LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PUBLIC ACCOUNTS

(Reference: Inquiry into Auditor-General's report No 4 of 2005: courts administration)

Members:

MR R MULCAHY (The Chair)
DR D FOSKEY (The Deputy Chair)
MS K MacDONALD

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 4 APRIL 2006

Secretary to the committee:
Ms A Cullen (Ph: 6205 0136)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents relevant to this inquiry that have been authorised for publication by the committee may be obtained from the committee office of the Legislative Assembly (Ph: 6205 0127).

The committee met at 3.47 pm.

GREGORY PHILLIP WALKER was called.

THE CHAIR: We may now commence the proceedings relating to Auditor-General's report 4 of 2005—courts administration. You should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation, for what you say at this public hearing. It also means that you have a responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a serious matter.

I thank you for making yourself available to appear before this committee today. We have only just received your submission. Dr Foskey and I have had a few minutes to do a very rapid read of this document but not to give it the depth of consideration we would have liked. It may be that, in a more considered environment, we come back to you with a couple of matters. Before we start, perhaps you would care to give your overview on the submission. Are there any top-line points you would like to raise? For your information, these proceedings are televised to the agencies and transcribed.

Mr Walker: Thank you, Mr Chairman. Firstly, I apologise for the late provision of the written document. I appreciate that that may slow down the committee's considerations to some extent in respect of what the law society has to say. It is also possible that the society may wish to supplement the contents of this document with some further specific experience from practitioners specialising in both the civil and criminal jurisdictions, in both the Magistrate's Court and the Supreme Court. The document at the moment represents my own views plus the comments I have received, in committee and otherwise, from practitioners with specialist involvement in particular areas of the court.

In summary, the society has considered the performance audit report. Clearly, there is a significant amount of material in it that will prove beneficial as far as the overall review of the performance of the court and the suggestions, ultimately, for any improvements in court performance are concerned. There are a couple of issues the society wishes to draw to the attention of the committee. Firstly, the report deals with a number of statistics which don't necessarily provide a fulsome picture of the efficiency or otherwise of the way the courts perform but which have unfortunately been bandied around in public as suggesting inefficiencies which either may not exist or haven't been established as being in existence.

By way of example, the report refers to the Children's Court as being the most expensive children's court in Australia and refers to the number of appearances of young persons before that court as being of a particularly high level. From statements of that sort one might initially draw the conclusion that the court needs to be tightened up and made more efficient, but that doesn't necessarily accord with the experience of the litigants before it, or that of the practitioners who appear in that jurisdiction.

The quality of the outcomes in terms of administration of justice in the Children's Court are certainly considered by the profession and, I believe, by litigants to be high as far as the results produced are concerned. Juvenile justice is a very sensitive issue. Failure of

the juvenile justice system to adequately deal with the situations that come before it can lead to much more expensive problems arising down the track.

None of this stuff has been monitored—certainly not by the law society and probably not by anybody else. I don't make criticism of anybody about that; I suppose it just illustrates the problem of picking up a statistic and drawing a conclusion from it where a number of different conclusions could be drawn. It may well be—and I suspect it is the case—that the Children's Court adequately meets the needs and demands of this community. If it meets those at a cost, it may be a cost the community is prepared to pay.

None of the statistics we have looked at in respect of other states deal with that issue—ie, the quality of the ultimate outcomes. It is an issue which in a number of respects the law society would like to bring to the committee's attention to ensure that, ultimately, the evaluation of some of these facts and statistics is seen in an appropriate light. That is not a criticism of the Auditor-General either; it is just a matter that there are numerous ways of looking at figures.

By way of example, referring to the court system and looking particularly at the Magistrate's Court, there are a number of figures referred to in the Auditor-General's report that deal specifically with the Magistrate's Court, but they don't seem to take into account the functions of that court in comparison with similar courts in other jurisdictions. The point is made in the report that there are, of course, intermediate courts in other jurisdictions. The Magistrate's Court here not only undertakes some of the functions intermediate courts such as district courts or county courts fulfil in other jurisdictions but the magistrates also sit on a myriad of civic tribunals, including the guardianship tribunal and the residential tenancies tribunal. It also fulfils the functions previously performed by the commercial tenancies tribunal.

That is an interesting and unusual tribunal or jurisdiction to look at. As you will probably be aware, that tribunal—it is now back before the Magistrate's Court so it is no longer a tribunal—has exclusive jurisdiction, by and large, in the ACT over disputes in respect of commercial tenancies. Whilst the Magistrate's Court jurisdiction in other respects is limited to amounts of $50,000, with regard to commercial tenancy disputes the jurisdiction is unlimited. That tribunal deals with matters of enormous complexity which, by necessity, proceed over lengthy periods of time and can require many appearances.

That is one example of the need to compare apples with apples when looking at the conclusions drawn by the Auditor-General. The Auditor-General specifically stayed out of some of those issues. For obvious reasons, I suppose, it would not be possible to complete a review of that sort within a realistic time frame if every possible aspect of the administration of justice in the ACT were taken into account. However, the society wishes to make the point that there are other relevant matters which can be taken into account to determine whether the courts in this territory operate effectively and efficiently. The society comes back to the comment early in the summary part of the report, in which the Auditor-General states as follows:

> Administration of the ACT Court system is adequate to ensure that the business of the courts functions smoothly. However, there are opportunities to improve efficiency in areas such as the management of caseflow, finance, human resources and registry functions.

The society would see that as a reasonable and realistic summary of lots of the material that has been put before you in the performance audit report. The society endorses the need to review the way the courts work to determine whether they can be made to function better. At page 3 of the comments, the society specifically endorses recommendation No 17. That refers to the need to find out what it ought to cost to run this court system—not so much whether it has gone over budget, is under budget or how it has performed in the past.

