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

WEDNESDAY, 17 MAY 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).

WITNESSES

The committee met at 4.06 pm.

CAHILL, MR RON, Chief Magistrate, ACT Magistrates Court
BURNS, MR JOHN, Magistrate, ACT Magistrates Court

THE CHAIR: I welcome Chief Magistrate Cahill and Magistrate Burns to the inquiry this afternoon into Auditor-General's Report No 4 of 2005, relating to courts administration. I would like to indicate to you before we take evidence from you that, as I am sure you are aware, 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.

We have now received a submission from you and we will look at it with considerable interest. If I could just say that I think that this is probably one of the most important inquiries that I have been involved with since being elected as chairman of the public accounts committee. I am hoping that, as a consequence of the evidence we are taking, we will be able to add our contributions to the discussions in relation to the administration of the courts and provide a few thoughts for the government and the Assembly to consider.

Before I invite members of the committee to raise some questions of you, Chief Magistrate Cahill, would you like to make an opening comment for the benefit of the committee to summarise possibly some of your views?

Mr Cahill: I think it might be appropriate. First of all, we welcome the opportunity to speak to you. As I have said in my part of the submission, the separation of powers is very important but there are times when the two branches or three branches of government need to get together, and this is one of them, in a constructive way. We would also like to thank the Auditor-General. I know that the Auditor-General worked very hard and we worked extremely hard to try to provide the maximum amount of cooperation. Everything was available to the officers and I think that the result is a good one, so much so that I think we can say that we certainly support the general thrust of just about everything the Auditor-General has said, including the brickbats as well, because we realised ourselves that there were some issues that we could do better on. Would you like me to give a general overview of our views, without taking up too much of your time?

THE CHAIR: Sure; that would be helpful.

Mr Cahill: I think it is important to look at the history of all this. I am only speaking, with my colleague Magistrate Burns, on behalf of the Magistrates Court. I do not purport to speak on behalf of my colleague the Chief Justice; they have their own issues. Some of the matters we raise will be germane to them as well.

I think the history is important. On 1 July 1990 we, separately as a court, moved from commonwealth control to territory control. At that particular time as I understand it, although I am not completely privy to the detail, a budget figure was agreed between the

commonwealth and the ACT as to what would be the transferable budget operation. I do not believe that figure has ever been the subject of any rigorous examination. Since then, one of our key submissions is, there has never been as far as our court is concerned, and it may be different for the Supreme Court, a completely budget bottom line examination done of what we do and what it should cost to provide those services, on whatever basis you do it.

That has created its problems because since 1990 we have had steadily increasing jurisdiction, particularly in the tribunals area. Guardianship has come in since then; the new mental health set-up has come in since then; discrimination; the Health Professions Tribunal only recently; we have got expanded jurisdiction which is now part of our general civil jurisdiction in respect of commercial tenancies, retail tenancies. So there have been little bits—I say "little bits"—of resources added on an ad hoc basis without looking at the total effect. That has been what we regard as a central problem on budget and finances. We believe the whole situation, as does the Auditor-General, would be greatly assisted by a proper roots and branches examination.

We accept that it is a matter ultimately for government how much money they give us, but at least if we know that it has been logically looked at and derived and is transparent, we can then say, "Look, here are the figures. This is what we can do and this is what we can't do." At the moment I think, with the greatest of respect, government has it both ways. They want us to keep producing at that level but are never transparent about the budget process. Also, in the model of court governance we have we never get to have any direct entree to Treasury or government about budgetary matters. It is all siphoned through JACS. That is the system and the way it is. We as magistrates, through our court administrator, may well say that we need more resources for this and that. That is then put up as a budget proposal. It goes to JACS through their system. It might never get to Treasury, because it might be stopped at that stage, and that presents a problem for us.

Another corollary of that, and I think it goes to the issues we are talking about, is that, because it has never been considered since 1990, no-one has ever clearly delineated responsibilities. You have the Attorney-General, you have the CEO of JACS, you have the Chief Justice and his judges, you have the President of the Court of Appeal, and you have me and my magistrates all part of a system, and other people are involved, and nowhere is it laid down and worked out where the responsibilities start and stop.

In the middle of that, in 2000, there was introduced a function called the court administrator which has no statutory basis, an attempt to make joint court administration, but it is all a bit muddled. I think, with the greatest of respect, the Auditor-General has hit the issues right on the nose. These are the issues that need to be addressed. I must say that, as you are aware, the department has formed a governance consultative committee. That has met twice, and that is certainly a great step in the right direction.

THE CHAIR: Over what period have they met and how long are those meetings?

Mr Cahill: We met for an hour with the Attorney-General in December and recently in March, so it is not something that—

THE CHAIR: Twice in six months for an hour each.

Mr Cahill: Twice in six months. But that is the pressure of time; I understand that. Of course, that is a step in the right direction in relation to consultation and information flow, but it has not as yet addressed that fundamental issue of what the governance responsibility systems, including finance, should be.

DR FOSKEY: Was that meeting with the Chief Minister as Attorney-General, as he was, so now you will meet with—

Mr Cahill: We haven't yet met with the new Attorney-General.

DR FOSKEY: But it was not in his role as Chief Minister that you were meeting with him; it was in his role as Attorney-General.

Mr Cahill: No, he was meeting as Attorney-General, and that is the make-up of that committee. We really believe there is a lot of work to be done on that. The creation of that committee was a partial response to recommendation 1. But we think it just does not go far enough and we are worried that after 16 years we haven't got anywhere. I won't be here in 16 years time and I would like to see the matters clarified pretty quickly.

We realise, and have realised for some time, that we could deal with our matters, particularly in the criminal area, much more efficiently. In the light of that, the magistrates and I proposed—with the assistance of the department; they financed it—and we did get in a consultant, Nerida Wallace, a well-known court strategic consultant who has done work in lots of places, including Victoria.

Nerida did two reports for us. One was about internal governance, which involves the Chief Magistrate formalising consultation and responsibility for the running of the court into a council of magistrates, which we have done. That part has been implemented. The second part was to look at new listing procedures. The key—I call it the linchpin—of all of that, and John may speak about it later, was the issue about having a listing coordination unit or a centralised cell for listing across the work of the whole court and its tribunals. Nerida said, and we agree, that that does require the input of some resources and we believe it should be headed.

