and therefore there will not be an appeal because they do not like their decisions appealed on errors of law and so on.

Supt LEANE — I think probably the key plank of parties who disagree with the Victoria Police perspective, is the fast and furious justice system in the Magistrates' Court. If the community accepts the fast and furious justice system, there has to be some counterbalance somewhere, and the counterbalance is a full de novo appeal without basis of law or fact. It is matter of what the community is prepared to accept. I have not met a magistrate who would admit that they would not consider each matter that has come before them carefully, nor have I spoken to a lawyer who would admit that they do not to the full extent of their skills and ability represent the interests of their clients with whom they have a contract to represent. It is a matter of balance, and I concede as a matter of broad public policy it is. We would probably suggest that the balance is perhaps too one way, and the development of the skills of the magistracy to a very high level and the type and calibre of people they have been attracting to be Magistrates' in the last 10 to 15 years has given me great faith that the Magistrates' are able to do their job effectively, still in circumstances of high volume.

The CHAIR — I accept that, but that has dodged a little bit what I was putting to you, which is not so much about the capacity of the magistracy and their training but the question of how the court functions. The argument is that the pleas would become longer, that the magistrate would feel compelled to explain everything when things are not necessarily explained now because they do not need to be in the vast majority of cases. It is really not so much about their skill — either of the lawyer or of the magistrate — but about the time in which the case is dealt with and therefore, to put it bluntly, some of the niceties are dispensed with on both sides and there is an understanding that that will happen in order to deal with the volume of cases. However, there will be some cases where an injustice as a result may occur, and having the right to have it reheard where someone feels strongly there has been an injustice is the counterbalance.

Supt LEANE — I might pass to Kyle because I have not prosecuted in a court for a little while. However, if you are saying that when an injustice occurs then that de novo then provides for that injustice to be remedied, appropriate limitations on appeal should also provide for the capacity

for those injustices to be identified and to be appealable. I am not suggesting an injustice that occurs in a Magistrate's Court not be the subject of appeal.

The CHAIR — Not all injustices appear on the face of the record; that is the argument.

Supt LEANE — Perhaps Kyle has some views he might be able to explore.

Sgt McDONALD — Could I first pick up on what the Superintendent was saying. The essential thrust of what we are putting forward is for appeals to remain but for them to be merit based. The point you make is entirely valid — that not everything on its face appears as an error. We are saying that it would be important to ensure there is some form of gatekeeper function to any appeal process, so it is not simply a case of a person saying, 'I can demonstrate on the face of it that there is an error' but rather, 'I can convince someone acting in a judicial capacity — whether it be a registrar or a master or a magistrate or a County Court judge or a Supreme Court judge — that I have somehow suffered an injustice that deserves to be corrected'. We see that as an important remedy that has to remain, that the system retains the ability to correct errors. I think your point is entirely valid, and any solution we come up with has to be able to absorb that.

In response to your question I can offer three things in return. The first is that our opponent's view is predicated on what I term — it is my own term — as the summary justice argument, that the sort of justice that is obtained in the Magistrates'' Court is summary justice in the pejorative sense. We reject that argument. It is certainly fast, it is certainly furious. Magistrates' are trained to operate in that summary manner, the practitioners are trained to operate in that summary manner and our prosecutors are too. Every player in the system will ensure that they provide as much justice and as much attention to each case as they think it merits on what they have been provided. There are no short cuts in our opinion in the sense of not crossing all the t's and not dotting all the i's, because where that occurs there are rights of appeal because there has been failure to comply with procedures. The denial of procedural justice is an important correction on appeals. We certainly would not advocate that being removed and indeed that is not what we are advocating.

I make the point that the figures we obtained from the Australian Bureau of Statistics and from the Country Court's web site were that some 2.9 per cent of cases are appealed from the Magistrates'' Court to the County Court, so we are talking about an extremely low volume at the moment where people take advantage of the de novo appeal. No doubt you will say to us, 'Does that not militate against your argument against it?', and perhaps we will come to that in due course. We are talking about a low volume of cases in the overall system from the summary stream that would go on appeal.

