LAW REFORM COMMITTEE

Inquiry into County Court appeals

Melbourne — 14 February 2006

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Mr I. Gray, Chief Magistrate;

Mr M. Gurvich, magistrate; and

Ms C. English, magistrate, Magistrates Court of Victoria.

The CHAIR — We welcome to this public hearing of the parliamentary Law Reform Committee into County Court appeals the Chief Magistrate of the Magistrates Court, Mr Ian Gray, and magistrates Caitlin English and Maurice Gurvich. Thank you for taking the time to come and speak with us today, and thank you very much for your written submissions. I understand we have two different submissions, as befits the independence of the magistracy, and we are looking forward to hearing those. Would you like to speak to your submissions, then we would like to get into a discussion with you about the contents and the issues they raise?

Mr GRAY — Thanks very much, Chair. I will say a few quick words about some of the court's workload. I think you know most of this, so tell me if you do know it. We have two folders: Caitlin has a folder which she will give you in addition to the folders I have handed around. From our web site there is some basic information about the court, which I think you know.

There is a paper by Justice Sackville, about which I will say a few words. It was delivered last November and is about appeals, about magistrates and about the matters which go more to what Mr Gurvich will say, and a section from the Magistrates' Court Act dealing with legal representation. There are some additional documents to come from Caitlin, plus two year-at-a-glance tabular pages, each from the last two annual reports. I have put the most recent annual report in, but that is June last year, so even that is getting old. That report has not yet been tabled though. I should also tell you that it is not officially yet published, so there are two year-at-a-glance pages of stats. Tell me if you know all of this; I am sure having done the work you have done you might know all of this. The workload of the court is depicted. The court is a busy, high-volume court.

I simply want to say a little bit about that. In terms of volume and size, it is the second-largest court in the country. It has 103 magistrates and operates in just over 50 locations. Magistrates, when you look at those figures, finally determine over 150 000 matters each year. They range from the most minor to very serious matters across the entire spread — criminal and civil, crimes of family violence, family law and WorkCover, plus about 4000 coronial investigative matters. That is the sheer volume.

In her paper Caitlin talks about volume and the implications of volume for the terms of reference. The magistrates have significant sentencing power. I think you know what they are: two years per charge with some additional capacity and under certain legislation, five years cumulative maximum, and $100 000 maximum claim limit in the civil jurisdiction since the commencement of last year. As the terms of reference note or imply, it is a very high-volume environment that the committee is looking at.

There are different views within the court on this. There are strongly held different views on some aspects of the terms of reference and on the correct approach to appeals — whether they should be de novo or based on error of law and, if it is the latter, where they should go. Those two positions are best represented by the position that Mr Gurvich is going to put and which Ms English is going to put.

You will see from the documents that I sent to the committee some time ago that a committee of magistrates met late last year to deal with the terms of reference. That is all in that first document I sent in with the response, which is the summary response which Mr Gurvich will be speaking to, and he has some other things to add to that today.

We are not familiar with the County Court's position, and we do not know whether they have spoken to the committee. I have had brief discussions with the Chief Judge, but I do not know what their court says, whether they will have a unified view, a consensus view or individual views. The view that Mr Gurvich is putting was supported by a majority at the last Council of Magistrates, probably in the order of 45 or 50 people supported that view. Caitlin's view, which has been circulated around the court since then, has had increasing numbers of subscribers,

currently totalling about 20 or 25 people, so it is a genuinely held, strongly different view with two blocks of opinion and some shades in between.

My view is largely in line with the view that Mr Gurvich will put — that is, that it is time to change the system, that the history and status of the court and the experience of those who are appointed to the court, the commonality between those qualifications and those of judges, the same for appointment and the same for dismissal and the thorough professionalisation of the court in recent years — in fact over the last 5, 10 or 15 years I think — does put it on a footing now where there ought to be a change from de novo. I think the historical reasons for de novo have largely disappeared.

There are many issues though to deal with volume and to deal with how much they may feel about the situation, given the volume and given the environment in which they work, which Caitlin's paper speaks to. But my own position, so that you know it, is that I support the view being put by Mr Gurvich, with one exception. Whilst I support a change away from a de novo system I think appeals from magistrates' decisions at both civil and criminal should go to the same court; and if they are to go to the Supreme Court, they should all go there. However, I think criminal appeals, were they not to be de novo, and only based on error of law to be demonstrated by the appellant if they go to the Supreme Court — and this is where we have a difference — it would raise significant access-to-justice, cost, complexity and delay issues. My own view, which is different to the one Maurice is espousing, is that all appeals from magistrates, civil and criminal, should go by way of an error-based appeal system to the County Court in all jurisdictions. Thereby we would overcome some of those access cost-delay issues which are raised.

I will say no more. That is my own view, and I will take questions. Maurice will go next in the batting order.

Mr GURVICH — The majority of the magistrates consider that the historical justification for appeals from the Magistrates Court to the County Court de novo no longer continues to exist. The effect of starting again or hearing afresh is that everything that has happened in the Magistrates Court has been completely wasted. It is a waste of time — the hearing of the evidence and the cost involved — in the sense that the whole thing starts all over again in the County Court. It may be helpful, if you have the opportunity, to visit the Magistrates Court and see what happens in our court, whether it is in the mention list or the contest list, and then to see what happens in the County Court. You may find that of some assistance in your determinations.

We say — at least the majority, and I am instructed to say — appeals de novo are anachronistic; they are out of harmony with current circumstances. They are a throwback to the 19th-century courts of petty sessions presided over by lay justices of the peace and stipendiary magistrates who came up through the ranks of the clerks-of-court system, never having practised as lawyers or acted for a party. The concern then was that in criminal, not civil, cases due to the isolation of the courts the relationship between the bench and police, the second division where the justices sat — I do not know whether you remember that, but I do — there was involved a risk that injustice can occur and the safeguard was appeal de novo, usually to a now-defunct court of general sessions chairman ,or the County Court. These concerns continued until the removal of the justices hearing cases and the requirement that magistrates be qualified lawyers about 30 years ago.

The presiding magistrates are now all highly qualified, both by academic qualifications and by experience — no less, we would contend, than the judges of the superior courts. I think the magistrates have a reputation for integrity second to none. They come from broad backgrounds of experience, unlike their predecessors, and indeed have actually represented parties over many years as legal practitioners. This has the benefit of gaining an understanding of the problems litigants and their lawyers face — a flesh-and-blood qualification rather than just being confronted with a routine passing parade of mechanical proceedings.

There is now transparency, which was not available in past times. Proceedings in our courts are now recorded. Those recordings are available to the parties. If error has occurred during a proceedings, this will emerge from those recordings. In the past reliance as to what occurred during a hearing and order-to-review applications to the Supreme Court was largely placed on the notes of the presiding magistrates or justices. This was plainly unsatisfactory. Given that if the parties appeal to the County Court the appeal is de novo, the notes were of no significance and never required. The tape recordings are only used to endeavour to contradict witnesses prolonging appeal proceedings. Recordings of evidence and decisions is an obvious safeguard, preventing injustice and removing the requirement of a hearing de novo. If on the material the magistrate's decision is correct in law, there is no need for an appeal de novo. If it is wrong, the Supreme Court will correct it or refer it to the magistrate to act in accordance with law.

The Magistrates Court, it is submitted, should not be regarded as an ersatz court — that is, a substitute or imitation court. When magistrates are appointed they take an oath or affirmation of office to do equal justice to all. They act responsibly, with care, mindful of their responsibility in exercising judgment. It is clear that appeals de novo render their decisions to be of no consequence. They are irrelevant and meaningless. The court is rendered impotent in such cases. The economic cost to the community is high, and that is not to mention the emotional cost to those involved in these matters.