The Auditor-General's report quite clearly refers to an issue in respect of division of responsibilities and perhaps people who are accountable for particular results not having all of the resources or responsibilities available to them to ensure that those are carried out. The report seeks to address those matters and, as I understand it, the department is also seeking to address them. We are assuming that that is happening in a satisfactory fashion. No doubt results will come out of that which will implement a number of the recommendations. The society is comfortable with the recommendations and is comfortable, at the moment, with the fact that there is a process in train to implement them. The society would prefer that decisions in respect of whether the courts are operating efficiently or not be deferred until a lot of those processes have been completed.

THE CHAIR: Thank you for the submission and the overview you have kindly provided. I hear what you say about the overreliance on statistics in assessing the performance of the courts. I have heard that view elsewhere and I see a considered credence in your argument about comparing apples with apples. With the range of different courts, or the range of different areas the Magistrate's Court is expected to handle, simply comparing the process here and elsewhere raises some real risks. I see in your submission the view that speed of resolution is not the be-all and end-all of a good judicial system. History has plenty of examples of fairly speedy solutions in respect of judicial treatment. I am sure that in the French revolution there were pretty quick outcomes, although they may not have been totally fair.

Obviously all of those involved in the public process struggle to find ways of measuring performance. We have assessed ourselves and our performance and we look at government agencies and try to apply an abundance of measures. If you don't apply the statistical measurements used by the Auditor-General on this occasion, does the law society have any thoughts on the best way to measure or assess the performance of our courts? Do you have any idea of indicators this committee might look at to provide more accurate assessments of how things are being handled?

Mr Walker: In paragraph five of the law society's comments we outlined what we thought was—admittedly in a general sense—a process that might be undergone with a view to getting closer to the reality of the issues that arose in the performance audit report. The first step is examining the sorts of results we are looking for not only in terms of speed and cost but also in respect of quality of decision-making and quality of results. That is a difficult one in a sense because I suppose one is making judgments about what the community expects, but those judgments are made on a routine basis in politics and public life.

The second step is turning that into the practical question of how much ought a court of

that type to do, having done the trade-offs between cost, quality, time and so forth. As we see it—certainly looking at the way these courts operate—that could be done by comparing the way in which that happens with courts in other jurisdictions where best practice has been identified as being carried out. We need to work out how to bring those practices to bear on the local courts and give an overall budget outcome or view as to what that properly administered court system ought to cost.

The third step is to ask whether we can afford it. Having determined the sort of court system we think the community wants and what it would cost to run it—and with best practices put in place—we need to determine whether, from a community perspective or from a political perspective, there is that sort of money available and, if not, what we need to get rid of to bring it back to a level the community can afford. That might sound fairly general.

THE CHAIR: It is fairly general. I don't necessarily say there is a correct answer; I am just interested in whether you have knowledge of any better system. By no means am I saying—and I am not sure that Dr Foskey is automatically accepting this either—that I am accepting these statistics as the be-all and end-all. I will take you a bit further down to the issue of ownership, which is talked about in the Auditor-General's report. It deals with budget and who is calling the tune in the area of territories administration.

The Auditor-General's report commented adversely on the blurring of the roles between the department—JACS—that administers the courts and the judicial officers who are at the service delivery end of the courts. Do you or the society have a view that there is a problem because of that blurring, or even a disconnection between the department and the officers of the court?

As a second question in the same vein, do you think there would be less uncertainty and improved administration—you refer to that under point five—if the courts had their own separate budget to manage and had to provide an annual report to show what the funds were used for and that, effectively, those funds were used? Do you think that would be a more desirable situation?

Mr Walker: I think that is the ultimate. That is the next step from the conclusion we have drawn—that is that, once a budget evaluation process has been completed, there is a benchmark—and there doesn't appear to be one at the moment—by which you can test court performance. I do not know that it necessarily matters whether that is done entirely within a separate court administration or whether it is an interchange between the courts and the department, provided there is a sufficient degree of communication and mutual understanding between the two as to what each is responsible for, when, under our system of government, the judiciary clearly want and need to be independent. There are certain things the administrators can't be involved with in that respect but administration itself against a budget, once a process of this sort has been completed, is, as we see it, a conceivable thing.

THE CHAIR: It seems to make some sense to get the costings worked out accurately, have a good baseline and then have some ownership of that preliminary view.

Mr Walker: Whether there is one leg in the court building itself and another in the department, there is separate budgeting of all the functions. That is very important

because, historically, one of the problems that has arisen—and it certainly comes out of the Auditor-General's report—is that nobody knows how much it is costing to run the courts. There are people performing different functions, some of whom might be directly associated with the courts and others who might not be.

THE CHAIR: In section 2 of your submission you say—and I take it that concern has been expressed by members of the law society—that there have been some issues in relation to the unavailability of prosecution evidence. You have particularly cited DNA. We are going to be hearing from the DPP later in the afternoon. Whilst some of the responsibility seems to be being sheeted home to that department, are you suggesting that there might be a problem further down the track—that the various sorts of agencies or elements within government that are meant to provide this evidence are either just not up to the mark or don't have the resources? From that statement, is that what your members are starting to conclude?

Mr Walker: No. I do not think members are really drawing conclusions about specific issues. The Director of Public Prosecutions will clearly be in a better position to comment in detail about that. A problem, which I believe has now been sorted out, existed when matters that required the provision of DNA evidence were being listed for hearing. The prosecutors at that time were turning up and informing the court that it was going to take a certain period of time for that evidence to become available. Matters were being listed in a shorter period of time, notwithstanding the fact that that information had been given to the court. I think that has been resolved, but there was some confusion as to the length of time it ought to take.

THE CHAIR: Your point is that this is not the doing of the magistracy.

Mr Walker: No.

THE CHAIR: —there are other factors involved.

Mr Walker: Nor am I suggesting that that is the doing of the DPP. There was general confusion—and, as I understand it, the DPP doesn't have ultimate control over the timing of that sort of evidence in any event. There are other issues involved.