I think the point should be made that if additional time is going to be spent — whether it be in the summary stream or whether it is on appeal in the County Court — it is a cheaper prospect for the community to expend that money and time on justice in the Magistrates'' Court than it is to do it once and then to revisit it again in the County Court. Put simply, if it takes a bit longer in the Magistrate's Court, so be it; that is a cheaper place to argue the issues more fully than it is to argue them more fully in the Country Court. There are attendant costs — not just for us directly but for the community by funding the dispute resolution system in the form of the courts, and also for the appellant or the respondent to the appeal, who has to engage counsel, and there are a whole range of knock-on costs. If they are sustained in the Magistrates' Court, which is a cheaper forum than in the County Court, that is not necessarily a bad thing.

The CHAIR — Except the argument goes that if it is no longer quick and speedy and it all slows down in the Magistrates' Court for every case in order to protect against the lack of a de novo appeal, then that argument falls down. Ultimately you are slowing down 88 000 cases as against — on your figures — the 1875 both criminal and civil cases that might go on appeal to the County Court of which 70 per cent are against sentence, which presumably someone would still be able to do under a system which was about appealing against the manifestly excessive nature of the

sentence. You might be talking about an even smaller number of cases. It is about how you weigh that. That, I suppose, is one of the challenges for us.

Sgt McDONALD — I guess the argument fundamentally comes back to how much justice does the community want and how much can we afford? Again, I would endorse what the Superintendent was saying, which is that to the extent the Magistrates' Court system is seen to be deficient and have it suffer from summary justice in the pejorative sense, perhaps — it is certainly outside the terms of reference for the inquiry — the community needs to say, 'Is that an acceptable way?' Is the way we deal with shortcomings in justice in the Magistrates' Court by allowing nearly 3 per cent of defendants the ability to automatically appeal it, or should we go back more to fundamentals and say perhaps we need to look at our system of justice and afford justice to everybody, not just those 3 per cent who have the fortitude to pursue an appeal.

The CHAIR — I think you were present when we were questioning the representatives from the Law Institute of Victoria about the 1999 changes. They were saying that the warning to the appellant that they could have their sentence increased acted as a sobering deterrent to taking appeals to the County Court. Presumably one of the grounds on which those sentences can be increased is that it is a frivolous or vexatious appeal. Does that provision not in fact reduce the likelihood or possibility that someone will ask for a de novo hearing at the County Court just for the sake of it in the hope that they might get off, because they do run the risk that their sentence could be increased by that? Are we getting only people who genuinely believe their case has not been dealt with properly, or even may not have been represented properly, and who therefore want to make that appeal to the County Court? Do any of you have comments on that?

Supt LEANE — You are right; we sat through the tail end of the law institute's submission and heard Mr Melasecca make comments about the submission. The difficulty I find — using probably a medical term — is the term 'informed consent'. In the medical world as a society we have moved such a long distance, where every one of us who now goes to a medical practitioner expects a great deal of information and then makes a decision based on informed consent. Listening to Mr Melasecca, what struck me is that I think he was suggesting — and I only heard parts of it, so if I am out of context I apologise to him and I will take rectification — that they are required to give notice and give these warnings to clients, who then think through the issues. What struck me is that if I was a client seeing Mr Melasecca about a medical condition, I would want to know all the facts, all the risks, all the considerations by informed consent and then make an informed decision about where I go from there. I do not think it is a bad thing for lawyers to be talking to clients giving them, as Mr Melasecca says he does, all the issues, all the risks, all the likely outcomes, and for the client to make an informed decision about whether he goes forward or whether he does not. And what I as a client see as important is a matter for me. As to the risk of going to jail, I might be a person who has been to jail several times and the risk of going to jail is neither here nor there, but it is an individual issue about what the criteria are and how you balance them up yourself.

The CHAIR — Going back to the point of my question, would you agree that that would in fact reduce unmeritorious de novo appeals? Can I put it that way?

Mr LUPTON — That it has decreased them already?

The CHAIR — That the changes in 1999 have decreased them already?

Supt LEANE — You would have to look; the statistics over time should indicate that. I am not sure of the statistics over time. I do not know if Kyle can comment on whether there has been a reduction in the last five years.