On an appeal de novo a defendant may change his plea — for example, he may have pleaded guilty in the Magistrates Court, but he is entitled to plead not guilty in the County Court. I refer to section 85 of the Magistrates' Court Act. Let me give you an example of what can happen in our court. In some hearings, especially drink-driving cases, defendants rely on highly technical defences seeking omissions in the evidence which will permit argument that the case be dismissed based on a loophole. This is not to say in a case of genuine failure by the prosecution to prove its case beyond reasonable doubt the charge should not be dismissed. However, sometimes the defence pursues all of the police witnesses in cross-examination, seeking flaws. At the end of the prosecution case the defendant calls no evidence and makes no submissions in law. The magistrate has no choice but to find the charge proven and, in the case of driving offences, deal with the licence when required by cancellation and disqualification orders. The defendant lodges an appeal immediately and seeks permission to drive pending the appeal to the County Court. The proceedings in the Magistrates Court have served no purpose but to permit an unmeritorious pursuit of a loophole. The proceedings have been rendered nugatory.

The minority submissions express concern for unrepresented defendants. I will add a further concern. In cases which are not indictable we can hear them ex parte or on a brief of evidence. The defendant does not even have to turn up. It is my strong belief in serious matters that most magistrates refuse to deal with the cases in the absence of the defendant and issue warrants to compel the defendant's appearance. However, in those cases where the proceedings are conducted ex parte the defendant who has not even bothered to attend court has a right of appeal de novo. There is nothing unusual in the idea of the defendant appearing unrepresented. It will be understood, of course, that some defendants appear unrepresented in the superior courts.

I accept that the mention list can be a heavy burden for some magistrates. The lists involve predominantly remands and bail applications, adjournments, licence restoration applications, interlock removals, traffic offences and minor criminal charges. In addition there may be many other types of matters often in this list, such as marriage of minors' applications, private agent licence applications, crimes family violence cases and permission to drive applications. The vast majority of matters on the mention list are not contested. Criminal and traffic cases mostly concern pleas and mitigation of penalty. No-one is prevented from making submissions upon plea, but where charges involve a more serious class I cannot imagine any magistrate failing to suggest that the defendant obtain legal advice and representation.

We have supplied you with a copy of section 39 of the Magistrates' Court Act, which provides:

> If —
>
> (a) a defendant is charged with an offence punishable by imprisonment; and.
>
> (b) the defendant is unrepresented on his or her … appearance before the Court in respect of the charge —
>
> The Court must —
>
> (c) ask the defendant whether he or she has sought legal advice; and.
>
> (d) if satisfied that the defendant has not had a reasonable opportunity to obtain legal advice, grant an adjournment if so requested by the defendant.

It is my experience that that approach is applied universally.

As for serious offences, such as robbery and burglary, they rarely come on for plea hearing in mention courts, and when they do they can be adjourned for a longer hearing to take place. It is beyond my experience and knowledge that opportunity is not given for pleas to be made as fully as required. Where appropriate it is the court which will seek appropriate reports as aids to sentencing — for example, pre-sentencing psychological and drug and alcohol reports. We do that all the time where we are not satisfied the material before us is sufficient, whether the people are represented or not.

These are no mere 10-minute careless driving-type pleas. Witnesses may be called on behalf of the defendant, both as to character and in the way of experts. It would contrary to the rules of natural justice not to permit a full plea to be made. If a defendant is represented by a lawyer, the lawyer will be in control of what evidence is to be put before the court in mitigation. Even so, if the court remains unsatisfied it has sufficient material in order to sentence in accordance with its obligations, it is incumbent upon the magistrate to seek an appropriate court report — and they do.

Let me refer to what I call the civil case anomaly. The law in civil cases is no less complex than in criminal cases. In many respects it may be more complex. It is a large part of the magistrate's work, and yet there is no right of appeal de novo. Our jurisdiction is now $100 000. Counterclaims are often involved. Our jurisdiction is unlimited if the parties consent.

The consequences to the litigants of our decisions can be far reaching. Is it appropriate that there is no right of appeal de novo from a civil judgment, but there is in a summary offence? Not all criminal penalties involve liberty of the subject; most involve financial penalties. Why is it that the law permits de novo appeals in the criminal sphere only? It cannot be said that we are capable of getting it right in civil cases but not in criminal cases. In civil cases appeal is to a single judge of the Supreme Court. It must be based on error of law. This has always been the case.

Some reference has been made in the submissions contrary to the ones I am presenting as to Crimes (Family Violence) Act, Children's Court and victims of crime decisions being decisions which can be appealed de novo. It seems to me that although this is not expressly mentioned other than in terms of the Children's Court, perhaps in the terms of reference the same arguments apply to all of those types of cases.

The majority of magistrates in the committee which prepared the original paper think there is a perception in the community that magistrates make errors of judgment when County Court judges determine matters differently on appeal de novo. Sometimes penalties are increased but this is relatively rare. The reason for the differences — often a tinkering or modification in penalty — are not explained, and the judges have no obligation in this regard. This may well have an impact on community confidence in our court.

Some magistrates find this impacts on their own self-confidence. I doubt if there were no magistrate who, on being informed of an appeal verdict where this has happened, has not experienced some degree of surprise. There may well be an impact on specific and general

deterrence. We think this is aggravated in regional areas where there tends to be wider reporting of court cases. A degree of cynicism creeps in as well.

For appellants who can afford to appeal there is in reality nothing to lose in having what has been described as a second bite of the cherry. But what about the defendant who cannot afford to appeal or is not eligible for legal aid? By reason of our judicial obligations we must deliver equal justice to all. If it is correct that only a small percentage of people appeal de novo and this is seen as a safeguard for the reasons enunciated, this does not sit well with a majority of people who do not appeal.

There is an effect on witnesses which cannot be overemphasised. This is the most serious consequence of appeals de novo in my view.

Imagine you are a witness in a case. You might be the victim of a offence. You might be an eyewitness to a crime who has come forward as a matter of duty; or you might be the parent or spouse of a witness. It is no easy task being a witness. Under oath, sworn to tell the truth, not understanding the system, you want to get on with your life. You think the case is on next week, but it is adjourned. You do not understand why. Finally, you are called after many sleepless nights of worry and anxiety. You are sworn, you give your evidence in chief, you are cross-examined and re-examined, straining to remember, endeavouring to be honest and fair. The magistrate makes a decision. Your evidence is accepted. It is over, so you thought. And then you are told there will be an appeal to the County Court. 'What does that mean?', you ask. Then come the indelible words, 'You have to go through it all over again'. And it does not matter how unmeritorious the appeal is. You will continue to relive events which you did not think were controversial. The pain continues for you and your loved ones. Victims of crime must endure delay and inability to put the circumstances of the offences behind them. This is commonplace.

I refer to the matters set out, or discussed, in paragraph 3. We understand the court is expected to take on even more serious cases summarily as foreshadowed by proposed amendments. We assume the Parliament has confidence in the court. It is trite to say the court is no longer the court of 'petty' sessions. I repeat the earlier submissions.

As to the appeal rate being low, of course the nature of the types of cases of appeal might be of significance, but there is a certain irony in this argument. I have referred to it before, and simply say again: how can we know with any certainty who will appeal? If only a small percentage of defendants appeal, what about the majority who do not? They get no second go, no second bite of the cherry. As I said we must do equal justice to all, as our oath or affirmation of office requires.