THE CHAIR: I turn now to the Children's Court and the comment about it being the most expensive of all jurisdictions. You have raised the interesting point that there are costs of a magistrate included in your costings that may not necessarily be the case with parallel jurisdictions. I do not know whether your practice takes you into that dimension, but are you aware of any other unusual factors which might suggest why the cost of running the Children's Court is so high, or do you think it is as simple as that preliminary information?

Mr Walker: I have no doubt that there will be a number of factors involved, none of which are fully known or evaluated, apart from perhaps anecdotal evidence. Some of them just go to the quality of justice—it is as simple as that. I practised extensively in that court some years back and, very occasionally, still do. That court has always taken a real interest in the young litigants who come before it. I think that, by and large, over the years it has been responsible for keeping people out of adult courts and adult institutions.

THE CHAIR: You are suggesting that matters may go on longer or may be adjourned more frequently in the quest to try and deal with underlying problems?

Mr Walker: Yes.

THE CHAIR: And that people are appearing, rather than quick conclusions being reached. I don't want to put words into your mouth.

Mr Walker: That is precisely the point I seek to make. I don't routinely appear there nowadays but I appeared in a matter about 12 months ago, and that was precisely my experience. There was a plea of guilty. In terms of the evidence it was a serious issue which involved a very intelligent, capable but, at least temporarily, troubled young man. I have no doubt that in other jurisdictions he would have been incarcerated by now, at around the age of 18. The matter spanned the two jurisdictions of the Children's Court and the Magistrate's Court.

It is very difficult to describe the process, but the court was prepared to take the patience to give proper consideration to this matter. It required the court to adjourn to see how particular things worked out, such as employment, relationships and what was happening with his family. The prosecution were looking at whether they wished to proceed on everything or limit the number of matters he was charged with to the more serious issues. There was a significant number of appearances involved, perhaps of a level that would not have been tolerated, or even nearly tolerated, in other jurisdictions.

THE CHAIR: You would attribute that to a genuine commitment to quality and justice, not simply to a tendency towards excess leniency in these matters.

Mr Walker: No. I speak subjectively because I was representing the young man, but I speak also from experience as a practitioner. The prosecutors were aware of this by the time the case finished. The outcome, by any standard, was appropriate. It provided that young person with an opportunity he might not otherwise have had, of which he has taken full advantage. He has since finished year 12; he is in stable employment; and he is in a stable relationship. In fact, he has recently become the father of a child and is exercising those responsibilities in a very appropriate way. The results are there. Again, this is anecdotal; we can't measure how often these things happen; but the way in which the courts and the Director of Public Prosecutions dealt with it was part of a process that delivered a result which probably saved the community lots of money into the future as far as correctional services are concerned.

THE CHAIR: You have raised a matter that I have heard elsewhere and that this committee has heard about—the decision to remove from the court last year the ACT Corrective Services officers who, in your words, were previously able to provide the court with on-the-spot reports. Would you care to elaborate on that? As a society, have you had any discussions with the territory administration over that decision?

Mr Walker: Only briefly. I am aware of evidence given before the committee by the chief executive of the department of justice. I understand there were certain matters referred to in that evidence on the basis of which it was sought to justify the decision. Representatives of the society have communicated concern to the department—not directly through me as president but as committee chairs—about that step having been

taken. I am not aware that there has been any formal response. This matter concerned the magistrates, particularly at a time when one of the KPIs for their performance was the number of times someone came before them before a matter could be finalised.

THE CHAIR: It seems incredibly inconsistent, doesn't it, that they do that and are then happy to see criticism when the matters come back repeatedly?

Mr Walker: There may be a number of reasons for it; we don't really know. It was certainly not conducive to magistrate morale. On one hand the report looked at their performance in respect of the number of times cases came before them and, at the same time, a resource which permitted them to deal with these matters more promptly was removed. I do not think we can put more into it than that. There may have been economic factors behind it, but we don't see what may have been.

THE CHAIR: Basically a new problem has been created.

Mr Walker: One assumes someone has performed a function within the confines of the court, or performed the same function in another location. If that is the comparison, it is difficult to see how savings can be effected by its removal. But there may be explanations of which we are unaware. The professionals who practise in that part of the world are concerned about it, as are the magistrates. We thought it an appropriate matter to voice before the committee.

DR FOSKEY: As a lawyer, if you could draw up a wish list, how would you like the courts to operate with regard to the issues addressed by the Auditor-General?

Mr Walker: That is not any easy question to answer. As a lawyer, maybe you don't concern yourself as much with how much it costs as having a system you really like to work within. So, in a sense, you approach it with an element of bias which the community can't afford because the community is concerned with balancing cost, quality and timeliness.

DR FOSKEY: You don't have to worry about costs in this answer. Just give me a perspective of what an ideal court would be from a lawyer's perspective.

Mr Walker: It is a difficult question to answer but I will answer to the best of my ability. Starting with the proposition of the outcomes in terms of justice in the ACT that I think the profession would consider appropriate, there is no dissatisfaction with the results obtained. When you descend to particulars, the information technology—the report refers to this and I think it is common knowledge—could be improved. For example, the resources available to magistrates and judges in terms of computers on desks that permit them to access not only legislation and cases but also to look at evidence and so on, can be improved. That will obviously come at a cost—although in the hypothetical example I am not concerned about cost—but that cost will, over a period of time, be amortised against the efficiencies the court can achieve as a result.

As far as the timeliness of the hearing of cases is concerned, neither I nor the profession at the moment, I do not think, are concerned about time delays in getting matters listed. Obviously we have a vested interest in ensuring that, after matters have been listed, judgments are delivered promptly. There is a protocol in place to address issues where

there are delays in the delivery of judgments. Those are the real issues, as I see them, in answer to the difficult question you posed.