The CHAIR — I know that one of the people from La Trobe University, who are submitting to us later on, has indicated that basically the amount of time that these de novo appeals

take up in the County Court has remained pretty consistent over time and that it has not dramatically increased. What are your observations?

Sgt McDONALD — The only thing I could say from our perspective is that it would be necessary to control for a variety of functions before you could safely conclude that the appeals had reduced because of those reforms solely, and there would be a variety of things that are occurring. It would presuppose that all of those appeals before the reforms were unmeritorious, that legal practitioners did not seek to dissuade their clients from pursuing unmeritorious claims and that County Court judges entertained them. I suspect that we simply do not know from those figures if that is the case or not. Be that as it may, if this has the ancillary function of performing a screening process and preventing unmeritorious appeals, what harm flows from then having a system where we explicitly articulate at the entry to that system that we would like to screen on merit rather than doing it as an ancillary — as a pleasant but unintended by-product of the system. If that is what we want to achieve, let us explicitly state that at the outset and have that as our ultimate aim with the system.

The CHAIR — How would you deal with the problem, though, of someone saying, 'I felt that the duty solicitor from legal aid just did not put my case adequately'? That may not appear on the face of the record as being an injustice, but the problem here is who will make the judgment on whether or not their case was adequately put by the duty solicitor who happened to get their case at perhaps a day's notice?

Sgt McDONALD — The trite answer is that they would have the same remedies that every other participant in the criminal justice system has at any level other than this one, which sidesteps the issue. I am sure that, given the other systems we have and the various appeals in other jurisdictions and to other levels in our hierarchy, we would be able to make sure — —

The CHAIR — Are you talking about civil cases?

Sgt McDONALD — Not so much civil — criminal. Every so often there are cases — and there have been recent ones before the High Court looking at this concept of, 'Has my practitioner done a good job for me or not; and, if he has not, what are my remedies?'. That is a slightly different issue that the law so far has said is not necessarily dealt with by appeal mechanisms, but rather is about, 'Does the person have redress to their counsel or not?'. But again that has not been looked at in isolation, nor should we, I suggest, simply deny a person the ability to seek remedy if they have somehow been short-changed by the system. There is a knowledge imbalance there and people who deal with the professionals in the system rely on their expertise and judgment, and they should not be left caught short if that was wanting for some reason.

The CHAIR — That is the question we are dealing with — —

Sgt McDONALD — How do we do it — —

The CHAIR — And what is one of the remedies?

Sgt McDONALD — I think we would have to take that on notice to come back to you with a concrete example of how we say it could occur. I think the theoretical point is simply to say, 'That is probably a valid concern; let us see if we can build that into the system and explicitly articulate that as a value we are trying to remedy', rather than saying, 'This is a system we have that is designed as a fairly blunt instrument to remedy a range of defects'. We see there are deficiencies with its current form.

Mr LUPTON — It seems to me that essentially you are saying that the system we have at the present time overwhelmingly gets things pretty right — and that seems to be the view of everybody who is coming and speaking to the committee — but that if one believes some kind of error has been committed there should be some responsibility on the person arguing that to say

what it is, rather than their being able to take the next step simply because they just did not like the outcome. Is that effectively it?

Sgt McDONALD — Yes. Should the community fund the person who has a necessarily jaundiced view of how successful or otherwise they were at court when the community has said, 'We do not entertain that at every other level of appeal'?

Supt LEANE — It is the maturity of the system, is it not? We have talked about how the Magistrates' Court has matured over time and become more sophisticated. Is it sophisticated enough in 2006 for there to be some limitations on the nature of de novo appeals? The view of Victoria Police is that we have progressed enough to start thinking through limitations. We have been open in regard to how you quantify or qualify those, including whether or not — taking Kyle's point — a practitioner has acted appropriately in defending their client.

Ms BEATTIE — In your submission you tease us with the functioning of the gatekeeper system in the Masters section. Can you give us a little bit more detail on the gatekeeper system in the Supreme Court?