First of all, we would allocate a magistrate to specialise in overseeing that listing. Then we would have a relatively senior officer responsible, taking control and establishing similar information points in the various stakeholder agencies, such as the DPP, the AFP, the defence, particularly legal aid, and other people. That was what was recommended in an ideal situation. So that is very much a linchpin. Unfortunately, in respect of that, what we didn't wish to happen was the department to strangle an already resource-strangled court and try to find the money from existing resources when we had that difficulty.

I have been trying to do that, I have really been trying to do that, but as yet they haven't come up with a solution because we are reluctant to attack financially the rest of the court when we are already struggling. So that is where we have come to on that, and listing is very important. We realise that we could be more efficient about listing, but once we do that, if we can get that initiative running, properly financed, properly resourced, I think we could move ahead with the reforms. Basically, that is the approach I would wish to take.

As to the challenge of running a system like we have here with the traditional Magistrates Court, with the Coroner's Court and with everything else all in one, I know that people have said, "Let's have an individual situation." If the government decides that, that is fine. I will get more sleep; it won't worry me. But I must say that the cost would be astronomical because each time you do that you have to create a separate administration with separate people. At the moment, the legal resources in all these tribunals and functions is provided by the existing magistracy. That would not happen if you had separate tribunals. You would be looking for someone at, say, $700 or $800 a day. At the moment, it is cost-neutral. Surely we can do it, but I think there are some issues there as well.

Basically, that is all I wanted to say. John might well say something about listing. Our view on listing, as John will tell you, is that we are only at the end of the food chain. We can do all the listing we like, but if people aren't ready, people want adjournments, resources aren't there, et cetera, we are the ones at the end of the day who are criticised for not getting matters on. We might list seven to 10 hours a day but even now, unless we get this other system going and have running lists and look at all the information flows, we are struggling because we are in the hands of others. As much as you jump up and down and threaten to do things, if they haven't got the resources or the will and the way of doing it, they can strangle the work. John, do you want to add anything on that?

Mr Burns: Just talking about that issue of us being at the end of the line, the analogy I use is one of an assembly line in a factory. If you owned this factory which has an assembly line in it and the product from the assembly line goes through to the packaging department, each week there would be a meeting between the packaging department and those who are running the assembly line to work out how much product is going to go through to the packaging department each week so that the packaging department can allocate appropriate resources for that amount of product.

If it turns out that the product isn't coming through to the packaging department, or when it gets to the packaging department it is not in a form that can be used, the resources of the packaging department are not being adequately utilised. If you were the owner of that factory, would you turn your attention to the packaging department or to the assembly line? That is equivalent to what we have. We have a lot of people who are turning their attention to us as being the people at the end of the line who can't control the processes of the assembly line and who provide resources for the hearing of cases, depending upon what we are told by those who are preparing the cases.

We go through quite a rigorous process of case management, particularly in criminal matters. I hear all of the case management hearings in criminal matters and matters are not allocated a date until the defence advise that they are maintaining a plea of not guilty to the charge and the prosecution say they are ready to proceed. They tell us how many witnesses they are calling. We encourage discussion between the parties so that only the minimum number of witnesses need to be called. We then work out, based upon that, how much time is going to be required for the hearing of the matter and we allocate a date, usually the first available date that the matter can be heard.

Unfortunately, we are still finding that despite that process there are cases that are not proceeding. We are already allocating more than five hours of hearings a day to each of our criminal hearing lists, but we are still finding that magistrates are not being entirely

utilised for a full hearing day because cases keep falling through. The reasons they keep falling through are many and varied, and I have referred to them in the document that I have handed to you. Amongst those reasons are that the Director of Public Prosecutions decides to drop the charges. We are generally not privy to the reason that occurs. We cannot say that there is any reason for criticism. It may well be that there is a good reason for the charges not proceeding, but the simple fact is that that is what happens.

Alternatively, the defendant pleads guilty to the charges, despite for some months having refused to contemplate a plea other than not guilty. There may be a combination of those: the defendant may plead guilty to some charges and the Director of Public Prosecutions may drop other charges. What quite frequently happens is the defendant fails to appear. In fact, over the last 12 months, I have looked at each court's criminal files on a three monthly basis that our records show as being older than 12 months, anything that has been on our records at that time for a period of more than 12 months. I have worked out with respect to each file the causes of delay. Seventy per cent of those files have at least one failure to appear in relation to the defendant, so that the most frequently occurring cause of delay in the court is the failure of the defendant to appear.

THE CHAIR: Are warrants usually issued, Mr Burns?

Mr Burns: Yes. Almost inevitably warrants are issued.

Mr Cahill: Then you have got to find them, though.

Mr Burns: They have to be located, brought back to the court, and that is something that is absolutely beyond our control. Witnesses often fail to appear, particularly so in family violence matters where there has been a reconciliation between the defendant and the complainant. We frequently find that the complainant simply does not turn up to court. The prosecution then generally asks for an adjournment of the matter so that they can try to locate the complainant and then discuss the matter with the complainant with a view to determining whether the matter will proceed. Quite frequently they do not proceed.

Again, I do not think that criticism can necessarily be levelled at the Director of Public Prosecutions over that. It is simply the human factor that is part of the processes of the court. In fact, I think that something that is often left out of consideration is that we are dealing with human beings and there is a human factor involved. People will often put off until the last moment what they perceive as being an unpleasant outcome, so that if a defendant knows that they are guilty, if they know that the prosecution can prove that they are guilty, they will still plead not guilty to the charge on the basis that they are putting off the evil day.

Mr Cahill: I think there is another factor, John, and that is that in human nature things go wrong. A witness disappears, the prosecution can't proceed, so there is a real interest in delay if you have no other defence because on some occasions it will work to your benefit. We have had that happen quite a few times.