DR FOSKEY: It is difficult but it probably provides the base from which you regarded the Auditor-General's report. You said earlier that you appreciated the time taken by the judge in a particular case because of the positive outcomes for your client. That is obviously another important criterion by which you judge the courts. You said that we can't compare apples with bananas, but do you think we should have access to a more comprehensive and discrete range of statistics? We have come up against the fact that statistics on various things are not collected because there are always time constraints. Do you think that would help us to deal with this matter?

Mr Walker: I have no doubt it would, but you can descend to a point where you are spending all your time collecting statistics and not doing anything about them. By the same token, if you are going to make valid comparisons based upon figures, you need to know they are valid. That is one of the matters we were looking at in determining the appropriate budget for the courts. It would involve, once you have looked at your ideal court, looking at best practice in other jurisdictions.

THE CHAIR: If you found a jurisdiction, were you particularly impressed—or was it too difficult?

Mr Walker: I am sorry.

THE CHAIR: Have you found a jurisdiction which you see as better run than that of the territory in terms of courts administration?

Mr Walker: Overall, no; but I would have to qualify that by saying that the ACT law society is not resourced to have a close look at the way in which another jurisdiction works, or even how particular aspects of its courts work. We are necessarily reliant upon the sorts of figures in the Productivity Commission report, for example, and this particular report. One sees features of management of courts in other jurisdictions which one thinks would be a good model that could be adopted in whole or in part in the territory. Case management is an example of that. The District Court of New South Wales operates a very tight and rigorous case management system. The practitioners who work within it understand that and tend to basically abide by directions handed down by the court. When a case starts, there is a whole series of directions handed down and there are cost sanctions for non-compliance.

Under our new harmonised rules, that may well become a prevalent situation in the ACT but it is not currently the case. That makes the New South Wales District Court model of case management a tighter system and one that is likely to bring a matter to hearing quicker than a civil case. So, anecdotally, there are bits and pieces one can pick out of other jurisdictions but, in terms of the collection and analysis of statistics, we can only work with what we have.

THE CHAIR: I understand that.

DR FOSKEY: I detected in your presentation on the one hand a concern that, if the department of public prosecutions had greater control of the courts administration, there

might be less ability for the courts to, for instance, appropriately sentence or deal with cases as you believe they should be dealt with—and you are welcome to comment on my interpolation in a minute—but that, if the court system administered its own budget, it might not have easy recourse to top ups, which would constrain its ability to act approprium. I am not a lawyer; I do not know. I am seeing tension between those two extreme administrative models.

Mr Walker: Firstly, when you referred to the department of public prosecutions at the beginning of the question, I assume you were referring to the department of justice.

DR FOSKEY: You are probably right.

Mr Walker: There are the two areas—firstly, the Director of Public Prosecutions, which is responsible for—

DR FOSKEY: I am talking about the funding.

Mr Walker: I don't see a problem with ultimately moving to a proper budget-based system. If, for some reason, you run out of money—and this happens in cases such as the bushfire inquiry, the Eastman inquiry and things of that sort—the court system can run its budget and still go over budget without doing anything wrong. Provided that is understood and once the basis upon which budgets are set has been determined, I don't see it as a problem for the courts to be separately budgeted, provided there is a level of flexibility. But once you have set those parameters, leaving aside exceptional circumstances, the court ought to work within them.

Whether that is done entirely by staff based at the court or done in part by those persons and done in part by people from the department, as long as they are separately budgeted I do not know that we would be concerned whether it was one model or another. There must be flexibility in the delivery of any public service, such as that of the courts, to deal with unexpected, unbudgeted for situations. Leaving aside those issues, ultimately any public organisation has to be accountable for the way it spends its money. Ultimately, all public organisations need to move to a position where they are responsible for those results.

DR FOSKEY: Two models that would be preferable ways of moving have been suggested to us. The bar society suggested a model more like the federal one. The South Australian model has also been recommended to us. You have mentioned New South Wales case management. Do you have any thoughts about those particular models in terms of a better method of court administration?

Mr Walker: The federal court does civil case management in a way that seems to achieve effective results in terms of type, management and implementation. I suppose some of the success of that model is that it involves judicial officers and senior people being in charge of matters moving through the various stages before they go to trial. The district court does it in a different style of jurisdiction—probably somewhat more cheaply in terms of judicial resources. Nonetheless, the similarities between those systems are that the practitioners tend to be highly motivated to ensure that they don't fall into breach of directions, because there are consequences.

The South Australian system is one that, as best I understand it, involves central administration—accountable administration—that has an appropriate separation from the judicial functions. I do not know how it works on a practical day-to-day basis because we don't have data on that. There are all sorts of conflicting things. As we have seen, data can conflict from year to year, in any event. A court that may appear to be operating well in one year according to certain criteria may do exactly the opposite the next year.

DR FOSKEY: With regard to the coronial process, is it the law council's opinion that the rotating roster approach is satisfactory; that inquests are completed in a timely fashion and findings published in a timely fashion? If not, what should we do about it?

Mr Walker: The society doesn't have a settled or considered view on it. It is probably fair to say that the coronial function is one that involves specialised expertise. In New South Wales, for example, they tend to have special magistrates who perform coronial inquiries and, probably for that reason, develop that body of day-to-day knowledge and experience. As specialists, they can perform their functions more effectively than generalists.

In this jurisdiction there have been a number of instances of coronial inquiries that have gone for lengthy periods of time, probably, at least in part, because this is a small jurisdiction. A couple of coronial inquiries over the last few years have involved some very significant issues relative to the size of other jurisdictions such as New South Wales. We can look at the Thredbo coronial inquiry in New South Wales and compare it against the Bender hospital implosion inquest here. The comparative resources available here to deal with coronial inquiries and the lack of specialist magisterial people are going to affect the way in which those inquests proceed and ultimately turn out. It may well make them more expensive.