Sgt McDONALD — My unit performs a gatekeeper function within Victoria Police for matters that are going to the Supreme Court, and then the Director of Public Prosecutions makes his own independent decision on that. We are fortunate that we follow that through. I am not a qualified lawyer, but as I understand the way the system works — I do not want to say the wrong thing and have the Masters come down on me — they are non-judicial officers who perform judicial functions or a limited range of judicial functions in the court, and it leaves the judges or justices free for the core function of the court. Essentially the Masters deal with all the preliminary matters as they proceed through the interim stages before a matter actually goes to a trial with a full appeal. They will have the parties come before them. Some of them are procedural matters such as 'Do you have all the paperwork filed? Are you ready to go on these dates? Do you have counsel briefed to appear if these dates are available? How long will it take? Will it be a half a day or a day?'. There are a lot of procedural matters there.

The other thing they do is provide a gatekeeper screening process where they look at the material that has been filed by affidavit where the parties say, 'Here is what we claim went wrong', and the opposition says, 'We say it was right for these reasons'. They essentially make a judgment about whether it is on the cards that there is a dispute that deserves to be aired in the Supreme Court and to take that amount of time and money out of the public purse. That, in very simple terms, is what they do. They are judicially qualified themselves.

In limited circumstances there are appeals taken under common law — remedies and reviews against decisions of the Masters — but the Supreme Court and the Court of Appeal are extremely reluctant to allow that for obvious reasons. Essentially they are a form of quality control: 'Will we let everything come through or will we allow only those things that deserve consideration?'. The higher one goes up the appellate hierarchy, the more rigorous that process is.

The argument we are suggesting is that one could have it performed by the new form of judicial registrar now available in the Magistrates' Court, or have some form of a judicial registrar in the County Court or use the Masters in the Supreme Court, or have the judges do it themselves. Our suggestion is that in the Supreme Court you have the Masters there already; they are tailor-made to do that function and indeed that is what they do already, anyway. Obviously there would probably be resourcing issues. We suggest looking at the 2.9 per cent of cases appealed; they would not be significant. That would be a ready solution that would deal with that process.

Mr HILTON — Following up on Liz's point, is there any cost implication for an appellant if he has to take his case to the Supreme Court rather than to the County Court?

Supt LEANE — No doubt. That is why we have offered it as an example for the Supreme Court. The higher in the legal hierarchy one goes, the more it costs.

Mr HILTON — Is it not then somewhat unfair to a person of limited means who is trying to get a decision in the Magistrates' Court, which is at the lowest level, overturned and he has to go to the Supreme Court and presumably run the risk of being financially disadvantaged?

Supt LEANE — Yes; certainly we will concede that, and perhaps the way the submission was structured did not make it clear. The reason we used the example of the Supreme Court is that in the prosecution of a matter if we are to appeal on a matter of law or fact we are off to the Supreme Court. The prosecution is off to the Supreme Court; the defence, by de novo, lodges an appeal notice and goes to the County Court, which is a lower-cost option.

Mr LUPTON — As a matter of practicality your submission could work equally as well by having the appeal mechanism to the County Court?

Supt LEANE — Yes. To put it absolutely crystal clear, yes, that is possible; you could do the same system in the County Court.

The CHAIR — Superintendent, your submission indicates that the de novo system creates the potential for perjury to occur undetected because of the difficulty in verifying evidence relied on in the Magistrates' Court. Is there any evidence available as to the rate at which this is occurring? Do you have any information that you can give us on that? Is it anecdotal or — —

Supt LEANE — I think it is anecdotal at this stage. I think it is becoming more and more difficult because a full recording of all matters in the Magistrates' Court has alleviated many of those concerns the police had formerly. But if you could imagine, in a court which was not recorded, there is no saying — there is only the lawyer's notes and it might have been a different lawyer. The police are not present; the defendant is the only party who is still there.