In relation to the argument that matters of disqualification/restitution/compensation can be appealed de novo, I am unclear as to this argument as I understand these are matters in respect of which appeal reform is being investigated by this committee. I do not concede that there will be any increase in the number of defendants refusing to consent to summary hearing, as suggested in contrary argument. There is no evidence to support that. We do not know, but reasons for thinking that would not be the case include the fact that in our court there is a cap on sentencing under the Sentencing Act. It is much lower than in indictable matters of course, in relation to those that can be imposed in the County Court. Legal aid may not be available. It is less expensive to deal with cases in the Magistrates Court, and it is more expeditious than, say, cases where the defendant appeals.

In relation to the proposition that when the Supreme Court remits matters to the Magistrates Court, this will mean not only witnesses giving evidence twice but extra delay. Firstly, I accept there will be delay, but I do not accept there will be an obligation on witnesses to give their evidence again. My experience of some 40 years in the law now shows the contrary is the case — that is, the magistrate is directed to apply the law to the facts as established. It is rare for a new hearing to be conducted. I have never seen it. I know it has happened, of course, but extremely rarely. I acknowledge there is a delay in appeals being determined by the Supreme Court, and that is a

significant fact of concern, but those delays are now being experienced in the hearing of County Court appeals and they are quite long in some cases.

Let me turn to paragraph 6. It is contended against the abolition of appeals de novo that this would result in additional adjournments in order to better prepare the case and an increase in time involved in hearing cases and preparing reasons for decisions. There is no evidence to support this. It is possible there would be little, if any, change in the approach of the court, for the reasons earlier discussed. But even if this proved to be the case it is reasonable to conclude that those factors would be set off by better preparation and presentation and an improvement in practice standards.

Our court is a creature of statute, but at the same time it is a human institution. We are all different, but we must follow the same rules. Mistakes are ordinarily errors in law. We usually get the facts right; if we make errors, they are appellable in the Supreme Court. There is a suggestion in the contrary arguments of a requirement for adjournments and magistrates taking longer to prepare their decisions. Frankly, I doubt that most magistrates would require more time, at least of a substantial nature, to do this. You really have to ask, 'What do you mean by this proposition?'.

We are supposed to give reasons for decisions. These reasons will be governed by the nature of the proceedings. Some will be short because the conclusion readily emerged from the facts presented. A short plea or hearing in relation to a driving offence will not take long. Others will be longer because there may be complex issues of law. That is the case now. We will take longer to deal with those matters. Why should that change if there were no right of hearing de novo? In sentencing there should be really no change at all. Some sentencing exercises are short, for example, a drink-driving matter where there are mandatory penalties and associated fines or other penalties. Some are more complex, involving victims, impact statements and other issues perhaps of a psychiatric nature. That is the case now. It will be the case in the future. Let me give you an example of what really happens at present.

Two people are charged with identical indictable offences. It does not matter what the offences are, but the evidence is exactly the same in relation to each of them — it can be a fraud case, a burglary, or an assault case, which is indictable. One of them chooses to have the matter heard summarily on contest before a magistrate. The other chooses to go to trial before a judge and jury, following whether it be a separate hand-up brief or a short committal hearing. The magistrate hears the evidence and charges himself, in effect, directs himself correctly, as he must, in terms of what law is involved and on a summary of the evidence. There is nothing wrong with it — let us assume that for the moment. There is a finding of the charge proven and the sentencing process is pursued. The sentencing process is conducted perfectly correctly by the magistrate.

Meanwhile in the County Court the judge charge the jury correctly, there is nothing wrong in law, and there is no error during the conduct of the trial. The jury simply comes back and says 'Guilty' or 'Not guilty', and in this case it says 'Guilty'. The jury does not have to say anything else, but the magistrate has to give detailed reasons why he or she came to that conclusion. The jury simply says, 'Guilty' or 'Not guilty', and we do not know what was in their minds. The defendant in each case is unhappy about the decision, naturally enough, and says to his counsel, 'What do I do now?'. The defendant in the County Court is told, 'There is nothing you can do. You can appeal to the Court of Appeal, but you will be thrown out on your ear. There is nothing wrong with this judgment. There is nothing wrong with what took place during the trial and the judges will not even call on the prosecution. That is the end of the matter'. In our court they will be told, 'You cannot go to the Supreme Court before a single judge on an error of law because there is nothing wrong, but you can go to the County Court and have it heard all over again'. Now, how can that be in 2006? They are the matters on which I wish to submit.

The CHAIR — Thank you very much, I appreciate that, Mr Gurvich. I suggest that before we go to questions on your presentation, we should hear from Ms English and then we can put questions to the three of you.

Ms ENGLISH — There are two points I seek to make in the submission that I am sure you have all had an opportunity to read. The first is the significant curtailment. I will explain the contents of the folders that have been distributed to members, too, as I come to them.

The first point is in respect of the significant curtailing of defendants' rights which would occur if appeals de novo were abolished. The second is the point that I will to concentrate on because I know the issue of access has been dealt with by a number of other bodies that have made submissions to this hearing. The matter that I really want to concentrate on is the tension with the Magistrates Court being a timely and accessible and economic forum for justice and that forum being safeguarded by the appeal de novo process. I was appointed a magistrate in June of 2000. I was previously Co-Executive Director of the Public Interest Law Clearing House and prior to that a solicitor at Victoria Legal Aid, and I am now appointed to sit at Broadmeadows, where I have been for the past 12 months. As you well know, Broadmeadows covers Hume, Moonee Valley and Moreland and is a large catchment area to the north of Melbourne. There are some 128 different countries of origin of people living there and where 101 languages other than English are spoken at home. So it really is a very diverse community.

As Mr Gray has pointed out, 90 per cent of people appearing before a court in Victoria appear before the Magistrates Court. Eighty-six per cent of criminal matters are dealt with in the Magistrates Court, and that means that because of those numbers there is a really important emphasis on case management. What I wanted to do was give you perhaps a snapshot of a day in the life of a magistrate in a suburban court. When you look at your folders, you will see the very first document that is stapled together is a list for Broadmeadows for today, Valentines Day. Basically many of these matters would be proceeding as a plea of guilty. There is an emphasis for magistrates to engage in swift decision-making; speed and efficiency are required. I am not sure whether many of you have been in the Magistrates Court, but the majority of matters of people who appear before the court would appear in a mention list such as this.

As the committee would be aware, there is an informality or an accessibility issue in the Magistrates Court. No wigs or gowns are worn by magistrates or practitioners. We do not have associates. We do not have a research unit at the court. The majority of decisions are given without even adjourning and are on an extempore basis. In addition to many people being represented by lawyers there is a significant component of people appearing before the court who are unrepresented or who are represented by Victoria Legal Aid on the day by the duty solicitor.

If you have a look at this mention list, it is sorted alphabetically. This list does not include the people who are brought into court on remand, so they are brought into custody and they then appear before the court for either a bail application, a plea, an adjournment or the like. There are prosecuting agencies on the left, as you can see there, and the hearing types. If you disregard the duration — because the registrar will generally put in 5 minutes for each — there are actually 16 matters on each page. There are about 80 matters on this particular mention list.