Mr Burns: That human factor, I think, influences a lot of people in determining the way in which they will proceed with their charges, but we cannot tell which ones are serious in terms of defending the matter and which ones are not. We do not know that. That means that, even though we do set down more than a full day's worth of hearings for

each hearing list, we sometimes, and in these days increasingly, find ourselves not sitting for the full day.

I have also referred in the document, and I won't go through it in length because you will be able to read it yourselves, to the fact that there was a lot of talk at the time of this report by the Auditor-General, and indeed beforehand, that, for example, magistrates were only sitting 2.5 hours a day. In fact, the information that was provided was incomplete. It did not include certain procedures that the court was undertaking; for example, mental health hearings at Canberra Hospital, which I think are undertaken twice a week.

Mr Cahill: Two half-days a week.

Mr Burns: They were not included in the figures. Hearings of the circle sentencing court were not included in the figures simply because they were not conducted in a courtroom in the Magistrates Court. In addition, modern case management principles suggest that you should try to reduce the number of witnesses that are to be called to give oral evidence in proceedings. That reduces the cost to the community and is a more efficient use of resources, but what that means is that at the case management hearings we try to identify those statements or documents that can be tendered by the prosecution or by the defence so that witnesses do not have to come along and give evidence as to the contents of those documents.

Frequently, what will happen is that these documents will be tendered at the commencement of the proceedings and the magistrate will be asked to go away and read them, so the court will adjourn into chambers and the court will then spend some time reading through these documents before going back and taking the rest of the oral evidence in the case. Often that means that the oral evidence is quite short. But because of the way in which the data was collected, and the manner of collection of the data was that it was from the court monitors' running sheets, all that was counted was the time that the magistrate was actually sitting in the chair in the courtroom.

That is because that data was never intended to be collected for the purposes of determining how long it took to hear a particular case. That data is collected for the purposes of preparing a transcript of the oral evidence given in the proceedings. So all of that material is completely unreliable. It was a matter of concern to us that that material was released in that form and that it then became a matter of some notoriety in the press.

THE CHAIR: That is useful. I am glad you illuminated the committee on that, Magistrate Burns.

Mr Cahill: The other issue is that one of the things that this territory is a bit slow on is the reform of committal proceedings. I do not think any of us want to see committal proceedings for major criminal offences abolished, as in other states. Some of them abolished them completely and have found that that has not been satisfactory; cases get too far without anything being tested. But, if we have the reforms that have been tried here on about five occasions over the last 10 years, there would be a lot more work done on the committal papers, so there would be a lot of time spent in, say, a fraud case reading stacks of papers, stacks of documents, but not in court, so the trend could become worse.

So we really have to look at a more accurate means of measurement, and that has got a double-edged sword to it, too, because our computerisation system is very poor and the resources need to be given for that. We went with the development of a computer system called Coram which was going to be very successful in New South Wales. Without knowing too much of the detail, Coram went belly-up. It cost New South Wales tens of millions of dollars. It did not cost the territory a lot, fortunately, because we were hoping to piggyback but, as a result, we are probably worse off in computerisation than we were five years ago. That is going to take time to make up, and a lot of this measurement of performance and studies is not possible without appropriate computerisation. So it is a bit of a double-edged sword. I am not blaming anyone. When the government went for the Coram solution, it seemed like the right one. We just did not realise what was going to happen.

THE CHAIR: Thank you for that information. We might go to a few questions, if you are happy to receive them.

Mr Cahill: Sure.

THE CHAIR: I am not sure if you have had an opportunity to look at *Hansard*, but if I can just take you to some of the evidence that we have received so far. In particular, I would like to refer to critical comments made by officers representing the Attorney-General during committee hearings last March. The particular evidence in question came on 1 March, at pages 8 and 9, and the witnesses for the Attorney-General were Renee Leon, Jennifer Cooke and Brett Phillips.

They said to me—and these are their words, not necessarily the view of the committee—that the courts had had their budget supplemented several times in order to meet what were identified as base-funding pressures. They said that this description was shorthand for saying, "This is really what it costs to run the courts." The officers added that, notwithstanding the supplements, the budget overspends had continued, but when they asked questions about the cost of running the courts the answer was that it depended on how you ran them. They said they were seeking to identify an efficient and effective way to run the court so that items of cost could be identified and so far had identified that there were possibilities for a more efficient use of staff resources through things such as multiskilling, breaking down silos and features of human resource management that were not particularly rocket science but needed to be applied to the courts before we could identify the true cost of running the service the courts provide. I am just wondering if you could tell me whether you think that those criticisms are in, fact, valid?

Mr Cahill: Buzzword management terminology, isn't it? Our first question would be, as I have put in my submission: what is the budget? We don't know, because it has never been transparent, it has never been identified, it is full of adhockery and, in fact, for a period in the 2000 years, the court was budgeted to run at a deficit of $1.3 million. In my submission I refer, if the court is going to be more responsible for itself, to the need for the court to have expert information. We had a report at the turn of 2000 by a man called McFeat, who was an accountant but a management person. He indicated what the court needed to be responsible for its budget was to have someone who could actually financially analyse, predict and make a budget.

A lot of those overspends and statements there weren't really known by the department. It was only when that particular officer started doing his work that anyone really knew exactly what it was costing. I think for three or four years we were budgeted to overspend by $1.3 million. There are arguments about whether they included increases in judicial salaries and whether they included devaluation, or whatever you call it, on the building, all sorts of issues. I disagree with those people. I am certain we can do things, but they underestimate the specialisation needed. We can certainly work on those, but I think fundamentally the answer is to put it into reverse. In other words, you actually do an examination of what the court is to provide and, based on what happens in other places, what it costs to do it. I think to do it the other way round is very difficult.

THE CHAIR: Have you found receptiveness on the part of the department to any ideas that you might have to more effectively or more efficiently run the courts or is it falling on deaf ears?

Mr Cahill: Not so much falling on deaf ears, but it is all about an overwhelming idea that we must cut the budget, whatever the budget is, but I can never find out satisfactorily. I did economics at university but not accounting. I can never find out what the budget is. We have had changes in budgetary collections and I would just like to have explained to me what the budget is.