Sgt McDONALD — Could I just make the point on that, as a technical aside, that the Magistrates' Court records all of its proceedings now. Occasionally errors occur, and we have had the unfortunate position with some of the appeals we have taken to the Supreme Court of having not been able to obtain a full transcript because the recordings have failed. There is always that occasional concern. It would be a brave defendant or person who appealed to the County Court who took that gamble. But also the Magistrates' Court retains those recordings for only three months, unless it is asked to set them aside for any particular reason. The time frames for appeals to the County Court are such that normally the tapes will still be available when the appeal is lodged, but it can and does occur that leave is sought to appeal out of time and then, or for some other reason, at the point in time when someone goes to look for the tapes and obtain a transcript, they are no longer there. I pick up on what the Superintendent says. We do not have any evidence that says this is occurring; it is a potential we are concerned about. Our argument really is that where the system allows this to occur and does not have a check or balance to try to prevent or minimise it — if it is said, 'Well we will just let the potential roll on and not try to address it' — and we see it as being a risk, it is not a terribly good system. Our contention is that it would be ideal if we could ensure the justice system does not have a mechanism where that could occur, or we could mitigate it as much as possible.

The CHAIR — I would have to say that the charges for perjury are somewhat uneven anyway, having looked at the administration of justice offences in our last reference.

Sgt McDONALD — By their very nature they would be extremely low.

Mr LUPTON — I pick up on that point on a slightly different subject to perjury, but one which, nonetheless, affects the nature of the way these sequential hearings go, and I expect that this is probably addressed to you, Sergeant. In cases that are appealed on conviction we have a

scenario at the moment where a person has the opportunity to hear what the complete case is against them in a Magistrates' Court. There have perhaps been orders for witnesses out of court, and so forth, and the whole thing has run its course. Then they get to run the entire thing again, knowing ultimately what the evidence of all of those witnesses would be and so there is the potential for, without there being perjury involved, cases to be perhaps differently constructed on the second time around. To an extent this can also occur where there has been a plea and an appeal against sentence, in that the sorts of things that perhaps appealed or did not appeal to a magistrate can be revisited the second time around. From your prosecutorial experience can you can comment on those kinds of things?

Sgt McDONALD — Absolutely. I think there is the potential for that to occur on both sides. From our perspective in practice, because we have different prosecuting agencies in the Magistrates' and County courts, it happens rarely, if ever, and I suspect it probably happens rarely with the defendant who becomes the appellant. It is not so much the case of a suggestion that people have the opportunity to improve their evidence or to refine it, although no doubt any practitioner worth his or her salt would make their best effort to present the case in a good light on the second occasion.

It is the theoretical concept that the system allows you to have two bites of the cherry — in a system where, aside from your own case, the remainder of the system is funded by the public purse — for no apparent reason other than you would like to have that second bite of the cherry. That really is the fundamental gravamen of what we are saying we think needs to be modified. By all means let them do that when an error is detected or they satisfy somebody that they have suffered some ill, because if the system does not have that mechanism it is not a justice system worth talking about, but we should not allow it to happen just as a matter of course.

Could I add on that point that from the research I have done — and we have not filled our discussion paper on this — the historical basis for the automatic 'no requirement to demonstrate merit' appeal in Victoria only came in in the 1989 act. If you trace through the various predecessors of the Magistrates'' Court Act right back to the first one which, from memory, was enacted in about 1861, there was always some trigger in the most part that needed to be pulled or some catch that you had to set off before you could go further up the hierarchy. It has only been since 1989 — or 1990, when the act came into effect — that we have had this open system. Of course our opponents would say, 'Well, it is 2.9 per cent; we are not doing too bad', and we agree with that, but we are saying that we think we could do better.

Mr HILTON — Did your research look to overseas jurisdictions to see if there is something similar in, say, the English or Canadian systems?

Sgt McDONALD — Yes. The English at the moment have something similar, but they also have a system where they have what are still called Magistrates' and they equate to the justices of the peace we used to have in their earlier form. They are laypeople who are appointed to the bench and are advised by essentially a clerk of courts who is a legally qualified practitioner. They also have what are now styled district judges, who are the equivalent of our professional magistracy. They sit on their own and there is a different avenue of appeal from them than from the lay Magistrates'. When we initially looked at this we put forward the argument that in that system there is every rationale and justification for having that automatic right of appeal from laypeople to professionally trained judicial officers. However, our contention is now that our judicial officers at every level are professionally trained that rationale no longer applies.