The first charge that is noted is just the main charge or the first charge listed on the system. So for each of those people they might be facing one charge; more often they are facing a few charges, and in some instances there could be 50 or more charges. The pressure of the list means that magistrates are making numerous decisions and they need to be speedy, efficient and fair. As I said, you can see from this mention list that there is an incredible range of cases that magistrates deal with. As Mr Gurvich pointed out, some will take longer than others. You will notice that the second matter is that of recklessly causing serious injury, which is the most serious assault matter that can be heard in the Magistrates Court. Contrary to that is perhaps a theft matter, which might

be a shop theft matter or a charge of being drunk in a public place or careless driving, so there is this incredible range of matters that are appearing in our court.

As I indicated some of those people will be unrepresented. Some people have English as a second language, and some people will be legally represented. Basically if you are looking at the cases that the Magistrates Court hears, this is a snapshot of one day, and when you look at the statistics in terms of the appeals you see that in the year 2001–02, something like 96 000 criminal cases were finalised, and 2147 appeals were lodged. It is indicated in the most recent annual report that Mr Gray has indicated has not been tabled that 130 000-odd cases were finalised. The number of appeals was 2133, which is actually a reduction in the number of appeals, despite the fact that something like 35 000 more cases have been finalised before the court.

The appeal rate is something like 1.6 per cent on the most recent figures, which indicates that it is a broad right that is very sparingly used by people coming before the court. The statistics provided by the County Court indicate that the majority of appeals are against sentence only, so there is not a situation in those cases where witnesses are being called, and there is only anecdotal evidence that I have heard from practitioners that many of those appeals are successful.

The other point that I did want to make about these offences was in respect of the seriousness of offences heard by the Magistrates Court. What I have also included right at the back of this folder are some examples of other mention lists, but I have also included an excerpt from the Sentencing Act of the tables of penalties and also schedule 4, which lists the indictable offences which may be heard and determined summarily by the Magistrates Court.

If you look at sections 53(1A) and (1B) of the Magistrates' Court Act, which were introduced in 1997, they significantly expanded the indictable matters which the court can hear summarily. So I agree there is certainly no dispute in the fact that magistrates are well qualified. They are often experienced practitioners when they come to the court, and certainly there has been a tendency to appoint magistrates from a very diverse range of backgrounds in the legal profession. There is no question as to the professionalism and competency of the magistrates, but if you look at the way in which the court operates, at the speed we are required to work at and the degree of efficiency with which we are required to do our duties and give our decisions, inevitably there can be mistakes. The appeal de novo safeguards that process.

Certainly if the appeal de novo process is abolished, there will be a disincentive to defendants. It is more expensive, obviously, to appeal to the Supreme Court, and there is the access issue; but there are also flow-on effects to the Magistrates Court. There will be more applications for adjournments, magistrates will be less inclined to deal with people who are unrepresented, there will be more adjournments for people to see the duty lawyer on the day, and there is no doubt it will have a significant impact on legal aid appearing. There will be less incentive for people to consent to summary jurisdiction. The inevitable consequence could certainly be more contests and more committals, which would then have the same impact on witnesses that Maurice has described.

It will also mean that practitioners will take more time in putting their case to the court. They will not leave any stone uncovered. They will be calling witnesses. Part of the joy and strength of the Magistrates Court is its ability to deal with matters very quickly, and there is a real danger that if that appeal de novo option or right is abolished, then much more time will be put into cases, and magistrates will be less inclined to give extempore decisions but will want to consider their decisions because the failure to state reasons — any reason if it has been argued before the court — will normally constitute an error of law.

Certainly the other issue to remember is that the County Court does not have to examine the correctness of the magistrate's decision: it is a completely fresh re-hearing of the case. Some matters that have occurred or proceeded in the Magistrates Court when they have not been as well prepared as they could have, where reports could have been obtained — there might be some

diagnosed mental illness; there might be language difficulties; there might be character evidence that could have been called and was not — all those materials could be put before the County Court.

In conclusion, my submission and that of the magistrates Ian has indicated who support this position is that the appeal de novo process is an efficient safeguard for a system that works extremely well. It is sparingly used. The figures are reducing, and it is not a reflection on the ability or talents or professionalism of the magistrates but a very realistic view of the pressures that the court is under when dealing with the incredible bulk of cases that we deal with. There is also the issues that the disadvantaged and marginalised people appearing before the court unrepresented or just seeing legal aid on the day can easily and cheaply appeal as a matter of right.

The CHAIR — I thank the three of you for putting your views to us. I will start with Ian. If we accept the proposition that the Magistrates Court will always be under pressure, given the huge volume of cases that come before it, and perhaps also accept the proposition that there will never be the resources that the magistracy would wish to have in order to undertake its functions — just taking that as a given — it seems to me that we have a bit of tension here in that one of the advantages of the court is that you can go before the court; it is fairly accessible; you can be dealt with quickly; in many instances there is a guilty plea although there will be people who plead not guilty, and you can get a decision fairly quickly at minimal cost, and the matter is dealt with.

How do you respond to those who say that if this is the first and only time that they will appear and they do not do not have any de novo appeal rights — bearing in mind that appeals on questions of law can be quite complex — that it will all slow down, that you will have lawyers taking much more time to make sure they lay all the legal arguments out so that they have grounds for appeal on errors of law if they need them, that the magistrates themselves would have to take longer over the cases? We might end up with some small savings in the County Court but we could end up with an expanded blow-out in the Magistrates Court. We have heard two different views on that from your colleagues.

Mr GRAY — That is right. There are several views on it.

The CHAIR — One view is saying there is no evidence that would occur and another is saying that it would occur, that it would be a necessary consequence. What is your view?

Mr GRAY — It is a risk but I do not think it is an unacceptably high risk; I think it is a low risk although it is certainly a risk. Clearly we have a difference of view on this, and that is as one might expect.

I was based in the Northern Territory for a number of years where there is an error-of-law appeal system from a high-volume Magistrates Court to the Supreme Court. We got through lists, just like this one here, in Darwin and Alice Springs. Lists like that were the norm. Some magistrates were slow and some were quick, but I do not think it made a difference as a general proposition as to the way magistrates worked compared to here. I do not think it necessarily would affect efficiency. There is a risk that in some cases it will. The better, more potent arguments that Caitlin has are the arguments about access. Magistrates are experienced, confident and know what they are doing, and, once they have settled into the role, that is expected to be the case. Caitlin is right; nobody is challenging professionalism, but those qualities mean that given the nature of the work and the environment magistrates are able to do that work effectively, properly and efficiently, whatever the nature of the appeal process.

My expectation would be there would be a risk that some would slow down. There would be a risk that some lawyers would want to put more material — that is certainly true. Some lawyers run cases in such a way that they are waiting for the appeal so they run a case skinny or they run it very lightly or they run it with less information; but generally speaking that is not the norm. The norm is

most lawyers in our court put all they can to us in each case because they know that the prospect of an appeal, given the tiny numbers of appeals, is not likely. Cases are run as the first and only crack at it in most cases. For sure there is the safety net of the appeal but the tiny numbers — now less than 2 per cent — make it very clear that lawyers are not really running this as a dry run in the Magistrates Court with recourse to the County Court as a fall-back in a routine sense.

Maurice is right on this — that they will and they can put what they have. They often put more in the County Court, but in my view the job can be done properly, effectively and efficiently, whatever the nature of the appeal process. That is the answer to your question — that even though there is a risk I do not think it is an unacceptably high risk; I think it is a low risk that the court would slow down in any material way.

The CHAIR — I think everyone has talked about the high volume of cases that are dealt with; the best description was Professor Willis saying it is instinctive synthesis at 100 miles an hour or something. That was the way he described it.

Mr GRAY — He would put it like that. He is right, in a way!