We could be murdered by this. If it turns out it is costing too much, we have to live by it, providing there is a transparent process. They are receptive enough and eventually they usually come around to it. I will give you one example. We believe that key to our listing reform is the creation of this listing cell. The department has been struggling, as I have said in my submission, to say, "Make savings with all sorts of multiskilling." That is assuming we have got the fat to cut. We haven't got it, and they are saying to do it that way.

They do not seem to be willing to accept the recommendation of Nerida Wallace saying you must have discrete resources to do this sort of thing. You invest those resources and you get a result from that investment. There has been a reluctance to do that. In fact, after we adopted, as a council, the recommendations on listing, which is the key one John has been talking about, that is, the listing operation, we had even created contact points in the other stakeholder agencies and they were very keen to do it.

With this sort of information that you need when cases are going to fall over, you know further in advance, you try to do something about it, you can try to use the resources. They have not come to the party. We wrote and said that we did not want an already resource-strapped court being stripped further because the morale was terrible.

THE CHAIR: Dr Foskey has a supplementary question. I will come back to the Wallace report in a minute.

Mr Cahill: On that, we wrote in September last year. I keep pushing it and I keep getting told, "Look, we're going to try to find the resources from the existing resources." I don't believe that can be done without substantial danger for the court and it is holding up our reform. So, in that respect, I am critical; but generally, I realise government has to do the best it can and we go along with that.

Mr Burns: I think we are concerned that there is a process of economic reverse engineering going on here. The Auditor-General recommended that a baseline funding study be undertaken; in other words, you work out what the functions are of the organisation and then, based upon those functions, you work out how much it costs to provide those functions. We are concerned that in fact what is happening now is that the resources to the court are being stripped back until we come within what is presently determined to be our budget and then there will be a statement that that is the budget of the court. So that we have, in fact, quite the opposite process to that which was recommended by the Auditor-General.

DR FOSKEY: Can I interrupt?

Mr Cahill: Yes, sure. We have been talking too much.

DR FOSKEY: We want you to talk. In relation to the evidence that Ms Leon presented, she also said that the courts have to go to JACS to seek approval for any funding or staffing proposals. She seemed to feel that this was perfectly appropriate. However, to me, as you have already said, this puts considerable strain on your workload and your independence. I just ask for your comment on whether it presents an avenue for the executive to exert pressure on the judiciary. That is the first question.

Mr Cahill: Do you want me to answer that one?

DR FOSKEY: Yes.

Mr Cahill: I agree with you entirely. In my submission, I have given you a little bit already if you really want to find out. There has been an amount of study done on what the relevant balance between executive and judicial power is in respect of court administration. Right at the end of my submission I indicate a couple of publications there.

In my view, the judiciary cannot be independent if it does not have a degree of financial control. We are held accountable for what we do, but I'm damned if I am going to be held responsible, should the court be held responsible, if we do not have the say. Whilst that exists, there is a blockage in the avenue directly to government. Of course, those are the other models that occur in what I call the court control model or the authority model which exists in South Australia and the federal courts; that is, that there is a direct relationship between the legislature and the executive, directly between that and the court, and there is a direct input. As I said before, there is a filtering process. We can make all the suggestions we like, but it goes through the filter at JACS and it is JACS that decides whether it gets to the Treasury or not. We don't even get that say.

DR FOSKEY: Isn't it also a waste of JACS' resources and time, because I gather they are not overstaffed either?

Mr Cahill: No, they have got staffing problems. I must say that all of this in the last 18 months has occupied a tremendous amount of my time, my colleagues' time and the staff's time. If we had a clear, transparent process, we could get on with what we should be doing—that is, running the courts—instead of fighting these battles about positions, transparency and budgetary cuts.

THE CHAIR: I get the impression that you are patiently waiting for a bit of action here.

Mr Cahill: I say that.

THE CHAIR: I must say that I did form a preliminary view when Ms Leon appeared before the committee—the report has been out since September, and it was then February, and they were dropping a submission on our table minutes before the hearing—that they haven't really come to terms with these issues. I get the impression from what you are saying that you are still struggling to get them to sit down with you and address the issues that you and, I gather, the Chief Justice have on these matters.

Mr Cahill: The Chief Justice can speak for himself, but I am sure he feels the same. If you take recommendation 1 as the prime example, I think that gets it to you. We have formed a court governance committee; that is what it is called. What we have really had is two 2-hour meetings discussing future things like security and changes and other matters. As to the issue of developing the second part of that recommendation, moving towards a proper governance model, which I appreciate is a political decision, my view is there isn't a governance model at the moment; we just go along. Of course, while it remains as it is, there is departmental control of the purse strings which gives control of the whole situation. So, in answer to what you're saying, Deb, I agree. I have difficulty with it. I think we need to move it along.

DR FOSKEY: In all fairness, Ms Leon had only been in the job a brief time.

Mr Cahill: Yes, that is right. She has got to be given time.

DR FOSKEY: Yes, but have you had conversations?

Mr Cahill: Yes. I must say that we have got a new court administrator who is only there for six months.

DR FOSKEY: Okay. So that has happened since the appearance of—

Mr Cahill: That happened when I was away on leave overseas. Jenny Cooke appeared before you. I don't know what is going to happen in the long term, but she is there on a temporary arrangement from the Family Court on loan. Whether she remains, I don't know. Renee came in on, I think, 23 January. So yes, but we have to be careful that there is not a position develop that the department would prefer the status quo because it means that there are not too many difficulties for them.

THE CHAIR: That clearly isn't acceptable from everything you are putting forward to us.

Mr Cahill: I don't believe it is if you look at principles, yes, look at principles of court governance, separation of powers and that sort of thing.

THE CHAIR: I appreciate your making available the Wallace review and we will look at that with interest.

Mr Cahill: Could I just say about that—Nerida is a very good friend of mine—that the magistrates and I have difficulty with some of the background information and opinions she has collected.

THE CHAIR: I understand that, yes.

Mr Cahill: But we do give general support to the implementation of the recommendations, particularly that linchpin one we have been talking about.

THE CHAIR: Right. In terms of the listing reforms—I have not read the report and the answer may be there—do you have an indication of the costs involved in accomplishing those outcomes?