THE CHAIR: Thank you for your attendance today and for the information provided. We will look through your submission with further interest. We may need to come back to you at a later stage. I thank you for making time in your busy schedule and for giving us such comprehensive answers.

Short adjournment.

RICHARD REFSHAUGE SC was called.

THE CHAIR: We will resume the proceedings relating to the inquiry into the Auditor-General's report No 4 of 2005, relating to courts administration. Appearing before us is Mr Richard Refshauge SC, who is the Director of Public Prosecutions. Mr Refshauge, you should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections, but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation, for what you say at this public hearing. It also means that you have a responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a serious matter.

I thank you for your appearance here today, Mr Refshauge. I think that you are a vital witness to our inquiry in terms of the issues that we are trying to come to terms with and to review. We have received and authorised for publication your submission, which I have speed read and am now weaving my way through slowly.

Mr Refshauge: I congratulate you and apologise to the committee for the delay.

THE CHAIR: The submission is quite comprehensive, 22 pages. To do justice to it, Dr Foskey and I, and Ms MacDonald when she rejoins us, may need more time to thoroughly understand the points of view because, on my reading of it, they are quite extensive and seem well considered in terms of the Auditor-General's recommendations. I will have a few questions in a minute, but we will probably have more after we have digested the submission. Before we go to questions, would you like to give us a bit of an overview of the situation from your perspective and take us through a few of the issues?

Mr Refshauge: Yes, thank you. It seemed to me important that the report be put in some kind of context. This is quite important in relation to the courts, because one of the significant points that I make in the submission is that the courts are really one part of a system. Of course, I am dealing with the criminal justice system, but the same applies to the civil justice system and other systems.

Whilst it is appropriate at a number of levels that the courts be the subject of focus—of course, that is what the Auditor-General was looking at and that is an agency that, quite properly, the Auditor-General was looking at—you cannot divorce one of the other agencies from the whole system. I have spent some time in showing the interrelationship between the courts and the other agencies in the criminal justice system because there are dangers. The first danger is that it will be assumed that the courts are in a sense master, or mistress perhaps I should say, of the criminal justice system.

DR FOSKEY: Justice is a lady.

Mr Refshauge: Indeed she is; and that therefore if you, as it were, fix up the courts you have fixed up the system. There are two problems with that. One, it gives a distorted view of where and how the system operates if you elevate the courts as the most powerful, as I think the Auditor-General described it. In one sense, that is obviously true, but in terms of actually running the system, it is by no means the most powerful within the system in lots of ways, and then you distort the system. The second is that if you concentrate simply on the courts and do not look at the whole system, then you result in

a failure to actually manage the process because you are not taking a holistic view. I think that is terribly important. That is not to say that the Auditor-General, and I certainly did not say so to the Auditor-General when we were consulted, ought not to be looking at the courts. Of course he should. That is quite proper.

DR FOSKEY: "She".

Mr Refshauge: I am sorry, yes. The officers were actually male and that was what was in my mind, but you are absolutely right and I do apologise. It is perfectly proper to look at the courts and see whether they are operating efficiently and so on, but it has to be within that context. The second thing flows from that. I have made also an important point of that and that comes through particularly in my comments on the recommendations that the way in which the system will work will be heavily dependent upon the approach that the agencies within it take to each other. I have said that they must be collaborative; that, if a system is to work properly, then the participants in it have to collaborate in good faith, cooperate with each other, to make sure that the system works as a whole.

I have made some other specific points in it. I think that it is important, for instance, not to lose sight of what we are about, and what we are about is not just efficiently processing cases, but delivering justice. Delivering justice includes efficiently processing cases, but it is more than that. So you have got to not lose sight of that. Even though it is difficult to identify measures that will identify how the system is working properly so far as quality is concerned, I think that we have to try to do that, and I can make some suggestions about that.

I have talked about the relationship between delay and justice, and that is important, too. Whilst "delay" is the word we use, it has to be distinguished from simply an elapse of time. Everything is going to take time. A complex case will take a lot of time because you have to work out the law, you have to get the facts together, you have to get the witnesses, you have to run the case, which will take a long time, and so on, but also you have to make sure that delay, when it is delay, is not prejudicial. That is the gravamen of the vice that delay is, when it is prejudicial. So it is not simply the elapse of time. We have to be careful that we are not talking just about the passing of time, but that we are actually talking about something that is prejudicial.

I have made some comments also about statistics and I have repeated what I have said before; namely, that we are in a pretty parlous state about statistics, and statistics are difficult to deal with. I am pleased to say, as a council member of the Australian Institute of Judicial Administration, that that institute, in cooperation with the Australian court administrators group and, indeed, the Productivity Commission, is trying to work on some better statistics. I think that everyone would agree that what the Productivity Commission has got are really, I suppose, at best fair average quality statistics, but ought not to be regarded as the be-all and end-all. In 2006, the steering committee which produced the Productivity Commission's report made the point that they have yet to identify and formulate quality statistics or indicators of quality. Of course, that is a very important matter. So it is an ongoing and evolving issue, but in the ACT we are well behind because most of our statistics that would help us to evaluate are not retained or are not retained adequately.

I have made some general comments also about committals. I think that there is a need for us to revisit the reform of committals because that will help us to make the process more efficient. I am not one of those prosecutors who favour the Western Australian scheme of abolishing committals altogether, but I think that we can do a lot more about making them more efficient than we do at the moment with a little bit of nipping and tucking here and there.

Those are the general things, and then I have addressed a number of the recommendations. I have not commented on those like human resources and so on which, I guess, as a bureaucrat I can say, "These are good things." I have tried to comment or contribute where my perspective may bring some particular colour or view to the matter.

THE CHAIR: I thank you for that, Mr Refshauge; it was helpful. To what extent is your effectiveness falling short of your own goals for the DPP by unreasonable resource constraints?