The CHAIR — Is the risk, therefore in that, notwithstanding the professionalism, that a mistake or mistakes can be made, which may not be apparent on the face of the record and therefore — aside from the obvious, if I could take Maurice's position — is it a sense of affront to the standing of the court? If we say that the system should ensure that no innocent person goes to jail, is it not worth having that safety net for the small number of appeals that are lodged, given the instinctive and fast nature of the courts?

Mr GRAY — It is "instinctive," that is the intellectual exercise. It is an instinctive synthesis, but it is an informed, legally guided and constrained one. Error of law is not a ridiculously narrow ground. If you make an error because you fail to take something into account or you have made a demonstrable error — you can get into the question of what is an error and what should be an error, because an error is a genuine, real ground; it is not going to be eye-of-the-needle stuff where just a few get through. If there is an error, there is an error — if you have left something out, if you fail to take something into account and so on and so forth. I do not think of that as a ground that is shutting people out in a material sense because provided you have a court that is professional, efficient and competent and is likely to get it right, I think Maurice is utterly correct: overwhelmingly, the decisions are correct, magistrates give reasons, spend time, do it properly.

The safety net issue is psychological. Sure, it is psychologically attractive to have a safety net, but is it a legally real proposition? You have a ground of appeal. You have already tiny numbers of appellants. You have a highly qualified court getting it right in the overwhelming majority of cases. What does a safety net really mean? It means that in the odd case where something might have gone wrong in the way that nobody could have identified at the time and somebody wants to have another crack at it. You might think justice is best by the de novo system served in a few, if not a tiny number of cases, where there is no demonstrable error. However, it has no other real function. To me the safety net argument does not displace the arguments that Maurice and I broadly adopt.

The CHAIR — If you do not mind, I would like Ms English to comment on the questions I asked if she wishes to.

Ms ENGLISH — Just following from that last comment of Ian's, even if you have a tiny number of people who are in jail when they should not be, but they cannot demonstrate an error of law and the psychological or the mental illness has not been diagnosed or there is no report, that is a incredible incursion on people's rights. Their right to liberty is being locked up without the right to — —

Mr DALLA-RIVA — I am sorry, you are the magistrate, you are making the determination, you are the one slotting them into jail; and here you are still practising as though you were a lawyer, saying that the poor person is in jail for some miscarriage of justice. I do not understand. It is the magistrates who put them into jail, so how could you sit there and say now it is a miscarriage of justice if somebody is incorrectly in jail and they do not have a right of appeal when it is your profession that is putting them in jail?

Ms ENGLISH — I am not saying — —

Mr DALLA-RIVA — I cannot understand the logic because it does not make sense. You are saying there are people who could be in jail who have not had the right of appeal, but there are three people in front of me who do. I do not put people in jail; it is you three in this room.

Mr DALLA-RIVA — I am just saying that in terms of the argument it does not make sense.

Mr GURVICH — It makes you wonder why anyone would want the job if you have those feelings because you have to live with the decision. You have to do it carefully and properly.

Mr DALLA-RIVA — I know, but I could not understand Ms English's argument, and I cannot let it go because of another comment she made earlier that there has been a reduction in the number of appeals. When you look at the proportion of actual cases, there has in fact been an increase proportionately from 1.56 to 1.58, so the percentage of increase has been proportionate to the number of cases heard. It is important that we put that on the record as well, that we do not make the assumption that there has not been an increase when proportionately there has been an increase.

Ms ENGLISH — No, in terms of the statistics, in 2001-2002 the statistic was 2.23 and from 2004-2005 it was 1.6.

Mr LUPTON — There were more cases and less appeals.

Mr GRAY — That is right, yes.

Mr GURVICH — But we do not know the character of those appeals. That is one of the real difficulties.

The CHAIR — I think we should give Ms English an opportunity to respond to Mr Dalla-Riva, and we will come back to that point.

Ms ENGLISH — The situation is that there are 101 magistrates who are sitting in courts all over the state, and the range of different responses and attitudes in the community is reflected in the different backgrounds and nature of magistrates we have. The fundamental problem is that there could be a situation where someone appears before a magistrate and they are unrepresented, or they are being represented by the duty lawyer, or there has not been a proper opportunity for them to prepare their case; but for some reason — whether it be the imperatives of case management, or the efficiency of the court of getting through the list — the matter is called on and dealt with and someone is sentenced to a period of imprisonment. You can see the serious nature of the charges we are dealing with. A lot of them have imprisonment — they are indictable matters and very serious. There is a possibility in that situation for errors to occur in the system: where matters have not been properly put before the court and someone ends up in jail. What you are suggesting is that unless an error of law can be demonstrated in respect of what is said, then there are no appeal rights. It is often the people who are unrepresented — not poorly represented but represented with very limited resources — who are likely to suffer in that particular scenario. It is a tiny end of the spectrum, and as you can see from the appeal numbers it is very sparingly used.

The CHAIR — What we do not know is what Mr Gurvich was referring to: how many people who pleaded guilty appealed or always maintained their innocence and appealed? We do not know much about the nature of the offences in relation to which appeals are lodged. We do know that 70 per cent of them are around the question of sentencing. As a committee can I say we need to know a bit more about the statistics. I know that is not your domain, but we are struggling with the nature of those appeals and the nature of the cases.

The previous witnesses from the Criminal Defence Lawyers Association made a point which I think is worth taking up: that if it is a hearing de novo it can happen fairly quickly because it is relatively easy to represent the case to court. If it is an appeal on an error of law, that could take longer, the argument could be more complex and therefore people could be in custody — in jail — for a longer period of time. That is obviously something we have to consider. Do you have any comments on that?

Mr GURVICH — In most cases the appellants are released on bail — not all, but the vast majority — so they do not spend longer in custody. The same legal arguments before the County Court will almost certainly be run before the Magistrates Court if it is a question of law, so that issue should not be a matter of concern.

I mentioned in my submission that I accept that the delays to the Supreme Court are terrible. To have to wait for a decision for an appeal for over a year — well over a year in most cases — is not good, to take a neutral term. Those delays are increasing in the County Court. You will be able to find out how long it takes from the time that somebody lodges their appeal before the matter is heard. I know of one traffic type of case which has been waiting for something approaching two years and starts this week. That is long time.

You mentioned the risk of innocent people being jailed. Most cases we do are pleas of guilty, so the question of innocence does not arise in that sense. If we have made an error in law on sentencing, that should emerge. However, it becomes simply a matter of opinion unless a whole new case is presented to the County Court. I am not so sure that happens, and my discussions with various people about this involved in County Court matters suggests that particularly when legal aid lawyers appear, they are briefed late and not a lot has changed between what is presented to us and what is presented to the County Court. Ordinarily prosecutors are young barristers who come in very late and are briefed the night before. Not a lot of time is made available to them to present the ultimate plea, or if it is a contest the ultimate presentation of the case. Where we deal with a contest and make a finding after a relatively long hearing, obviously there is a greater time to digest what it is about and we know all the matters that are put on plea. That question remains in the vast minority of cases as to whether that person is innocent or not. But ordinarily if a person has been on bail prior to the hearing before the magistrate he can expect to be bailed again. It is rare for the police to oppose that, and it is usually an undertaking pending the appeal and that would obviously be the same to the Supreme Court if that occurred.

Mr GRAY — That is the point. Delay is a factor in bail, and unacceptably long delay will militate towards bail. So I think the bail point is the answer.