Mr Cahill: We would say none, if we get the implementation—

THE CHAIR: It's an implementation process, yes.

Mr Cahill: Looking at the particular head of that unit, it would not cost you anything for a coordinating magistrate; they would probably do a lot of what John is doing already in a more formal way. We probably are looking at the injection of a senior officer. I think it needs to be at that level to get the sort of respect you need, say, a SOGC or something like that, and probably another officer. So it is not a huge amount of money.

THE CHAIR: Could I just take you to another issue? I will come back to performance indicators. The Australian Federal Police Association appeared yesterday and they were advocating one efficiency. This is more from a police point of view, but I would be interested if you have a preliminary view on what they referred to, I think, as voluntary agreement to appear in relation to a number of offences.

Mr Cahill: Yes. I drafted something like that with a previous Chief Police Officer five, six or seven years ago. It came to the department and nothing happened with it.

THE CHAIR: Yes. They said the problem in the past was that there was no subsequent action that they were empowered to take if people did not honour it, so what they were proposing was to reintroduce that but with the capacity to issue a warrant or whatever in relation to people who do not appear on the designated date, but it would dramatically reduce the number of people that have to be summonsed.

Mr Cahill: I wonder what their power to issue a warrant would be if it is not a compulsory procedure. I would have thought the answer to that was to implement a system in New South Wales already—

MS MacDONALD: Yes, they made reference to that.

Mr Cahill: We had a proposal here developed by a person who is probably deputy commissioner by now, Rudi Lammers, who was in charge of the legal operations here. That has to be about eight or nine years ago. We drafted that, we put it to the department and it is still in the bowels of the department somewhere. We would support it.

MS MacDONALD: They did mention the system in New South Wales when they

appeared before us yesterday and they undertook to provide us with more information on the system as it operates in New South Wales. I think the entirety of the committee was interested to see that further. They were talking about things such as drink-driving cases whereby in most cases there would be an appearance and there would not be an issue with that.

Mr Cahill: We would still like to see them arresting in appropriate cases, though.

THE CHAIR: They didn't dismiss that.

Mr Cahill: I must say I am constantly amazed by the cases where summons are issued and I would have thought there should have been an arrest, but there are provisions about arrest.

MS MacDONALD: They did not enter into that issue.

Mr Cahill: The other thing is where it takes six months for them to get a summons out. Look, we are not into criticism but, in short, I would favour it.

THE CHAIR: You see merit in the idea.

Mr Cahill: We have already put that system up.

Mr Burns: I have been speaking to Superintendent Peter Budworth from the AFP over the last month or so relating to this very issue. Also, I had some discussions yesterday with officers from JACS concerning the implications for the court of the introduction of the Crimes (Sentencing) Act and the Crimes (Sentence Administration) Act, and we got on to talking about these voluntary agreements. To my mind, it is quite a misnomer to suggest that they are talking about voluntary agreements.

THE CHAIR: I thought that at the time.

Mr Burns: I do not know why they simply won't call them court attendance notices.

MS MacDONALD: They talked about a system that had been in place beforehand which was voluntary.

Mr Burns: That's a VATAC.

Mr Cahill: We actually had a voluntary system here for five or six years. We have done it. It need not be voluntary.

MS MacDONALD: My understanding of it was that they were making reference to a system like the court attendance notice system applied in New South Wales.

Mr Burns: So that in cases where police would otherwise have issued a summons, they will have a form, a pro forma, available to them on the beat. They will fill that in and give it to the alleged offender with a date that that person has to appear before the court.

Mr Cahill: And we would have preordained dates.

Mr Burns: That would operate in the same way as a summons would operate, that if they did not attend court a warrant may be issued for them. That would very significantly reduce the period of time between the commission of the alleged offence and the offender's first appearance before the court.

THE CHAIR: There are no obvious issues that you could take with that; you see it as sensible.

Mr Burns: No.

Mr Cahill: No, except you would not want to see it being an excuse for sloppy investigation. It is probably better used in the straightforward cases, drink-driving, speeding. You would not want it used in a complicated matter where they are issuing a notice before they have properly investigated it.

THE CHAIR: No, they acknowledge that there was a range of offences where it would not be appropriate, that it was more for the prescribed alcohol issues.

Mr Cahill: Perhaps you could even adjust that by issuing them with a notice to attend court once the investigation is completed and they have got the charge. The summons procedure is very unwieldy and police resources are stretched to serve summonses, to execute warrants. We have a huge problem with that and the police are under great stress and I sympathise with them. So anything that could reduce that would help. Did you get to the second of your questions, Dr Foskey? I only answered one. You were going to ask a second one.

DR FOSKEY: You answered the second one in answering the first one.

THE CHAIR: Could I just go to the performance indicators, which are a fairly critical factor and I want to give you the opportunity to respond to some comments? During the hearings on 22 March with Mr Meagher SC and Mr Robert Crowe SC of the bar association, we had a pretty interesting discussion about trying to measure the performance of courts. As you have already pointed out, there are some misunderstandings in terms of public debate, and Magistrate Burns has made that point.

The bar association drew attention to the limitations of statistical comparison such as the speed of processing cases and the clearance rate of cases used by the Productivity Commission's comparisons. They did not actually propose to us any more useful indicators of performance. If you had greater control, even total responsibility, over the budget of the courts and control over how it was spent, what would be the main indicators of performance that you would use? In other words, how would you be able to indicate that for the dollars invested the courts were working at a reasonably high level of efficiency? Have you had time to think about that?

Mr Cahill: I think time standards are most important. We have been working, and John himself has done some work on key performance indicators, but the real problem for us is the measurement of them. I think we need to make sure that we have got the appropriate computerisation, and we would be more than happy to do it ourselves because I believe an accountable court should have its own responses and should have its

own accountability.

The difficulty for us at the moment with the falling behind of the computerisation is that some of these statistical analyses are very difficult to keep manually, so we have to make sure we have got the appropriate computerisation. But throughput of cases is a good measure.