Mr Refshauge: I have to say that that is happening. I think I mentioned in the annual report, or hinted at it if I did not mention it expressly, that our resource position is such that our ability to deliver the services that are expected in this community is now being affected adversely.

THE CHAIR: Is that in terms of the number of personnel, the level at which you are able to recruit to conduct proper cases or your capacity to outsource matters to counsel that you want to retain but maybe cannot because of funds? Which areas would you specifically quantify?

Mr Refshauge: In the ideal world—I noticed that Dr Foskey asked for a wish list; I do not know whether she is going to ask me for a wish list, but in that sense—we would like all three. At the moment, I think the most significant point is numbers. However, it is followed fairly closely by the level of experience and quality, and then thirdly by a need to outsource. I think the experience of most prosecution agencies round Australia is that, on the whole, the better result is from managing within a salaried structure, but as long as you can get people of the appropriate skill.

There is no doubt that we have done quite successfully with people outsourced. We had a major murder trial last year for which we briefed external counsel from Sydney and we were successful in obtaining a conviction. On the other hand, I have to say that when it went to appeal we retained the same counsel and we lost the appeal. We are seeking to appeal to the High Court and we will almost certainly retain the same counsel; so that will be an interesting assessment as to whether that works.

On the whole, a salaried service is probably better, but at the moment there is enormous pressure. We can service all the courts but not necessarily with the degree of preparation that is necessary, because preparation is the elastic part of the process. You have to be in court and, if you have to be in court, you have to be in court; but, if you have not had the time to prepare, then the delivery of the service obviously will be adversely affected.

THE CHAIR: Would it be reasonable to assume that a prosecutor supporting you who is engaged at a particular salary level would not reasonably be expected to deal with or

process as many cases or process them as expeditiously as, for instance, somebody from interstate who may be a much more senior prosecutor and who is remunerated at a higher level and therefore, one would assume, is more experienced?

Mr Refshauge: I have to unpick that a little. Certainly, someone who is more experienced will take less time in preparation, because they will know the law and they will have more experience at addressing issues. They will have addressed an issue before, most likely, know how it works and so on. In that sense, that is true. On the other hand, the more experienced practitioners are going to have the harder cases, rather than the easier cases. That will not necessarily mean more cases or more cases expeditiously being dealt with; whereas, for instance, a more junior prosecutor who knows better than I do, for example, the road traffic act probably would be able to run through a road traffic list more quickly than I would, because I would have to get up to speed and understand what is probably the most complex piece of legislation in this territory, understand how it all fits together and so on. So it is not quite as you described it, although I think that the underlying thrust of what you are saying is true. Obviously, someone with more experience can handle cases more effectively and, in an appropriate circumstance, probably more cases of appropriate level.

THE CHAIR: Do you have positions funded at the appropriate level that you could recruit that level of person or can't you compete in terms of interstate officers?

Mr Refshauge: It is difficult to compete. At the moment, the senior prosecutors in my office earn around $100,000 to $120,000. A crown prosecutor who would be doing similar work at a certain level—there are much more experienced crown prosecutors, obviously—will get nearer $200,000 in Sydney. There are cost-of-living implications, too, but that is a significant difference. Even in the local market, where we compete to some extent with the commonwealth Director of Public Prosecutions, he will be paying a greater salary for sometimes a comparable, perhaps not even so challenging, role for a similarly experienced person.

THE CHAIR: Are there matters that you have not proceeded with because you have not had adequate resources to prosecute a case? Related to that, if you have a case where the strength of your independent witnesses is not as strong as it might desirably be, does the fact that you have limited resources and, obviously, a substantial workload have a bearing on your decision as to whether to proceed on a particular matter?

Mr Refshauge: That is a very challenging question because, professionally, I have to answer no, in the sense that my role is to prosecute those cases which are worthy of prosecution in accordance with the policy, which says that if there are reasonable prospects of securing a conviction I should prosecute them. I can say to you honestly—everything I say, of course, is honest—that I have not declined to prosecute or terminated a prosecution because I did not have the resources financially to do so. Whether one, I hope can say honestly, subconsciously magnifies the weakness of a witness because of the pressures of the case is really more problematic.

I would like to put my hand on my heart and say, "No, we really try to do them all." At the moment, although we are stretched, the fact is that we do, but what happens sometimes is that cases fall into traps in the court which we would like to think we should have been able to avoid, and so the prosecution does not succeed because we

have not necessarily been as prepared as we would like to have been. I can think of a case where I think we were not as well prepared as I would like and it was ultimately withdrawn, probably before the inevitable was going to happen.

THE CHAIR: Do you often find a lack of policing resources impacting also on whether you can prosecute?

Mr Refshauge: They can. They can in a number of areas. We are still finding that the police force is perhaps less experienced than it used to be in former years. There is a rollover of police and there are some inexperienced people. I guess they are under some pressure, although I do not know the detail of that, and, of course, there are issues in relation to forensic services, but that is a somewhat different issue to the one that you are addressing. We are assisting quite significantly in training the police. That, of course, is resource intensive and puts pressure on the office.

In fact, this year, I think I am right in saying, we are yet to undertake an adjudicators course, which is a relatively senior course for police officers to assist them to evaluate and assess the brief that is being prepared for my office and ensure that it is in good form. I think that, on the whole, we are well served by the police. I am not trying to bag them, but there are challenges there. I think the police could do better in cases, but I am not suggesting that they are other than doing, on the whole, a very good job within the limits that they have, which include experience, training issues and so on.

THE CHAIR: I have one last question, although I have many I would like to ask you but I need to hand over to Dr Foskey and give her an opportunity. There is a theme in the introduction to your submission. The words "cooperation between agencies" appear quite frequently. From my reading of it, there is almost an admission there. What is the issue with cooperation? Are there issues in terms of the relationship between the police or the police forensic unit, or is it an issue between the DPP and the listings in the courts? Could you share with us a little more your perspective on that so that we understand what the issues of cooperation are between agencies?