The CHAIR — I suppose we could evaluate the effectiveness or the desirability of de novo appeals from a wide range of angles. One of the comments that has been made to us is that if you look at the rates of imprisonment, particularly for juveniles, and if you also look at the recorded crime rate in Victoria, they are both at very low levels. The comment has been made that perhaps the system works quite well, that people who ought not be imprisoned are not imprisoned

and it does not necessarily mean there are a whole lot of people who have committed criminal offences running around out there reoffending. Do you have any comments about the issue of de novo appeals in the context of the imprisonment rates? Do you have any views on that?

Sgt McDONALD — I would not comment on the broader area you raise. It is an area that people like Professor Freiberg would be expert on; and some of it touches on government policy, which is not really for us to set. There is a bit of a trap for me if I venture there.

Mr LUPTON — Well spotted!

Sgt McDONALD — Suffice to say that provisional appeal mechanisms are not ultimately about — —

The CHAIR — This is purely an operational matter.

Sgt McDONALD — It is almost like that, isn't it? Appeal rights are not really about rates of imprisonment. In the prosecutions division, and I think the wider police force, we have long moved past the idea of saying justice is all about locking them up and throwing away the key. We are a little bit more sophisticated than that, and even if we were not the rest of the justice system has moved on and we have to keep up. It is about being able to ensure that the right outcome has occurred as frequently as we are able to obtain it in a system staffed and populated by humans with all the errors that come up. We are not saying we would like the ability to go willy-nilly to the County Court or the Supreme Court every time we get an appeal we disagree with. We recognise that there will always be some sort of brake on the prosecution's ability to just launch appeals, because no matter what our perspective in an individual case the organisation — the system — is funded better than the average individual. What we are saying is where we can also satisfy somebody above that there is an error and they say, 'Yes, you are right', whether it be the police prosecutions area or the Crown as represented through the Director of Public Prosecutions which feels there is an error, the community should be entitled to have that error corrected. So, too, for the defendant: where they can satisfy a court, 'I have been wronged', they should be entitled to do that. It should not be founded on whether you went to jail or whether you simply received something lower down the system. It should be merit based — the error in itself should be sufficient to trigger or refute the basis for appeal.

Supt LEANE — I think the issues around incarceration rates are low, therefore crime rates are low — —

The CHAIR — Recorded crime rates.

Supt LEANE — Sorry, recorded crime rates. It is nice to see how many people are putting their hands up to take responsibility for the lowering of the recorded crime rates across Victoria, but as a matter of policy we would like to put our hands up and suggest Chief Commissioner Nixon and the rest of Victoria Police would like to claim some credit for that as well.

Mr LUPTON — We are happy to give it.

Ms BEATTIE — Credit given.

The CHAIR — We are very happy to accord you that credit.

Supt LEANE — It is interesting to find another way in which those statistics are being used to buttress other arguments.

Ms BEATTIE — I think it was a *Herald Sun* campaign that led to those figures.

The CHAIR — I was merely asking the question: if we do have low rates of imprisonment and a low recorded crime rate, is there something about the system that works well?

Mr LUPTON — I do not think the Chair was actually suggesting that there was a cause-and-effect relationship between the two, but simply that they are both existing at the time.

Supt LEANE — That is the difficulty. I do not think there is a cause and effect directly between the two.

The CHAIR — Exactly. Returning more to the detail, your submission argues that any broadening of the Magistrates' Court's jurisdiction to hear more serious offences should also involve coordination between the court's sentencing jurisdiction and the maximum term of imprisonment that can be given for any offence. In other words, you are suggesting that we should match the court's sentencing jurisdiction to the charge jurisdiction. Presumably that would mean an increase in the maximum prison sentences the Magistrates' Court can impose, which are currently two years for any single offence and five years for an aggregate of offences. Would that cause any problems for offences which are currently triable summarily?