Mr LUPTON — I would like to ask you about the way in which the court these days uses pre-sentencing reports, how common it is and how you go about making those sorts of assessments because I think it affects our judgments in terms of whether things are run differently at a County Court level.

Mr GURVICH — The other day I had a man before me who was in his late 60s. He had never been in trouble until about six years ago. He appeared through a duty lawyer, pleaded guilty and accepted the jurisdiction for shoplifting matters. It was simply said, 'Oh, just fine him'. That is just not good enough. Here is a man in his late 60s who starts offending in his early 60s. There is something wrong. I was not going to act on that. This man may need assistance. He is plainly not a terrible criminal who deserves to be locked up or run the risk of breaching a suspended sentence,

so I simply ordered a pre-sentence report. This is simple stuff. I think without fail all magistrates would take that approach. That is one example, but there are many examples. I use them constantly and I think most magistrates do.

Mr GRAY — I think that is right. Increasingly sentencing in Victoria, as in other places, is better and better informed by pre-sentence reports. So we have what we call problem-solving jurisprudence coming into the whole equation of how we run the business of the court. That means you are tackling both the problem of the punishment and the offender's problems because it is in the interests of the community to resolve those as well as punish the offender, all in the same sentencing package. So the short answer is that increasingly sentencing is informed by pre-sentencing reports — assessments which are sometimes oral, sometimes written. Maurice is right; they are an increasingly preferable feature of sentence.

Mr GURVICH — And very, very helpful. You can spend a bit more time and find out some history. You find out really interesting things which help you no end. The person may have come to terms with the issue and got it out of their system. Not in all cases, but certainly in the case to which I referred.

Mr HILTON — We have heard a lot in the last one and a half days about this idiosyncratic magistrate, and I think by implication — —

Mr GRAY — He is not here!

The CHAIR — He has not been named!

Mr HILTON — This idiosyncratic magistrate is likely or is liable to make wrong decisions, and that is why we need this fallback position of having to go to a County Court judge who can hear the whole thing again. From your perspective as the Chief Magistrate, does such a person exist; and if they do, what are you able to do from a quality control perspective to make sure that they do not?

Mr GRAY — There is obviously a variety within the court. Some people will describe others as idiosyncratic; some people will use other adjectives — —

The CHAIR — Bias was also mentioned.

Mr GRAY — Biased. Some people will say there are 2, 3, 5 or 10 magistrates who are outside the general range of sentencing within the court. That is true. There are magistrates who represent extremes of a spectrum; that is true. Some are more severe; some are more lenient. It happens in all courts. It certainly happens in the County Court. So the observation that they are idiosyncratic is an understandable word to use colloquially, but the best way to describe this is that across the spectrum there are an enormous number who probably gather around the middle of the range, if you like, in sentencing disposition, and some at each end of the spectrum.

If you talk about quality control, which we do not in the sense that you mean it, of course, but in terms of professional development a number of things are happening. We do an enormous amount of professional development on sentencing, and part of that discussion which we do several times a year in groups, small and large, is to compare what sentences we give, and we do that across a range of areas; there is no doubt about that. Sometimes it is very surprising just where somebody might be on a particular charge and there is no doubt about that either. But with the professional development resources we now have the advent of JOIN, which is this Judicial Officers Information Network, where one can now go and see all the most recent sentences applied by judges in all the superior courts, on burglary, theft and all manner of things, and you can punch in age, gender, number of prior convictions, homeless, mentally ill and all those other things. There is now an environment within which we sentence which is better and better able to create, support and promote consistency. Does it do that yet? No. Is it likely to do that over time? Yes.

What do you do with those at the end of the spectrum? If somebody is at the end of the spectrum and they are way out of the range that is said to be the proper range, then that may well be an error of law, and in the end that is the answer to this because error of law can include manifest sentencing error — manifestly excessive, plainly wrong; use whatever language you wish. Error of law is not necessarily a narrow frame of reference for deciding something is wrong or right, and I think Maurice would broadly agree with that, although he will perhaps have some other things to say about it. But that is the way I see it.

I know from my experience in the Northern Territory that people whose sentences were argued to be well outside the range — manifestly excessive — had their sentences overturned because in the end that represented, for the purposes of that test, an error of law. So I think that is the answer. The beauty of the human court is that there are different views and different responses to all sorts of things. That is the human nature of the justice system and that is good.

Mr HILTON — If I interpret it correctly, I think Ms English's point was that we run the risk of getting it wrong in the Magistrates Court, and therefore we need this fallback position to try and make sure that we do not get it wrong.

Mr GRAY — I think that is correct.

Ms ENGLISH — And perhaps those magistrates who are outside the range that Ian was talking about are the ones who are regularly appealed to the County Court, and that offers a speedy and efficient avenue for those defendants.

Mr GRAY — That is a fair comment.

The CHAIR — Looking at your position I am trying to understand what you are seeking to preserve. If most people are pleading guilty and 70 per cent are on the basis of sentence and someone can prove that the sentence is manifestly excessive and that they could do it as an error of law, can I ask what in your experience you are concerned about that would not be preserved as an appeal right if appeals de novo were removed? Give us some examples of what would be lost?

Ms ENGLISH — When you are talking about manifestly excessive, that is a very high threshold. When we are looking at the sentencing hierarchy, the final point of which is jail, there are a multitude of options within that hierarchy of which jail is the last and perhaps the first is a dismissal or an adjourned undertaking. Often the manifestly excessive sentencing decisions that the Court of Appeal is involved in relate to very significant imprisonment decisions. I am not convinced that that is an argument you can apply if someone is given a sentencing order that is way up the hierarchy and does not involve imprisonment, although it might, on a shop theft. Perhaps they have been before the courts and have been given an order like an intensive corrections order or a community-based order. If they are not going to be able to demonstrate that it is manifestly excessive or that there is an error of law, then they are not going to be able to challenge it.

Mr HILTON — If it goes to the County Court they can get a variety of judges there as well.

Ms ENGLISH — That is right.

Mr HILTON — Who could presumably be lenient or excessive and that could apply to all the courts.

Ms ENGLISH — Exactly; and it is exactly the same for the Magistrates Court.

Mr HILTON — Yes, but the argument would therefore be, as I understand it, it is only at the Magistrates Court where we have this appeal process which rehashes the whole evidence

which has already been presented. We do not have that system in any other appeal to any other court.

Ms ENGLISH — If you look at a plea in the County Court, a whole day will be devoted to hearing that, as opposed to the Magistrates Court where you have a clear illustration of the time that is involved with magistrates making those decisions one after the other in a busy court.

The CHAIR — Mr Gray, may I ask a question about the New South Wales legislation. We are still trying to understand exactly what it means because we have been told by one group of eminent lawyers that appeals de novo were preserved, and we have been told by another group that it was abolished.

Mr LUPTON — You will not find that unusual!

The CHAIR — We need to go back and find out. As I understand it, the appeal seems to be de novo on sentencing based on the transcript; is that correct?

Mr GRAY — I think that is right but I am not utterly certain.

The CHAIR — Have you had any discussion with your interstate colleagues about that and how it works?

Mr GRAY — No, I cannot assist you with that I am afraid. I will be seeing them in April but that might be too late for you. I will discuss it at length but I have not done that.

The CHAIR — I do not know whether you could use your good offices to hold those discussions — —

Mr GRAY — I certainly will.