Mr Refshauge: Police-DPP cooperation is at a reasonably good standard, although it needs to be worked on and continued, but it is at a good standard. I think that there are real issues at the moment in the relationship between the DPP and the courts. I think that the level of cooperation there is not as good as it should be.

THE CHAIR: The Supreme Court and the Magistrates Court?

Mr Refshauge: Both. I think that the genesis of that, in part, is that the courts have been under pressure for some time. That is why I started off by talking about the system and interdependence, because when you focus on the courts and say that you are going to send the Auditor-General in to look at them and so on you get a degree of anxiety, understandably, and you also get a degree either of passing the buck, and I am not suggesting that they have necessarily done that, or at least of identifying with perhaps too great a clarity the line of responsibility and saying that that is their responsibility and sheeting it home to them.

In the last few weeks there have been comments made which probably three years ago would not have been made about things that prosecutors have done—some

understandable, some unfortunate and not acceptable, but have been suggested to be causing delay, because then the courts can say, "It is not our fault." I have said that it is, of course, a collaborative effort. It is an effort of all of us. We have a part to play and sometimes we fall down on that. But the courts also have a part to play in coming to us and working cooperatively with us. At the moment, I do not think that cooperation between the courts and the DPP is at the level that I would want or expect.

DR FOSKEY: I want to follow up on that. I am not going to ask you for a wish list, Mr Refshauge.

Mr Refshauge: Curses, I've got one! No, I haven't.

DR FOSKEY: I am sure that you will find a way to give it to us. This could be a wish list question anyway. What measures do you think might reduce that tension that you are, I think, honestly discussing with us today between the magistrates, the judges and other people in the court system? What might it take? Is it something to do with the institutional arrangements that could be changed quite simply, or does it boil down to something as intransigent as a matter of resources or personalities?

Mr Refshauge: Resources and personalities are always relevant, but I am thinking more in terms of a collaborative approach to listing where there is a more relaxed view of the way in which the courts will deal with cases where there are challenges. For instance, I asked some time ago to be told when the Supreme Court was going to have three criminal trial lists running at the same time, because three trials at the one time mean six prosecutors out of the office when I have still got to staff the Magistrates Court. I have to have prosecutors on leave, I have to take the risk of prosecutors being sick and so on.

DR FOSKEY: How many are there altogether?

Mr Refshauge: I have about 22 prosecutors. Having six prosecutors working in the Supreme Court, as well as others preparing for cases and so on, is quite a challenge. I was told that when they were about to list three trials they would then let me know. That is an uncooperative attitude. That is a tiny thing. I do not want to build a mountain out of that, but that is the kind of thing that would be unhelpful.

One of the proposals that the Auditor-General has referred to and that the Magistrates Court has been looking at is to have a magistrate in charge of listing who would sit down with my office and we would work out some strategies in relation to the lists. He or she would delegate an officer who could ring up my office and, "Some cases have fallen out next week. Have you got anything that can fill in that time?" We could talk about that and so on, that kind of interaction at a level which respects the independence of each agency—and that is very important. I do not want to run the courts, but I think that there are levels at which you could talk to each other, you could work collaboratively about how to list, instead of the court taking an attitude, which I think is hinted at in there, whereby the court says, "We are running the lists because we are under the gun and, unless we run the lists, people are going to criticise us." We could talk more cooperatively, collaboratively, and work these things out together, respecting the independence of each.

DR FOSKEY: Who decides the administrative structure of the courts? For instance, they

have just advertised for a registrar. I am not sure whether that has been filled.

Mr Refshauge: Yes.

DR FOSKEY: Is it the courts themselves that decide what positions they will have or are you able to say that an arrangement is needed whereby communication is improved?

Mr Refshauge: I do not claim to be an expert on the courts' governance structure. My understanding is that courts administration is a cost centre of the Department of Justice and Community Safety. The courts administrator is responsible to both the Chief Magistrate and the Chief Justice, but also to the chief executive of the department. I guess if you wanted to draw a black-and-white line, the courts administrator determines the staffing structure of the court, but no courts administrator worthy of being paid the amount that they are paid would do other than consult, discuss and probably agree with the head of jurisdiction in relation to the way that these things are managed.

DR FOSKEY: I am told that, at the moment, there is a very low level of satisfaction amongst the staff surveyed with the law courts and tribunals unit being a good place to work and that the courts administrator is in an acting position and, I guess, is not in a position to make substantive, long-lasting changes to the way things work. That would seem to me to be a symptom of the problem, if not the problem.

Mr Refshauge: Undoubtedly, having an acting administrator is undesirable, although, I would have to say, Ms Cook has been a very respected courts administrator nationally and is highly regarded by the Family Court, from which she comes, and I do not think for one minute that she would say, "I am only here for six months, so I am not going to address any of these problems." However, being there only for six months is obviously a limiting factor on how she could deal with those matters. I do not think that it would be proper for me to comment too much on the morale of the court staff and so on but, certainly, I think that there are issues. The difficulty is that when you think of courts you think of judicial officers; you do not think of the army of people out the back who need to be respected, who need to be trained and who need to be encouraged as well. I think that there are issues about that that the report hints at, throws up, and need to be addressed.

DR FOSKEY: I assume that a number of the Auditor-General's recommendations have been acted upon by now and we have your comments which, of course, I have not thoroughly perused.

Mr Refshauge: I do not know that many have been acted upon by now, but you may have different information.

DR FOSKEY: I was actually wondering whether they have been, given that it is some time since the report was prepared.

THE CHAIR: I think that I raised that issue on the day that the chief executive appeared, the long delay, and I also previewed the fact that we may be inviting them back to join us again to talk about that. A number of those are matters for JACS which will require a response.