Mr Burns: The clearance index, to my mind, is probably by itself the single most useful of the key performance indicators in determining how a court is dealing with its workload, because that provides you with a figure on the number of finalisations in the reporting period divided by the number of lodgments in the same period, multiplied by 100 to convert to a percentage. In other words, you have got an idea as to whether the court is keeping up with its workload, whether it is getting ahead of its workload or whether it is falling behind.

The other key performance indicators, in truth, really do not tell you very much by themselves. What they do is, in comparison with other jurisdictions, and you have to be very careful in making those comparisons, they raise issues about which you can then ask questions. That is the intelligent way to use key performance indicators, as flags which then enable you to ask questions about why these matters may be the way they are in this particular jurisdiction as opposed to a different figure in a different jurisdiction.

THE CHAIR: I gather, just on that, that one of the things that caution has to be exercised over is that what the Magistrates Court embraces in the ACT versus, say, Victoria, which has a county court, is quite markedly different. Would you like to say, so that we have it on the record, what those issues are? It would be helpful.

Mr Cahill: Those measures are largely a quantitative issue and not a qualitative one. I think this particularly appertains in relation to the Children's Court. I would like to think that the quality of our outcomes in the Children's Court probably exceed the children's court in other places, but that means you take a lot more time. In the Children's Court, for example, we have introduced restorative justice and things of that nature. But in relation to your question specifically, I think we can do better. I believe that we should be having our own performance indicators introduced. Those performance indicators should be clearly public, transparent, and we should be working towards them.

Mr Burns: If I can just pick up on that point that you have raised. I have raised in the paper that I have provided to you a couple of examples of how different jurisdictions exercised in different places can lead to very different results in key performance indicators. For example, in the ACT, because we do not have a district court, we deal with a lot of matters that would otherwise be dealt with in a district or county court elsewhere. That becomes quite an issue when you are dealing with difficult sentencing matters involving alcohol or drug abuse, because you may defer sentencing for some time to give the offender an opportunity to go away and undertake rehabilitation programs before you conclude the sentencing process.

If that offender were being dealt with in the district or county court, the timeliness standard would be two years. But because that person is being dealt with in the Magistrates Court here, the timeliness standard is 12 months. It is the same person on the same charges with the same personal problems that need to be addressed in order to try

to avoid further offending, but the timeliness standard in one court is twice that of the other.

Mr Cahill: That is often because there is the committal stage that you wouldn't have.

THE CHAIR: Sure, and that is significant.

Mr Cahill: The other issue, of course, is that we have the new sentencing package which, I believe, is scheduled to come in, God forbid, on 2 June. It is going to be a huge effort for us to get that operational, but that at least provides and recognises the ability to suspend sentence and put the matter over to give the person the opportunity to do something about their drug or alcohol problem or do something about their lives. We have found that pretty important, but that counts against us in relation to timeliness and the clearance rate.

DR FOSKEY: To what extent were you consulted in the development of that legislation?

Mr Cahill: In general terms, yes, but the exposure draft came out before we had much time to look at it. It does introduce some change. It is very complicated. We will meet it. It has some very good features. It imposes extra demands upon us, such as having to give a lot more reasons for decisions, which will slow us up, a lot more forms, a lot more ritual, but I don't mean ritual in a critical sense.

DR FOSKEY: No more resources.

Mr Cahill: No, not even resources for getting the implementation done, and we have to change a lot of things over. Computers have to be changed. Orders have to be changed. We are struggling to meet that deadline at the moment, but we will.

THE CHAIR: I have one more question before I hand over to Dr Foskey, because we have not got a lot of time, and then Ms MacDonald. The DPP has been the subject of many references from different witnesses. Under questioning, Mr Refshauge virtually gave us a very clear indication that there were significant resource issues there, particularly his capacity to have more experienced prosecutors. Obviously, having less experience means more time is required and that impacts on their capacity to work in a timely fashion in the courts. I do not think I am misconstruing what he is on the record as saying.

Mr Cahill: No.

THE CHAIR: Would you care to express a view? Do you believe that that may be a significant factor in some of the problems that have been the cause of delay?

Mr Cahill: I believe it probably is because the DPP, traditionally, has had a large turnover of staff. I was a prosecutor, as was John as part of his career. It does take time to develop the particular skills of prosecution and the experience. I think on some occasions greater experience assists because if you have greater experience, particularly with the upper echelons of the office, they can train the young people coming on. I see fairly new prosecutors with outstanding potential but, unless you have got the middle and

high ground and the experience, I would agree with Richard; it really does cause you problems because there needs to be some mentoring and nurturing of talent. I would agree with that.

THE CHAIR: Thank you for that, Chief Magistrate. Dr Foskey, do you have some questions?

DR FOSKEY: Thank you. I do. We have only got five minutes and I am a bit concerned about that. I must say that we have had some excellent submissions and evidence before this inquiry and I believe that we can produce a really excellent report with some good recommendations. I will just refer you to something that the bar association said, which had a sigh of despair to it. It said, "The sad history of unimplemented review recommendations highlights the failures of the structure of court governance and administration over past years." Basically, they are saying, "Terrific, a useful Auditor-General's report."

Mr Cahill: Let's do something with it. I agree.

DR FOSKEY: That's the case. I think that there is a lot of concurrence, too, between the things that you are saying and the bar association is saying, and also to some extent the DPP.

Mr Cahill: And we didn't collude, either.

DR FOSKEY: No, but you are working in the same system.

Mr Cahill: Yes, that is right. We would hope we would have similar views.

DR FOSKEY: You have similar frustrations. You mentioned data. The court administrator, temporary, told us that the courts have no capacity to collect their own data on, for instance, the effectiveness of various sentencing options in terms of recidivism rates. If you had the ability to collect your data, it might inform your ability to—

Mr Cahill: We would have to give a lot of thought to how we did it. But without the IT at this stage, it becomes very difficult.

DR FOSKEY: There is an issue with IT, obviously. Do you have a dedicated research officer or people who are in a position to do that?

Mr Cahill: No-one doing that sort of work, no. In fact, that becomes an obstacle for us every year when we have to produce statistics for the ABS and the Productivity Commission. As John has said, the way those are presented can be very damaging or very encouraging for your reputation as a court.