The CHAIR — We may or may not speak to the Chief Magistrate of New South Wales, but it would be helpful to us if you wanted to put any supplementary information before us so that we could get some idea of what the New South Wales system is and how it works, because if it is in fact an appeal de novo on sentencing based on the transcript, then you are not actually rehashing the whole thing but you are removing the legal technicalities around how the sentence is reviewed, which seems to be one of the major concerns of the legal fraternity. You may have heard the Criminal Defence Lawyers Association saying, for example, just the mere act of asking for a transcript at the moment in order to make an error of law appeal could take some time which means there is delay, and to the extent that justice delayed is justice denied is a concern. If there is any information you are able to get for us and provide to the committee, that would be extremely helpful.

Mr GRAY — If you wish I can liaise with Nathan or Merrin quite quickly.

Mr LUPTON — We are particularly interested in what effect, if any, the change has had on the processes of the magistrates.

Mr GRAY — That is a very good point.

The CHAIR — The processes of the Magistrates Court and also how it works when it gets to the County Court.

Mr GRAY — The point you are making is that there are error of law systems and variations on the error of law system. They are not all necessarily as rigorous or as onerous or as narrow as each other.

The CHAIR — That is right.

Mr GRAY — And there are ways and ways. But I will follow up the New South Wales experience in its Local Court if you wish and let you know next week.

The CHAIR — That would be really helpful.

Mr DALLA-RIVA — You are just lucky that politicians never make any errors at all.

Mr GRAY — They never appear in court either.!

Mr GURVICH — Every man and woman is presumed to know the law and only judges and magistrates have their errors of law corrected by courts of appeal.

The CHAIR — Could I ask one more question about an important point made by Mr Gurvich in relation to civil and criminal matters in de novo appeals. Are you able to give us any information about the amount of time that would typically be spent on a civil matter compared to a criminal matter? I know there are varying degrees of complexity and so on. It seems to me that there is a slight difference in the way in which the matters might be dealt with in the Magistrates Court. Perhaps you could describe that to us?

Mr GRAY — There is a real difference. Let me start here. The overwhelming majority — in the area of 95 per cent, and by the time it has been through our systems it is closer to 97 per cent or 98 per cent — of criminal charges resolve into a plea of guilty. Some will start as a plea of not guilty and will go through processes and systems which will result in them turning into the plea of guilty. It will end up between 97 per cent or 98 per cent. The contested summary trial is a diminishing and not an increasing element in our overall work. That is the vast bulk of the criminal matters. Magistrates fundamentally are sentencing in crime far more often than hearing summary trials. Inevitably and almost invariably civil matters take longer than the average criminal plea. So there is your first starting point. A civil contest is always longer. A crash-and-bash, a simple driving accident motor vehicle insurance claim might be over in 1, 2 or 3 hours — and many are. Anything more complex than that of a commercial nature will take between half a day to two or three days.

Committals are one thing; let us take them out of the equation because they can run for days, weeks or months. Most contested criminal charges, say of theft, burglary, fraud or assault, will run in the order of one to three days. Five, six or seven-day criminal contest charges are unusual, but we have them. As a matter of interest, Maurice may take a different view about this, but I think the average criminal contest averages between one and two days in our court. The average civil contest is probably between two and three days. Therefore, civil is longer on balance and in general than criminal, but one has to be very careful. I have not done the work on that very point, but as a general proposition civil is somewhat slower in the running but not much, and somewhat longer but not dramatically. I would say on average they are one-quarter to one-third longer than the average criminal contested hearing.

The CHAIR — And when there is no contest we are basically dealing with this kind of timetable.

Mr GRAY — You are dealing with a list like that where the average case, as Caitlin said, is assumed to take 5 minutes, although of course many take much longer, and should.

The CHAIR — Five minutes.

Mr GRAY — Sorry, 15, 20, 25 or 30 minutes, some less.

Mr GURVICH — A lot will be adjourned.

Mr GRAY — And a lot will come out of that list by way of being adjourned.

The CHAIR — The pleas are obviously all guilty in these cases.

Mr GRAY — Yes, the plea is guilty. If you want I can give you a bit more assistance with that last point as well. I can get for you the comparison between civil and criminal running times:

Mr LUPTON — The point the Chair was probably alluding to is while it is clearly impossible to directly compare a criminal contest with a civil one because the nature of the matters are different, does the fact that there is no de novo appeal in a civil matter have any noticeable effect on the way civil matters are run as compared to a criminal contest where there is a de novo appeal? A lot of people who have come before the committee have said, 'If you get rid of the de novo appeal it will just blow everything out of the water and things will take far too long', and so on. We have the magistrates dealing with one jurisdiction where there is no de novo appeal. Can any of you — —

Mr GRAY — You go first on this Maurice.

Mr GURVICH — Cases take as long as they take. That sounds crazy but when you are doing a civil case, you must ensure that you get the evidence in and you apply the law to the evidence. If you make an error you are liable to have your case, your decision, appealed, reviewed by the Supreme Court, and if you are wrong it will be overturned or have to be reheard, or whatever. I cannot think of any situation where a magistrate takes a view, 'There is no appeal de novo; I do not have to worry about this much.'. On the contrary. I can think of the magistrates who are predominantly involved in civil cases, and I have in the past been involved in hundreds, if not thousands, of civil cases. We take our time as required. Obviously a crash and bash may not be as complicated as a deceit in a contract case, or some issues of that kind. The judgments have to be written, they have to be carefully written, covering the reasons why you have come to that conclusion and applying the law. If you have made an error in it, the Supreme Court will overturn it.

Mr LUPTON — If we were to recommend a change in the law in the criminal area to remove the de novo appeals and substitute a similar system to what now operates in civil cases, do you think that would have any noticeable effect on the way criminal matters are dealt with? Would it slow them down? Would there be that 'laborious', in inverted commas, process?

Mr GURVICH — If I can just say this. I do not understand the argument of having to slow down to write a more detailed or careful judgment. Our duty is to apply the same approach to every case — whatever. We should not have our eye on what might happen after we have made our decision. Our decision is to be fair, to act in accordance with natural justice and to let everybody have a fair hearing. The defendant is the most important person in court. That person has to leave the court knowing they have had a fair hearing. I cannot think of anything more axiomatic than that. To suggest that we have to be more careful seems to me, or to us, to beg the question of why. Surely we have to be careful all the time in our approach to these matters. Coming to a judgment is a very difficult job. Our job is judgmental; that is what we do every day. We are undermined — it is a question of confidence; if you lose your self-confidence you have got problems in this job.

There are magistrates who feel that way about appeals de novo, because that is an opinion more than saying you are wrong. It is simply another person's opinion, if there is a change. And remember that the police are entitled to appeal — only on sentencing matters, if they consider a sentence is too low. They can appeal, if we are wrong in law, to the Supreme Court, even if we have acquitted. It is one of the strange ironies of the law. They cannot do it with a jury, but if we are wrong in law and we acquit, the matter can be sent back by a Supreme Court judge saying, 'You are wrong in this approach; you will now approach the matter in the way I say you should have in accordance with the law'. There are all these anomalies, and I think most magistrates are extremely conscious of their duty. It does not matter what happens after their decision is made.

The CHAIR — Putting aside the variability of the magistracy argument, can I ask you, based on your experience, about the variability of legal representation argument — which seems to be the other prong here — and where people who may be up on serious charges for which they could go to jail are not being adequately represented? There may be no error of law on the face of the record, but the fact of the matter is that their cases having not been run as well as they could have been is an argument for preserving de novo appeals. Can you comment on that from your own experience on the bench?