Supt LEANE — I can comment on this in regard to generalities. It is a matter that is being worked on through the bureaucracy of the Department of Justice in discussion with Magistrates', the police and the Director of Public Prosecutions. On its face, if you were to increase the nature and severity of the circumstances of the crimes that come before the Magistrates' Court there would be a public interest in ensuring that a magistrate has the right capacity to deal with those appropriately. That on its face is the argument we have put. It is as simple as that. Another way of dealing with it — and it is a matter that is being worked through — is capacity for a magistrate to refuse to take the jurisdiction of the Magistrates' Court. Indictable offences triable summarily is not mandatory. What is being worked through, and what Victoria Police is quite supportive of working through, is the circumstances in which a magistrate can refuse to take jurisdiction and therefore refers it to a higher court. In circumstances of a serious offence it would be our position that Victoria Police may be making submissions if that was a decision for a magistrate in regard to the nature and gravity of the criminality and therefore asking Magistrates' to refer matters to higher courts. That might be a circuit-breaker. It would take out the tension from Magistrates' not having the capacity to deal with matters. You need some sort of, as we said, circuit-breaker. There needs to be some release valve if you are putting more serious matters in the Magistrates' Court for Magistrates' to deal with them.

As I have suggested, an option being explored is to not deal with them. They deal with what we have considered more serious offences incurring up to two years. If as an offender I go into a house armed with a weapon, aggravated burglary is such a complicated offence that it could be for the purposes of assaulting somebody, for the purposes of stealing — and I think there is one more.

Sgt McDONALD — Purposes of committing criminal damage.

Supt LEANE — Purposes of committing criminal damage. If I am armed with a knife while breaking into a house and I use the knife to jemmy open the window, the moment I step inside the house technically it is an aggravated burglary. While it is an aggravated burglary and it may come down to the jurisdiction of the Magistrates' Court, that is a different matter to my being armed with a knife and breaking in through a window with the intention of committing a serious assault on the person I believe is living in there. That is the sort of issue that needs to be worked through. How do you pick up the first where you keep possession of the offensive weapon as opposed to where you are going to go in there and stab somebody? I would suggest that the second should not be dealt with in a Magistrates' Court if it is limited to two years or a five-year maximum. Therefore, how do we eliminate that opportunity?

Mr LUPTON — The law institute representatives who gave evidence before you raised the issue that abolition of the de novo appeal right, in their opinion, would have the effect of

increasing the number of defendants opting for trial by jury. Could you comment on whether you think that is likely or not? If it is, is it a good or bad thing, given the comments you were just making?

Supt LEANE — That is a hypothetical. If I hark back to my earlier evidence in regard to a well-informed client being able to make a well-informed decision, that is a matter for the law institute to deal with — how lawyers deal with their clients. At the moment, to be vulgar, I am a qualified lawyer and if I happened to be in private practice representing a client it might be that I might suggest that if you go to the Magistrates' Court now with de novo appeal, even though we do not think we are going to do very well, you get a free whack at the evidence. You get a free whack at this and there is nothing held against you, we can appeal. We can appeal against sentence and we can appeal on the basis of an error of law, we have de novo. At the moment defence is sitting in a pretty good position. Whether later on they make a decision about going to trial and have it heard before a jury rather than taking their chances in the Magistrates' Court and have themselves limited, that is an informed decision of the client depending on the circumstances of the case. If it is a complicated matter which requires consideration of levels of criminality, it may be better to be heard in front of a jury. That is decided in the best interests of the client depending on the circumstances at the time. To make a generalisation and say we will be off to trial more often — it might dawn on a solicitor that they have to give that advice, but whether a client acts on that advice, I cannot say.

Sgt McDONALD — Could I add something on that? That viewpoint, I suggest respectfully, is slightly cynical in that it is predicated on the opinion that the decision is made on the knowledge that 'I have a get out of jail free card essentially if I get an unsatisfactory result in the Magistrates' Court.' Can I suggest many defendants would also genuinely take into account things like the quicker resolution of the matter in the Magistrates' Court rather than having it hanging over their heads. In a great many circumstances there is a genuine desire to plead guilty, to pay their just desserts to society, to apologise to the victim, to make reparation, to do all of those things and to move on, not just simply to ensure that they obtain a sentencing disposition that they are satisfied with and to avail themselves of an ability to remedy that automatically if they are dissatisfied with it.

The CHAIR — I think we have covered the territory fully and well. Thank you very much for taking the time to make a submission to us and for appearing before us today.

Witnesses withdrew.