DR FOSKEY: Politicians do not have the understanding that a legally trained person or someone who has worked in the system might have.

Mr Cahill: I don't know. Sometimes an untrained eye is better than a trained one; you do not have blinkers on. I am looking forward to working with the new Attorney-

General. He may have different views to the traditional legal ones. As long as he has got good advice, that should not present a problem.

DR FOSKEY: Good. That is being very optimistic. Currently, are individual judges and magistrates relying on their own personal experience?

Mr Cahill: Yes. We don't have the same sort of facility as the New South Wales magistrates and judges have, where they have a computer program with a judicial commission which services them well. With a touch of the computer you can bring up what the mean sentences are. We have to do it impressionistically and by discussion amongst ourselves.

DR FOSKEY: It does not sound like you have a lot of time to sit around and workshop things.

Mr Cahill: No.

DR FOSKEY: You referred to the courts governance committee and there was a hint of optimism there.

Mr Cahill: It should help the information, communication and consultation process. I want to see the figures up in the frame about how far it is going to go towards the development of a new and appropriate model for court governance. That is the part that I have to see yet. We have only had two meetings.

DR FOSKEY: Indeed. It is a complex task and one would hope that at each of those meetings will commission or set up some sort of work program that is able to inform the next meeting. Is that happening?

Mr Cahill: Not on that subject. At the end of the submission I have made I have referred you to a number of AIJ publications that really canvass the issues in current court governance. One in 1991, I think, and the other one in 2004, and a Victorian that I can provide to you. I have not got that in a published form, but I can give it to the secretary if you need it.

THE CHAIR: We can research it through the committee secretariat.

Mr Cahill: They really identify the issues of control. There is an index to the latest AIJ report in 2004 that compares and contrasts where the various powers are held. It is a complex matter, but what I would like to see is not just giving lip-service to it and having a committee, but actually putting forward some process by which it can be debated. It needs to be debated. There are varying views about it. It can be debated and then decided.

THE CHAIR: Chief Magistrate Cahill, if we have a couple of other questions, would you be happy to take them in writing and consider them. I am conscious of time.

Mr Cahill: Sure. We are right for a little while.

THE CHAIR: Are you happy to wait a little longer?

Mr Cahill: Yes.

THE CHAIR: Dr Foskey has a couple more questions. Ms MacDonald has another meeting.

MS MacDONALD: I apologise, I do have to go.

Mr Cahill: That is all right. I have to go to the AMA and talk about hospital deaths, but not until 7 o'clock.

DR FOSKEY: In the ACT, people appear before a magistrate an average of 4.9 times in the course of their matter compared to 1.7 times in Queensland. Why is that?

Mr Cahill: John might be able to give a more specific answer.

Mr Burns: The truth of the matter is that we tend to deal with matters in a more thorough manner than they are dealt with in other places. Let me say two things. If you ask a member of the profession who appears in other courts, New South Wales or Queensland, not that many of the ACT practitioners appear regularly in Queensland, you will find, in fact, that we do a rather more thorough job in performing our function than magistrates in other places. So you get a better hearing at the end of the day.

Can I also point out that a lot of the states and territories, states particularly, such as Queensland, have that intermediate court. They have a district court in Queensland. A lot of the cases only land in the magistrates court as a stepping stone to hitting the district court. A lot of those cases that are dealt with in the district court may only ever appear once in the magistrates court. So those cases are then moved on to the district court. That is why, when you look at the averages, remembering that these things are always averages, Queensland has a much lower average. Also, a number of those places still deal with a lot of stuff that we don't deal with.

The high-volume, low-duration cases such as parking matters, speeding and things of that nature that we now deal with administratively in the ACT are still the subject of lengthy lists where a magistrate will sit in a courtroom virtually by himself or herself for the afternoon and go through the list with the prosecutor, with nobody else being present. Each of those cases takes about 30 seconds to deal with and they only ever turn up before the court once. So it means that in those jurisdictions the averages are reduced very significantly.

Mr Cahill: When you look at that attendance index of 1.79, that means that most of the people are not appearing twice. In our system, because we have got also a greater preponderance of legally aided people, our legal aid commission do a good job, if someone comes before the court, the first step that will happen is we will give them a three-week adjournment to get legal advice and legal assistance.

DR FOSKEY: So there are two appearances there.

Mr Cahill: Yes. I would prefer that and a better result for the punter than having to rush evidence.

Mr Burns: We do not have a duty solicitor scheme either in terms of the legal aid office. When I was in legal aid in New South Wales, which is where I started my career, I would go over to the court at Liverpool from the Liverpool legal aid office at 9.30 in the morning or some time around then and I would have people come and see me. I would take instructions from them as the duty solicitor that day. They would fill in a legal aid application form. I would grant legal aid. I would then appear for them on the day and in a lot of cases I would enter a plea of guilty and the matter would be dealt with on the day. We do not have that duty solicitor scheme in the ACT. So, if somebody wants to apply for legal aid, they turn up before us and say, "I want an adjournment so I can apply for legal aid." So you have automatically got two appearances.

DR FOSKEY: There is another inefficiency.

THE CHAIR: Why don't we have that? Is it just that nobody has turned their mind to it?

Mr Cahill: We have spoken to legal aid about it.

Mr Burns: We're talking to legal aid about that at the present time and we are looking at making changes to the way in which we get matters into court through the court attendance notice, where we have been discussing that with the AFP. We then want to try to arrange to have somebody from the legal aid office there as the duty solicitor each day because we believe that 50 or 60 per cent of cases could probably be dealt with on the day if that was in place.

Mr Cahill: If you did a survey, that is what the average minor offender would want, because they have to come back and take another day off work. Equally, we have a greater number of represented people, even by non legal aid, and—I did the list today—any solicitor worth his or her salt would never plead on the spot. They always invariably take their three weeks.

THE CHAIR: It probably won't make the courts more efficient, but would assist the police to do what they are supposed to do: they did put an idea to us yesterday to replicate a notice they have in the Northern Territory in relation to bail whereby there is a series of matters addressed which would enable the prosecutor to put forward an argument for the denial of bail, and there is a whole series of items in the pro forma that I gather is used in the Northern Territory.