Mr GURVICH — You always remember the terribly good and the terribly bad appearance; the rest come into a blend. But when that happens, there is no problem with the terribly good; the advocacy is fine and there is no issue. With the terribly bad the magistrate must take into account that representation and think about what could have been done — this, that and the other. I am not talking now about contest, because in a contest there is nothing we can do about that. On a plea in sentencing, if we get to that stage, that is a matter where we have plenty of arrows in the quiver to use, such as a pre-sentence report and all the rest, so we can find out things we are not being told, if we think we need to have them. I accept that, however, if the representation is not satisfactory in a contest, there is nothing we can do about it — but nor can the County Court judge; nor can the Supreme Court judge. Unfortunately that is the system.

Mr GRAY — There are a couple of things I want to say about this, very quickly. Unrepresented people are one category and one might say at the end that perhaps they should have a certain sort of appeal right, and even a different sort of appeal right, because they represent a particular category if they have been unrepresented, or it might go to the question of whether their appeal has some sort of other merit to it. I am not suggesting that, but that is a possibility.

I think Maurice is absolutely right. But just very quickly, if I can, on Mr Lupton's earlier question, I do not think there is any difference between the way magistrates approach civil and criminal. I do not think that removing de novo appeals would significantly slow down the processing of criminal cases in our court — a vast volume notwithstanding. I entirely agree with what Maurie Gurvich has said about confidence and efficiency. It has to be brought to bear to every case, quite regardless of what the appeal system is, that one is not looking over one's shoulder, normally, at what the appeal system is or could be or at what might happen. You bring to the task the same skills and the same obligations. I do not think it would significantly slow the court down. Obviously from my point of view I would be profoundly worried if there was a real likelihood of that — I would be deeply worried. I do not think there is a really high risk, as I said earlier. I do not think, in the experience of the civil jurisdiction in the court, the error of law appeal system has slowed it down, complicated it or otherwise been an issue for our court or our magistrates at all. It has never been raised with me. It is an issue for the odd appellant, of course, because the Supreme Court is expensive. I agree entirely with what Maurice said about that matter.

The later point is something Caitlin perhaps wants to address, but I think non-representation is an issue. The quality of representation in our court is extremely variable, as others have clearly said. But the point Maurice makes has to be remembered — this is a critical point in this day and age. Ninety five per cent plus are matters proceeding to a plea of guilty at the end of the day. Magistrates are increasingly interventionist, inquisitorial, if you like, and less and less adversarial — after all, this is a sentencing exercise, not a contest — and they are ensuring that, notwithstanding poor advocacy, they are getting what they need. Increasingly they ask, ' you have not told me about any of this, but I am getting a report anyway'. So the compensatory work being done judicially, if you like, goes to minimise the risk of the poor advocate, leading to the bad result, leading to the necessary appeal, if you understand the way I put that. The judicial intervention is a mitigating factor.

The CHAIR — That was the nub of my question.

Ms ENGLISH — I would agree with those matters that Ian stated. With respect to the matter Mr Lupton raised regarding criminal-civil matters and if there was a different appeal, every magistrate views a case with exactly the same importance as the next, regardless of what appeal options are open to the parties. But certainly in civil cases where you are having to give written decisions, my experience has been that there are more cases reserved because you are less likely to have the time to give that immediate written decision. It is a slowing of the process when you have to give a written decision. In terms of the consistency between criminal and civil that you have talked about, it should also be remembered that in crimes family violence, as well as in the Children's Court, there is an appeal de novo, so it is not just criminal that has the appeal de novo.

Just taking up that last point that Ian made about the standard of representation, it is very variable. There is a lot of under representation in the court, where someone has a legal practitioner who is perhaps not as full and comprehensive as they could be, and a magistrate takes a proactive role in terms of finding things out. A lot of junior practitioners, of course, appear in the Magistrates Court on a regular basis and a lot of young barristers cut their teeth in the Magistrates Court. But there are ways in which the court can properly inform itself. Unfortunately the court does not keep statistics on the number of unrepresenteds appearing before the court, but that is perhaps something we should look at for our next report.

Mr LUPTON — In my past experience those cases generally took longer.

Mr GRAY — They often do.

Ms ENGLISH — That is right.

Mr LUPTON — The court is very mindful of the fact. I assume that is still the case.

Mr GRAY — It is still the case.

Ms ENGLISH — And a lot of court craft is involved in dealing with unrepresented people, not only in the mention list but also in areas like crimes family violence where there are very long contests and all parties are unrepresented. The court has to be very interventionist in those matters.

Mr GRAY — Can I just say Caitlin is absolutely right of course. The writing of a judgment makes the whole case to its utter conclusion, longer. I must add that qualification. There is no doubt about that.

Mr LUPTON — I was really referring to in the running.

Mr GRAY — I made the point about in the running earlier.

Mr LUPTON — Certainly I understand that if you have to produce a written judgment that is going to take a period of time you would otherwise not need.

The CHAIR — There will be a slowing down where there is a contest.

Mr GRAY — Not necessarily because in a criminal contest you will go out and consider it — maybe for half an hour, maybe over lunch, maybe for half a day — but you will not be required and you will not be expected to produce a written decision in a criminal contest in our court. The Children's Court runs somewhat differently.

The CHAIR — Will you not be required to do that now if the appeal is on errors of — —

Mr GRAY — No, you will not, and this is a critical point. You will articulate your reasons for decision in court under that system, as we now do, simply by sitting there having considered the matter, either immediately, after a short adjournment or even overnight, whatever it

may be. You will sit there and you will orally deliver your criminal judgment and hand down the sentence. That would remain the overwhelming norm, with a few decisions being done in writing, very few criminal. That will not change. In civil they are generally written decisions. But if you take the average crash-and-bash case and who is at fault in that intersection collision, they are routinely done orally, on the spot, often by arbitration — simple rules, a quick decision. The arbitration mode is a quicker mode for good reason. They do not require written judgments either. To give it context, that is the way it would be. Criminal contests would be rarely dealt with in a written decision.

Mr GURVICH — I write about five a year. A lot of people do more than that, I accept that, but I am satisfied that when I read it it is recorded and if the parties want the recording, they can get it and it is all there.

Ms ENGLISH — The only point I would make in respect of that is the time. It might not be a written decision in respect of actually being handed down to the parties but, and Maurice used the words, 'When I read it', the actual crafting of the decision by the magistrate could well take longer than it would in an extempore situation where you are just giving it off the cuff.

Mr GRAY — Can I add one last thing to that. I am not disagreeing with Caitlin on that, and that is true, but in the end it will be the nature of the charges that determines the approach taken. Is this a complex, serious fraud charge or collection of charges? Is it a simple theft, a simple assault? If it is simple, whatever be the nature of the appeal system, the decision will ordinarily be quickly arrived at, efficiently delivered, orally delivered, usually with very few notes and often with just what has been written on the spot. The more complex the criminal case, as with civil, the more time required to think about the decision. However, quite irrespective of the nature of the appeal process, the more complex case will take a little bit more time to think about and then longer to articulate the reasons. You might write down your reasons and then articulate them, as Caitlin says, and that is right. However, all of that is driven not by the nature of the appeal process, in my view, but by the nature of the charges, the complexity of the case. That is the driver, in my view.

Mr LUPTON — We will reserve our decision!

Mr GRAY — Can I thank you all very much, and reiterate our invitation to visit the court if you have time to come and have a look.

The CHAIR — We thank you very much for giving us what is really a unique insight into this reference from your own practical experience and wisdom. We appreciate the time you have taken to write the written submission and come and appear before us, particularly given the huge volume of work the court has.

Committee adjourned.