DR FOSKEY: Yes. We might be asking for an interim report on that. Is it appropriate for you to comment further on that?

Mr Refshauge: I must say that, when writing my submission, none immediately sprung to mind as having been implemented. Having said that, I know that there are processes in train to implement some of them. I know that the Wallace report is getting serious consideration in the courts.

THE CHAIR: Is that about the review of the listings?

Mr Refshauge: Yes.

THE CHAIR: You said in your submission that you have not seen it.

Mr Refshauge: I have now seen a copy, but we have not been consulted about it.

DR FOSKEY: But you will be.

Mr Refshauge: That is not my decision. I would expect so. It would certainly be my wish, yes. That would certainly be part of my wish list.

DR FOSKEY: Is the courts governance committee the same as the joint rules advisory committee that you have referred to?

Mr Refshauge: No. The joint rules advisory committee is a committee which is chaired by a judge of the Supreme Court and has members of the Supreme Court including the registrar, members of the Magistrates Court including the registrar, members of the profession and me that advise the rules committee on the making of rules for the conduct of proceedings.

DR FOSKEY: Ms Leon talked about the courts governance committee.

Mr Refshauge: That is the one that consists of the Attorney-General, the Chief Justice and the Chief Magistrate.

HE CHAIR: It meets about every six months for a little while.

Mr Refshauge: Yes.

DR FOSKEY: I gathered that that was a new initiative.

Mr Refshauge: It is a new initiative. I am not sure of the timing in relation to the Auditor-General's report.

THE CHAIR: You have spoken here of your strong belief in the importance of statistics. We have had evidence presented to us by the Law Society and others who advocate that you have to be very careful about comparing what is done in the Magistrates Court here with what happens in other jurisdictions. Also, in the Law Society's submission there is reference to the fact that, whilst you might have a large number of, for example, workers compensation cases listed, they have been listed in

anticipation that a very large number will be settled and there is a very high rate of settlement. Can you give us your thoughts on statistical measures as to what one might look for in terms of the performance of the courts, or do you think that it is an exercise that it is very hard to place much weight on?

Mr Refshauge: No. I think that statistical information is important and measures are important, but what is important is, first of all, to ensure that you are comparing, to use the phrase, apples with apples, and I think that sometimes that is not done. For instance, in a general sense, you can compare jurisdictions around Australia, but in Tasmania, the Northern Territory and the ACT there is no intermediate court, and what a magistrates court does includes some of what a district or county court does. So, when you are comparing a magistrates court in the ACT with a magistrates court in New South Wales, they are not quite the same thing.

THE CHAIR: How do we stack up against, say, Tasmania?

Mr Refshauge: I do not remember, but in some areas we are doing well and in others we are not doing so well. Again, there are processes that are different. For example, in Tasmania the committals are virtually exercises in brief disclosure, so that the magistrate has no decision to make. Few committals are run with a full hearing, whereas the ACT is one of the last jurisdictions where you can have a full committal and you can go for days and days and cross-examine up hill and down dale. Comparing that system statutorily with a system like Tasmania's is not necessarily quite fair.

THE CHAIR: As a rule of thumb in terms of committals, what percentage do not proceed to trial, from your experience here? I do not want a precise figure, just instinctively. Are there many that do not?

Mr Refshauge: It is hard to give a feeling. In sexual assault cases, there would be more because the committal will give us a fair sense of whether the complainant is likely to be credible in the Supreme Court and, therefore, whether we are likely to secure a conviction. In other cases, the majority would proceed. I would think it would be 10 or 15 per cent overall. I cannot think of one which has not proceeded because a magistrate has directed that it not proceed. I still have power to present an ex officio indictment nevertheless, although I would obviously look carefully at it. The large percentage of them proceed.

THE CHAIR: On another issue, you talk strongly here about the need for improved technology, particularly as to victims of sexual assault. What is the issue there? Is it just a reluctance to spend the money?

Mr Refshauge: Yes, I think so.

THE CHAIR: Where is the deficiency in the technology that you have observed?

Mr Refshauge: It is difficult not to be anecdotal in this area but, to give you an example, at the moment the witness who is in a remote location giving evidence faces a screen which is cut in four and on one screen the witness can see himself or herself. Recently, we had a case where a young boy who gave very good evidence at committal decided that he wanted to give evidence by remote video, CCTV. He confidently identified where

he was slapped on the wrong side and we believe it was because he was looking at a screen that was meaningless to him and reversed it.

That would not be acceptable in New South Wales. They have a very good system at Parramatta, where they have state-of-the-art technology. We do not need state-of-the-art; we need better. That is an important area. I believe the CCTV between the Magistrates Court and the Belconnen Remand Centre is now improved, but there are problems. We do not do bail applications from the Belconnen Remand Centre. In New South Wales it would be rare for an alleged offender who is seeking bail to appear in court. They would appear by CCTV from Goulburn, Lithgow or wherever. I think that the CCTV has improved, but is simply not being used there. For a long time it was very poor and did not work very well.

An alleged offender who is in the Belconnen Remand Centre and who comes in for a bail application has to pack up all their gear, come into court and sit around for the whole day until transport takes them out, because if they get bailed they will be off and if they do not they have to wait with everyone else until they get back. For them to do it by CCTV would be more convenient for them and for everyone.

THE CHAIR: What is the reason for not doing that?

Mr Refshauge: I think that it is largely cultural. It was not done because the system was pretty bad, so no one ever thinks of it.

DR FOSKEY: Might this fate be overcome when a new remand centre is built? Do you assume that it will have state-of-the-art technology?

Mr Refshauge: I would hope so. If we cannot slip a bit of ICT into the Maconochie centre, with its capital budget, it would be pretty depressing, wouldn't it?

DR FOSKEY: Yes.

THE CHAIR: Mr Refshauge, I thank you for your time and for the information that you have provided to the committee.

The committee adjourned at 5.16 pm.