Mr Cahill: They have that here too, but I will just ask one question. If you are adjudicating on natural justice in bail, how do you cross-examine a piece of paper? It is assuming that all the information is correct and often it isn't.

THE CHAIR: Is that right?

Mr Cahill: Not often, but, for example, we have a system here whereby the police only attend if bail is opposed. We think even on the papers we need to consider bail being opposed, which isn't in a great number of cases. Bt where they do not appear, we would like them to be there because in most cases the officer will be tested and the defence will ask them questions about the strength of the case, which is only a side issue, but will particularly ask them questions about the dangers or otherwise of granting bail lots of

people get bail after that process.

THE CHAIR: So the prosecutors could fail more frequently if they did not have that police witness there.

Mr Cahill: There is a practice direction that says that, if you want to oppose bail, you have your officer here. There is a further practice direction that says that the defence have to give them two days notice to get them here. Okay, it is efficient in the sense of getting your attendance index lower, but I do not think it produces a more just result because often after hearing the officer in cross-examination taking place we will have a different view on bail. That is a pretty threshold decision for someone who might be remanded otherwise in custody.

THE CHAIR: Sure.

Mr Cahill: I think the Northern Territory probably has stacks more people remanded in custody than we do, and most of them are Aboriginal.

DR FOSKEY: I did think of that at the time.

Mr Cahill: It's efficient, but sometimes efficiency does not always breed justice; that is all I'm saying.

DR FOSKEY: Also, there do appear to be occupational health and safety issues for police officers.

Mr Cahill: Yes.

DR FOSKEY: So there does appear to be a problem there. Perhaps the Northern Territory solution isn't the one, but it is an issue. Finally, in a judgment of the Full Court reported last year in the *Canberra Times*, the court was critical of "the potential for public confidence in the independence and hence impartiality of courts to be undermined by administrative arrangements which treat them as sub-branches of public service departments." I am not sure who said that.

Mr Cahill: I think the Chief Justice said it.

DR FOSKEY: Would you like to comment upon that?

Mr Cahill: I think that has an element of truth about it. In fact, I can probably dig it out for you. There was a final statement issued by the former Chief Justice of Victoria, John Phillips, who said that it was amazing that after all these years the budget for his court was just the sub-budget of any other branch of a normal department in Victoria, and he was critical of that.

I think there are dangers, and that really blurs the separation of powers. I have mentioned the separation of powers. There are articles written on it, but basically it simply means you have got the legislature, executive and judiciary. They have to interface, and this is an area where we do interface, but the guarantees of the separateness of each need to be determined, I think. I have mentioned there that far too often the court's budget is just

treated as a sub-budget of the JACS department, and I think that is wrong. So I would agree with that statement.

Mr Burns: Looking at the question of separation between the department and the court, if you went back, say, 30 or 40 years, most magistrates in Australia would have been public servants, they would have been employed by a government department, but it was recognised over a period of decades that that presented an appearance of bias, particularly when so many of the cases that were heard by magistrates involved the executive government. The executive government brings criminal prosecutions. The executive government sues civilly in the court. Many of the cases that we hear involve the executive government.

The analogy that I have used on a couple of occasions, and it is not perfect, is that if you were to appear in front of a court and you knew that the party that was opposing you was BHP or something and you knew that this court was funded by BHP, wouldn't you be a little bit concerned about whether or not you were going to get a fair hearing? On the question of appearances, we get a "budget" from JACS, but whether ultimately our budget goes up or down or whether we lose resources or gain resources is very much in the lap of the executive government.

It would be a much more transparent process, less given to creation of concerns about the fairness of the proceedings before the court, if we had the right to determine the way in which our budget was spent and to make representations directly to Treasury in relation to our budget allocations. There would be a much greater separation between the judiciary, then, and the executive government.

Mr Cahill: I would add to what John said, and he did touch on it in that statement, and that is it is not only what the budget level is but also a question of how it is spent. We don't have total control even over how the budget is allocated and spent. At the time we left commonwealth control—I have to admit that I was Chief Magistrate then, too—we got to the stage where the commonwealth budgeted for the courts with a one line budget estimate and it was up to the courts how they spent it and to be accountable for it. We have regressed from that over the last 16 years. In fact, we are in a worse position on the separation of powers and independence than we were on 1 July 1990.

THE CHAIR: That is pertinent to note. I might conclude on that note, if you are happy with that, Dr Foskey. I would like to thank you, Chief Magistrate, and Magistrate Burns. I hope taking you out of the courts has not impeded the justice system too greatly. We thank you for your time. Your evidence has been, certainly from my point of view and I think that of Dr Foskey, enormously valuable. I look forward to reading your submissions.

Mr Cahill: I am happy to take on my own behalf and behalf of John and any of our colleagues any questions you might have before you finalise your report. I would like to thank you for the opportunity. It isn't very often and there would be certain judicial officers that would frown upon it, but I felt and I think John felt and our colleagues felt that it was too important for the court not to put its own position. I do not promise you that we would appear at every single committee, but this one was so fundamental to our existence.

THE CHAIR: Your personal knowledge of the courts has been of enormous value to this committee and will help us form a balanced opinion.

Mr Cahill: Equally, if any member of the Assembly ever wants to come over and have a tour or raise any questions, as I have said to Deb before, we are more than pleased to discuss it, because you are in the best position to make judgments on legislation if you know what you are legislating about.

DR FOSKEY: Could I ask you a question?

Mr Cahill: Yes.

DR FOSKEY: With the budget process—this is just my ignorance and I seek elucidation—are you as dependent on whatever comes out in the budget? Is it black box to you until the day the budget comes out as it is to every other department?

Mr Cahill: Yes. We have got a number of budget bids in. We know we have got some that have not got past the JACS filter.

DR FOSKEY: So you can't plan until you see that budget, so the estimates process is as important to you.

Mr Cahill: Yes.

DR FOSKEY: That's of interest.

Mr Cahill: Our gripe is that we don't have a direct say in it.

THE CHAIR: All right, I formally conclude these hearings.

The committee adjourned at 5.12 pm.